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# A Sociology of Transnational Constitutions

Social Foundations of the  
Post-National Legal Structure

CHRIS THORNHILL

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# A SOCIOLOGY OF TRANSNATIONAL CONSTITUTIONS

This book is the second in a series of volumes on the Sociology of Constitutions. This volume focuses on the rise of transnational constitutional laws, primarily created by the interaction between national and international courts and by the domestic transformation of international law. Through detailed analysis of patterns of institutional formation at key historical junctures in a number of national societies, it examines the social processes that have locked national states into an increasingly transnational constitutional order, and it explains how the growth of global constitutional norms has provided a stabilizing framework for the functions of state institutions.

The book adopts a distinctive historical–sociological approach to these questions, examining the deep continuities between national constitutional law and contemporary models of global law. The volume makes an important contribution to the sociology of constitutional law, to the sociology of post-national legal processes and to the sociology of human rights law.

CHRIS THORNHILL is Professor of Law at the University of Manchester. His research is mainly focused on the sociology of constitutional law, both in domestic and transnational contexts, and he has published a number of influential works in this area. His work has been published in many languages, including Chinese, Japanese, Spanish, German, and Russian.

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Post-National Legal Structure

*Chris Thornhill*



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*For Atina, and for Grace and John*





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# INTRODUCTION

## BASIC CONCEPTS AND STRUCTURE OF THE BOOK

This book is the second in a series of volumes intended to provide a broad sociological analysis of the foundations of constitutional law. The first volume in this series was primarily concerned with the historical formation of constitutional law in different national societies, mainly in the early constitutional heartlands of Europe. In contrast, this book examines the constitutional form of contemporary society as a whole. It seeks sociologically to elucidate emerging constitutional norms, as society's political order expands beyond the historical limits of national jurisdictions and territorially organized public law, and as national sources of normative agency and authority lose their ability to produce legitimacy for some legal and political functions. In particular, the book is an attempt to isolate the structural pressures that have shaped the constitutional norms on which contemporary society relies, and it aims to account for the deep-lying social origins of prevailing, increasingly post-national, patterns of constitutional law.

To explain the constitutional form of contemporary society, this book proceeds from the claim that, to an increasing degree, modern society is in the process of evolving a global political system. To be entirely clear, this political system is not centred around global institutions, and it surely does not take the form of a world polity based on clearly constructed centres of authority, standing above national states, which is envisioned, critically or affirmatively, by some literature on

global politics.<sup>1</sup> However, in contemporary society, only few political exchanges, at any societal location, are without some global dimension, and there are few interactions in any part of society which do not raise normative questions or presuppose principles of normative order that reach beyond their immediate territorial context. As a result, national political authority is only rarely the exclusive point of regress in the justification of political decisions, in the resolution of political conflicts or in the validation of laws, and national political decisions and national legislative processes are usually circumscribed by, or proportioned to, legal norms of extra-national origin. Most decisions in society are backed, however obliquely, by legal norms whose provenance is not solely national, and most acts of legislation are supported by multiple authorities, located both inside and outside national polities. In consequence, modern society has evolved an encompassing although highly variable and diffuse political system, which incorporates both the distinct political systems of national societies and institutions, mainly of a judicial nature, operating above and across national jurisdictions. This political system has a distinctive *transnational* character: that is, it performs basic political functions – it generates authority, it produces decisions, and it circulates, and obtains compliance for, laws – on foundations that are constructed across the boundaries between historically separated political units. Different components of the global political system authorize laws and decisions in contingent fashion, and they are not supported by identical, simply hierarchical laws or sources of legitimacy. However, different components of the political system are densely interlocked, and the functions of national political systems are not easily separable from the global political system as a whole. The global political system cannot be identified as a set of institutions standing outside national societies. On the contrary, the global political system is formed through a thick interpenetration between national and international legal structures, which, although separate in some respects, cannot be normatively disentangled from each other. As will be discussed, in fact, international elements of the global political system often have their origins in national societies.

On this basis, this book proceeds from the second claim that contemporary society is in the process of developing a distinct constitutional order, and the global political system increasingly relies on normative

<sup>1</sup> For this argument see Held (1996: 354); Shaw (2000: 216–8, 255); Wendt (2003: 525); Chimni (2004: 5); Archibugi (2008: 97, 110).

premises for decisions and acts of law which cannot be solely derived from classical patterns of constitutional authority and legitimation. Quite evidently, contemporary society as a whole still relies on strictly national constitutional laws to provide legitimacy for some political decisions. However, contemporary society is rapidly acquiring a recognizably *transnational constitutional order*, and, in different components of the political system, the political exchanges of contemporary society are increasingly ordered in a normative form that amalgamates national and extra-national norms and procedures. The global political system possesses a transnational constitutional order insofar as it is primarily focused on exchanges within national contexts. As components of a global political system, national societies increasingly support and organize their inner political processes by assimilating norms of international or transnational origin, which they reconfigure and adapt to address their own distinct sociological pressures. Even within national societies it is often difficult to make a very sharp distinction between laws of national, laws of supranational and laws of international character, and norms originating at different locations in the global political system fuse in a rather informal, spontaneous manner to establish legal structures on which national societies constitutionally depend. Further, the global political system possesses a transnational constitutional order insofar as it reaches above national domains, into the international or the supranational dimensions of social interaction. In its extra-national extension, the global political system presupposes a particular normative structure, often combining national and international elements, to facilitate and underpin its exchanges. At both levels, a transnational constitutional order is evolving to provide normative cohesion for the global political system, which organizes its interactions by combining principles extracted from national, international and supranational legal environments. It remains possible to separate the global political system into notionally distinct spheres – the national, the supranational and the international – and it remains possible to observe some normative structures that are particular to each of these spheres. But the global political system as a whole integrates and fuses each of these domains, and in each of these domains the legal elements that sustain political functions usually possess, in part, a transnational composition.

This book attempts to propose a sociological analysis of the rise of the global political system and global constitutional norms, and it endeavours to explain both the social foundations of the global political system and the social foundations of the constitutional norms by means of

which this system stabilizes itself. In proposing this analysis, this book employs both a distinctive definition of a political system and a distinctive definition of a constitution.

First, a political system is defined here, not as a distinctly mandated set of directive institutions, but as *the mass of institutional interactions in society by means of which society produces, justifies and enforces decisions with some claim to inclusive and collectively binding applicability*. The exchanges belonging to the political system naturally include the actions of national governments, governmental agencies and other public bodies. They also include the acts of organizations, national and extra-national, inter-governmental and non-governmental, to which collective decision-making functions have been assigned, and which national institutions presuppose for the formalization of decisions beyond their boundaries. Additionally, however, the exchanges pertaining to the political system incorporate acts of institutions with legal or norm-setting functions, such as courts, commissions, quasi-judicial bodies, organizations with jurisdictional responsibilities, all of which make decisions with binding effect across society, both globally and nationally. As discussed below, in fact, in global society the political system coalesces closely with institutions usually seen as pertaining to the legal system, and global law and global politics are not easily separated. A political system, thus, is construed quite generally as a *system of inclusion*: its function is to absorb the demands for political decisions and legal regulation in a society at any given juncture, to authorize the *consistent generalization of collectively binding acts* across the environments that society contains and to serve as a final point of regress for collectively binding acts across society in its entirety.<sup>2</sup> Every functionally and geographically extensive society necessarily possesses an inclusive political system. All such societies need to make decisions that are not based on personal acts of coercion, that appeal to principles that are not exhaustively articulated in single areas of social practice and that can be inclusively and *iterably* transplanted and replicated across different parts of society.

This definition of the political system as a system of inclusion does not imply that political systems necessarily perform their inclusionary functions in a smoothly consensual fashion. It is indubitably the case that, in the emergence of political systems, the boundaries of political

<sup>2</sup> This concept of a political system is derived from Luhmann's political sociology (1970: 159; 1984: 40; 1988: 34; 1991: 201).



inclusion are always contested, and acts of inclusion also entail specific *acts of exclusion*. Indeed, this definition of the political system does not fully preclude Marxist or Gramscian constructions of the political system as an arena of hegemonic contest. Yet, complex societies inevitably develop political systems that are inclusive in the sense that they penetrate deeply into society, that they presuppose support amongst a number of social groups and that they are required to produce and justify legislation for most social phenomena – most social phenomena exist in an immediate inclusionary relation to the political system, and few exchanges in society have no relevance for the political system. Indeed, a political system is always likely to evolve to a higher level of generality and to a higher degree of inclusivity as society becomes more complex and as the requirement for decisions in different parts of society increases, that is, as society demands and consumes greater quantities of law. The political system of contemporary society, therefore, is a system of inclusion, through which society attempts to sustain consistent reactions to rapidly escalating demands for law, often extending beyond national domains, and in which normative support for law has to be constructed in accelerated, highly positivized fashion. In contemporary society, as discussed, political institutions are expected to perform functions of inclusion at a national level, and national societies clearly retain their own political systems. However, most national systems are increasingly internalized, in part, within a transnational political system, and each national system interacts closely with other parts of a global political system. The interpenetration of the national and the global political system is typically a precondition for the ability of contemporary society to generate the required volume of binding decisions, and in fact to preserve a distinctively political domain *tout court*.

The political system of any extended, complex society is supported by an underlying *inclusionary structure*, which in fact forms part of the political system. On one hand, the inclusionary structure of the political system is an aggregate of norms that allow political institutions in society to support and to authorize law, and to react to pressures for legislation and regulation. The inclusionary structure of society forms a reservoir of normative legitimacy to facilitate and authorize the rapid production of laws. As such, it insulates the political system against demands for legislation, and it provides normative support for laws as they are applied across society by the political system. To this degree, the inclusionary structure allows the political system to act at a relative level of autonomy and differentiation towards other spheres of

society, and to produce and distribute law in reasonably independent fashion. On the other hand, the inclusionary structure of the political system is a set of legal provisions, procedures and institutions which connect the political system to society: these institutions enable agents in different parts of society to be drawn into the political system, they extract generalized support and legitimacy for the political system from agents in society and they motivate agents in society to acknowledge decisions of the political system as valid and binding. In both dimensions, the inclusionary structure of the political system is the basis for the effective societal penetration of the political system. The existence of a stable inclusionary structure ensures that political institutions are recognized through society as the legitimate authors of decisions (laws), that decisions made by the political system are collectively accepted, that social actors in different spheres of society receive decisions from the political system in similar fashion and that new laws can be produced that can easily claim authority and presume compliance. In these respects, the inclusionary structure of the political system underpins the distinctively *public* domain in society, and it stores norms which allow society to make decisions, or laws, that can be legitimized at a high level of social generality, or *publicness*.

Every society marked by any degree of geographical and temporal extension and complexity depends on a structure of this kind. Simple societies, marked by low systemic penetration and relatively limited, predictable demands for law making, presuppose only a relatively simple inclusionary structure for the political system. Societies with complex political systems, exposed to highly unpredictable demands for political decision making, however, presuppose complex reserves of legitimacy and complex, adaptable inclusionary structures to authorize decisions. Where a society possesses a robust inclusionary structure, the political system is typically able to operate in relatively autonomous fashion, it is unlikely to be dominated by particular societal interests and organizations and it is likely to produce decisions that have even and equal effect throughout all of society. The more complex a society is, in other words, the more its political system is likely to rely on an intricate and flexible inclusionary structure, from which collectively usable authority can be extracted to meet the demands for legislation that society, in its complexity, produces and encounters. Indeed, the more complex a society is, the more its political system is likely to construct its inclusionary structure at a *relative degree of autonomy*, and the more it is likely to articulate legitimacy for laws and political decisions from within a corpus of

norms that are relatively stable, whose authority is commonly acceded, and which, to some degree, is independent of particular persons and locations in society.

On this basis, second, this book proposes a definition of a constitution as *the legally articulated form of a society's inclusionary structure*.<sup>3</sup> A constitution is conceived here as a body of legal norms, either derived from identifiable documents or at least projected as reasonably universal and obligatory expectations, which distil higher-order principles to support the exchanges of the political system, which produce basic premises to authorize collective political decisions and which underpin the broad organizational form of society. A constitution expresses a set of norms for the political system that lend authority to secondary laws, that underpin the iteration of political decisions (laws) and that support the relatively stable, inclusive generalization of legislation and decision making across society. In these respects, a constitution establishes a normative structure, in which laws can be produced rapidly and positively, and it allows a political system to perform its functions at a relatively advanced level of autonomy.

To this extent, this book utilizes what is in some respects a neo-classical definition of the constitution.<sup>4</sup> On this definition, even in highly diffuse contemporary societies, the constitution is *inseparable from the political system*, and it contains a set of norms that shape the distinctive political form of society. The constitution can be viewed as the aggregate of primary principles, inscribed in laws of identifiably *fundamental* nature, that enable society to sustain its political acts, even in response to highly uncertain regulatory phenomena. The constitution remains, thus, an inclusionary source of supra-positive norms, quite distinct from other spheres of exchange, which permits society to construct, validate and reproduce its laws on a solid public/political foundation. In fact, every society reaching a certain level of complexity is required to construct certain legal norms as public, as set apart from private interest, and the formation of a constitution is the primary means for achieving this. The construction of constitutional norms

<sup>3</sup> This idea partly has its origins in Luhmann's concept of the constitution as a mechanism for preserving the differentiation of the political system (1965: 23–4). But the role of the constitutional system, and attendant 'judicial agencies', in stabilizing the 'integrative structures of society' was also expressed clearly by Parsons. The general concept of the constitution as part of a 'legitimation subsystem', which binds the political system to wider patterns of normative integration, is identified by both Parsons and Luhmann. For these claims see Parsons (1969: 339).

<sup>4</sup> For the classical formulation of this view see Schmitt (1928: 21).

is the precondition for the ability of a complex society to evolve an autonomous system of political inclusion.

In proposing this definition of a constitution, however, this book clearly deviates from more classical constitutional theories, and it argues that the inclusionary structure of contemporary society is expressed, not only through nationally binding laws but also through a *global or transnational constitution*. This concept of a transnational constitution is applied in two distinct ways throughout the book. On one hand, it is proposed that national societies now increasingly construct their inclusionary structure through many different processes of norm formation, often located between the national and the extra-national domain. In most cases, national constitutions are formed through complex interactions with the international legal order, and they cannot be tied categorically to one location, to one will, to one form or to one set of norms. Most national constitutions are unthinkable without norms established at international level, many of which gain effect in national societies and form intrinsic parts of the domestic constitutional fabric. On the other hand, however, global society as a whole, beyond national institutions and political processes, is also developing a distinct transnational constitution. As contemporary society articulates demands for political inclusion that extend beyond classically centred territories, new dynamics of constitutional formation and norm construction – of inclusionary structure building – evolve to insulate society, and its political system, against this process. These two levels of transnational constitutionalism are not fully separate, and, taken together, they form the constitution for the global political system. Overall, the political system of global society is in the process of constructing an interlocking, two-level constitution, and both its dimensions possess a clearly transnational character. In both dimensions, the basic function of this constitution is that it enables the political system of society as a whole to respond to new demands for law, decisions and legal inclusion. As a result, the constitution is itself necessarily subject to change, and it necessarily produces new norms to support societal processes of inclusion.

As an attempt to provide a sociological explanation of the constitutional form of contemporary society, this book places its primary emphasis on examining the pressures that shape and transform the inclusionary structure of the political system. The book is centred on the claim, as mentioned, that constitutional norms serve to abstract and sustain society's functions of political inclusion, permitting the

political system of society to generate and *normatively to authorize* legislation adequate to the *demands for inclusion* that society produces at a particular historical moment.<sup>5</sup> Constitutional norms are constructed as layers within the evolving inclusionary structure of the political system; new constitutional norms are articulated, progressively, as society's political system is exposed to challenges and demands, which it cannot absorb, and as it requires additional normative complexity to sustain its functions of inclusion. The key to understanding constitutions, in consequence, is to examine constitutional norms as a historically constructed, adaptive apparatus, which is closely correlated with distinct *inclusionary pressures* in society. Accordingly, the key to understanding the contemporary constitutional form is to observe how constitutional norms produced in contemporary society support the autonomy of the political system and stabilize its functions in face of the inclusionary pressures with which it is confronted. On this basis, this book claims that modern society *necessarily* produces a transnational constitutional order, which is located partly within and partly outside national societies; in fact, both the national and the extra-national domains of contemporary society are exposed to distinct, but closely linked inclusionary pressures, and, in both domains, these result in the formation of transnational constitutional norms. The pressures on the inclusionary structure of the political system in contemporary society inevitably give rise to a transnational constitution. This constitution allows the political system to generate normative resources adequate to its complex requirements for legislation, and it upholds the political system in its abstract, differentiated and increasingly diffuse form.

In each chapter, consequently, this book tries to elucidate how constitutional norms have been articulated as a result of pressures on the basic inclusionary structure of the political system. It attempts to capture the rise of transnational constitutional norms by setting out a history of societal inclusion and political-systemic formation and by tracing the adaptive functions performed by different constitutional norms in this context. To achieve this, this book adopts a dual focus. It examines the emergence of transnational constitutional norms both by observing inclusionary pressures within national societies and by observing inclusionary pressures in the international arena. Through this dual focus, this book aims to construe the contemporary transformation of constitutional normativity in a wide sociological

<sup>5</sup> For the provenance of this approach see Luhmann (1965: 16; 2000: 319–71).

perspective, and it emphasizes how the global political system and global constitutional norms have been shaped both by national and by extra-national pressures and possess both national and extra-national origins and dimensions.

In [Chapter 1](#), this book proceeds by examining the sociological position of classical constitutions and their main conceptual elements, and it explains the historical role played by classical constitutional norms in forming the inclusionary structure of the political system of national societies. This chapter argues that classical constitutions are widely misinterpreted, or construed in excessively *literal* fashion, in conventional constitutional inquiry, and this often prevents nuanced comprehension of global constitutional norms. This book uses a historical–sociological perspective to interpret the importance of constitutional norms for the evolution of the modern political system as a whole, and one implication of this approach is that it stresses the deeper social foundations of contemporary constitutional law and identifies important continuities between classical and contemporary patterns of constitutional norm construction. Throughout, this book argues that a sociologically adequate analysis of classical, national constitutions is a *vital precondition* for an accurate comprehension of current constitutional norms, and it claims that contemporary constitutional norm production is still, to a large degree, determined by the same social pressures that shaped classical constitutions. In fact, this book suggests that the evolution of constitutional norms is always, in part, a recursive process, in which the political system constantly stabilizes its inclusionary structure, often reacting to pressures created or intensified by preceding normative forms. In [Chapters 2](#) and [3](#), this book analyses the emergence of an international legal order after 1945, which profoundly transformed the constitutional grammar of contemporary society, both in its national and in its international dimensions. These chapters attempt to isolate and explain the social pressures, especially in the *external* functions of states, which led to the re-orientation of constitutional norms at this time. These chapters propose a sociological framework for interpreting the growth of *international* law, and especially of international human rights law, and for understanding the constitutional impact of international human rights, both nationally and outside nation states. In [Chapter 4](#), then, this book assesses the problems inherent in the form of classical, national constitutionalism. This chapter claims that, in most societies, national constitutional law contained intrinsic contradictions: the norms of classical, national constitutions often engendered

pressures of inclusion which national states could not resolve, they proved incapable of addressing inclusionary expectations in complex modern societies and they often actually obstructed the emergence of effective inclusionary structures and of reliably abstracted political systems. On this basis, [Chapter 4](#) closes by examining the rise of *transnational* constitutional laws in many national societies, and it explains this process as a sociological response to problems inherent in classical constitutional law, enabling national societies to soften the pressures to which their national constitutional laws had exposed them. In [Chapters 5](#) and [6](#), this book exemplifies this claim by discussing the permeation of international or transnational legal norms, especially regarding human rights, into the fabric of different national societies and national constitutions. Addressing a variety of national constitutional histories, [Chapters 5](#) and [6](#) analyse the structural and historical reasons that have induced different polities to construct their inclusionary foundations on transnational premises, combining national and international constitutional norms. In particular, these chapters argue that, in incorporating transnational norms, national political systems have often been able to stabilize their inclusionary structures at a level of autonomy that was not possible under solely national constitutional law. In [Chapter 7](#), this book concludes by discussing how present-day global society as a whole increasingly produces the inclusionary structure to support its political functions at a heightened degree of autonomy, and it generates a contingent body of transnational constitutional law, through which it adapts to the multiplication of inclusionary pressures which it experiences. [Chapter 7](#), thus, shows how the contemporary constitutional order has begun independently to stabilize itself, on irreducibly transnational premises, such that constitutional law is now partly severed from national processes of inclusion, and it examines the sociological reasons for this development.

Overall, this book is designed to propose a multi-level sociological interpretation of contemporary public-legal norms. It bases its analysis in a historical reconstruction of the inclusionary pressures that have accompanied the formation of contemporary society and the contemporary political system, both in its national and its extra-national dimensions. It construes constitutional norms as historical products of deep-lying inclusionary pressures, located both within and beyond national societies, and it observes the emergence of transnational constitutional norms both within domestic public law and in the legal order of global society as a whole. In this approach, as mentioned, this book



posits a deep underlying continuity between classical (national) and contemporary (global) constitutionalism. It argues that different periods of public-legal norm construction are falsely construed if they are viewed as divided by incisive or categorical caesuras. In fact, all constitutional norms – national and extra-national – have evolved, through embedded historical processes, as reactions to the changing pressures of inclusion with which the political system of society is confronted. In particular, constitutional norms are responses to conjunctures in which the political system is exposed to escalating, or increasingly intense, demands for legislation, and they supply autonomous legal structures to absorb such inclusionary demands. All constitutional norms, ranging from the first classical constitutional norms of basic rights and constituent power to the hyper-contingent norms of contemporary transnational law, are formulae that serve to abstract, differentiate and consolidate autonomous inclusionary structures for the political system, and for society as a whole.<sup>6</sup> The task for a sociology of the transnational constitution is to isolate and observe the inclusionary pressures which underlie society's constitutional norms and which have transformed the norms of classical constitutions into the norms of contemporary constitutionalism.

## RESEARCH BACKGROUND

This book positions itself distinctively towards a number of fields of research that have assumed prominence in recent years. Naturally, it has not gone unnoticed in current debate that contemporary society is in the process of acquiring a constitutional order that is distinct from the constitutional models prevalent in national states. As a result, there now exists a large body of literature, sub-divided in accordance with emphasis and focus, which is concerned – broadly – with the emergence of global patterns of constitutionalism.

On one hand, some literature concerned with global constitutionalism proceeds from a classical *legalist* or *internationalist* position, and it argues that the constitutional order of contemporary society is defined by the fact that the norms of international law now acquire constitutional force, located above, but binding on, national states. Accordingly, this literature tends to examine the growth of global

<sup>6</sup> For claims regarding the symmetry between domestic and international rights see Cappelletti (1981: 653); Gardbaum (2008: 750).



constitutional norms as an analogue to the *hierarchical* authority of classical constitutional laws, in their literal construction. This literature observes global constitutional law as a body of laws, which are imposed externally on national political institutions and which ensure that these institutions exercise their power in a manner proportioned to commonly accepted higher norms.<sup>7</sup> Of particular importance for such *internationalist* research on post-national constitutionalism is the claim that after 1945 international law progressively lost its foundation in interstate diplomacy, and it became increasingly centred around human rights instruments, possessing autonomous peremptory force. This line of inquiry can in fact be traced to an early stage in the legal analysis of contemporary society, and its basic preconceptions had been articulated before 1939 (see Scelle 1932: 13). After 1945, however, it became more common for legal observers to perceive international conventions, human rights charters and increasingly hard principles of international law as elements of a legal order with force close to that of classical constitutional norms.<sup>8</sup> More recent exponents of this view often perceive international human rights law in particular as a normative framework in which national states are transformed into simple subjects of law, similar to single persons within classically constituted jurisdictions (Kadelbach 1992: 320; Klabbers, Peters and Ulfstein 2009: 154, 179).

On the other hand, some literature focused on global constitutional norms breaks with classical lines of constitutional analysis, and it accentuates the essential *pluralism* of the constitutional features of global society. This *pluralist* or more avowedly *transnationalist* literature on constitutionalism opposes the strict normative implications of internationalist constitutional analysis, and it rejects the assumption that modern society has simply transferred its classical constitutional

<sup>7</sup> For a representative statement of this view see van der Vyver (1991a: 426). This view runs through much of the literature, whatever its methodological emphasis. For an early realist version of this view see Keeton and Schwarzenberger (1946: 146). For other prominent assertions of this claim see Jessup (1947a: 406), Falk (1970: xiii), Delbrück (1982: 572), Henkin (1995: 38) and Koh (1998: 1410). For a distillation of this account of human rights see Rosas (1995: 75) and Milewicz (2008: 422, 432).

<sup>8</sup> The most extreme version of this view suggests that there exists a hierarchy of international laws, close in structure and force to the hierarchy of classical public law. As a result, national states are perceived as constituted subjects in a constitution of international law, and they cannot exercise powers exceeding this status (Franck 1992: 50). For a general cross section of the global-constitutionalist literature, see Kadelbach (1992: 32), Dupuy (1997), Henkin (1995: 39), Ackerman (1997: 777), Fassbender (1998) and Kadelbach and Kleinlein (2007). For a nuanced approach, see Petersmann (2001: 22), Helfer (2003: 237), Kumm (2004), Peters (2005), Habermas (2008: 369) and Stone Sweet (2009: 637). For an overview, see chapter 1 in Schwöbel (2011).

hierarchies to the realm of global politics. Some positions in this literature are sceptical as to whether conventional discourses of constitutionalism can be applied to today's society (Berman 2002: 491; Krisch 2010: 17; Kingsbury 2012: 210–2). Other positions in this field accept the diagnosis of society's irreducible pluralism, yet they attempt to discern patterns of constitutional formation within society's pluralistic form (Zumbansen 2002: 432; 2006: 747; Fischer-Lescano 2003: 751; Teubner 2012: 59–72). Distinctively, pluralistic approaches that still ascribe a constitutional form to contemporary society tend to renounce the classical assumption that constitutional law pertains solely to the realm of public law, or even that it pertains distinctively to the political system. Instead, they identify ways in which activities traditionally pertaining to private law generate, and are in turn framed by, norms with public, *de facto* constitutional standing.<sup>9</sup> Equally distinctively, transnationalist approaches to global constitutional law reject the residually dualist perspectives of constitutional analysis based on international law, and they view transnational law as part of a hybrid legal system, formed, spontaneously, across the jurisdictional borders of national states (Zumbansen 2012: 48).

Both these bodies of constitutionalist literature share common ground with a further rapidly expanding quantity of research, which is concerned with the growing constitutional power of international or transnational judicial bodies. As will be discussed below, one salient feature of the emergent constitutional form of global society is that courts and other judicial institutions play an increasingly vital role in binding norm construction.<sup>10</sup> In particular, courts now obtain a quasi-constitutional position as institutions that interact with each other in the interpretation of international instruments and conventions, and that apply and transmit norms, usually distilled from international human rights agreements, across the boundaries between national societies. This means that courts have central importance in defining the legal parameters in which national states operate. This applies to courts

<sup>9</sup> See Teubner (2006: 328; 2016) and Viellechner (2013: 155). For alternatives see Hamann and Fabri (2008: 487) and Calliess and Zumbansen (2010: 75, 166–8, 243).

<sup>10</sup> This was already identified in Jessup (1959: 63). For a basic sample of the now vast literature on this topic, see Hirschl (2000: 104), Baudenbacher (2003: 397), Commaillé and Dumoulin (2009) and Teitel (2011: 216). See the classic account in Tate (1995: 27). On judicial checks on legislative production of statutes in established democracies, see the account of the final 'painless death' of parliamentary sovereignty in France, its traditional heartland, in Stone Sweet (2008). On the UK, see Kavanagh (2009: 275). For a more general picture, see Lasser (2009: 24).

located outside national domains, which interpret international or supranational law for national judiciaries and legislatures. But this also applies to courts within national jurisdictions. In particular, this applies to national Constitutional Courts with authority to conduct review of statutes, which, owing to their close cooperation with international courts, have recently seen a general expansion of their role in producing norms, mainly within, but also beyond national societies. The fact that national Constitutional Courts review domestic laws in light of international norms means that they are widely able to maximize their power within domestic political systems, often transforming classical separation-of-powers provisions in domestic systems of public law.

This expansion of transnational judicial authority in recent decades has produced a great quantity of influential research, addressing the authority of courts as part of a rising global constitution. Literature in this field includes analyses of national polities, considering reasons, strategic or structural, why these polities allow judiciaries to rise above their traditional role as repositories of neutral power (Moravczik 1994: 2, 3; Garrett 1995: 172–3; Stone Sweet 2000: 3). This literature also includes analyses that address transformations in traditional state institutions caused by lateral interactions between national judicial actors and members of transnational judicial communities (Slaughter 2004: 66). Further, this literature includes important analyses that seek causal explanations for the growing imposition of transnational judicial power and transnational human rights law (Hirschl 2004: 50–99). Of course, not all interpreters of these processes view the proliferation of international courts as uniformly constitutional, and some observers see the global extension of judicial power as a process that fractures legal unity in global society.<sup>11</sup> Despite these variations, however, a large body of contemporary research has developed that examines how courts contribute to the construction of a normative order that inserts states into an overarching legal system, such that, through judicial rulings, international or transnational law places clear constitutional constraints on the typical acts of national states (Nollkaemper 2009: 539).

This book shares common ground with all these fields of research. Clearly, like the lines of research considered above, this book is centred

<sup>11</sup> See Nico Krisch's assertion (2010: 17) that in 'postnational governance' the 'classical forms' of constitutionalism are not sustainable. For an account of international courts as creating jurisprudential 'cacophony', see Spelliscy (2001: 152). For further reflections, with different levels of emphasis, on dissonance between international courts, see Koskenniemi and Leino (2002: 555), Shany (2003: 273), Koskenniemi (2004: 202) and Kingsbury (2012: 210–23).

on the claim that contemporary society is witness to the emergence of a new constitutional structure. Moreover, much of this book explains how international laws and international judicial bodies have transformed the constitution of global society. At the same time, however, this book provides a sociological reconstruction of the constitutional processes that are usually described more literally, or more positivistically, in other fields of literature. For this reason, this book takes up a position that is clearly distinct from other approaches to the rise of global or transnational constitutional norms.

In relation to the more classical *internationalist* analyses of global constitutional norms, first, the position of this book can be summarized quite simply. This book endorses many objective principles of the internationalist literature on global constitutionalism. In particular, it accepts the view that national constitutional norms are now commonly overwritten by international norms, especially those reflecting human rights instruments, and it concurs with the claim that, in some spheres, domestic constitutions assume secondary importance next to principles declared in the international legal system. As discussed, however, internationalist accounts of global constitutional norms tend to operate within rather conventional legalist paradigms, and they do not typically endeavour to give a sociological account of international legal norms. By contrast, this book promotes a decidedly sociological approach to the rise of international legal norms. It tries to elucidate the deeper societal conjunctures which underpin the growing intersection between international law and national public law, and it attempts to explain the social foundations for the growing prominence of *international* or *transnational* constitutional law in modern society. In this respect, this book uses the concept of *transnational law* in a deliberately broad sociological fashion. The understanding of transnational law advanced here differs slightly from the sense used by other theorists of such law, who normally use this term to account for the spontaneous inter-systemic creation of legal norms in global society, usually in the form of contracts among non-state actors (Vieljechner 2013: 181), and who distinguish transnational law quite sharply from international law (Scott 2009: 873–4). In contrast to such usage, this book proposes a twofold definition of transnational law. On one level, it accepts the more standard definition, which it employs in Chapter 7. However, it also subscribes to a wider construction of transnational law. It defines transnational law as law which originates outside the strict confines of national

jurisdictions, yet which takes effect in national societies, and whose domestic application is intrinsically propelled and defined by forces particular to national societies: in many cases, *transnational law is law that is configured through the domestic absorption of international norms in reaction to processes usually seen as exclusively national*. On this basis, this book argues against a strict separation of transnational law and international law. In particular, it claims that, in many settings, legal norms of *international* provenance are profoundly reconstructed as they are interpreted and applied by judiciaries situated in *national* society. These norms acquire distinctive implications as they allow domestic societies to address historically embedded, highly localized pressures, and as they are applied to resolve problems that lie deep in the historical structure of national societies. As a result of their domestic application, these norms often lose their distinctive quality and functions as *international* law. Much law of *international* origin is translated into *transnational* law as it is filtered into *national* jurisdictions and deployed within domestic settings for purposes resulting – often – from quite specific historical/sociological conflicts. Through this process, law, remotely derived from the international domain, produces structural results that are very far removed from the motives that shaped its promotion by actors in international situations. The constitutional impact of international law, thus, needs to be seen, in part, not as an external framing of national institutions, but as the result of an intrinsically transnational process, in which the domestic internalization of international law performs distinct functions for national societies: the global political system, in fact, has its basis in the inclusionary interaction between national social forces and international law. This second conception of transnational law runs through [Chapters 5 and 6](#), which examine how, in different societies, international law is consolidated in domestic constitutional law as an instrument for resolving specific inner-societal problems. Generally, the book is an attempt to understand the structural forces, within national societies, which lead to the construction of constitutional norms of transnational nature. Transnational law is formed, to some degree, as international law assumes force and gains autonomy within national societies, and it is created as a reaction to the structural pressures that shaped the historical formation of these societies.

In these respects, some of the analysis in this book may be viewed as a contribution to the *sociology of international law*, and it entails an inquiry into the inner-societal motivations which have stimulated the

recent expansion of international law.<sup>12</sup> In particular, parts of this book can be viewed as a contribution to the sociology of human rights law, a notable growth area in recent sociological inquiry.<sup>13</sup> In this respect, although generally favourable to human rights, the claims in this book are not intended to offer moral advocacy of human rights. Instead, this book is concerned, above all, with offering a sociological explanation of that part of international law concentrated around human rights norms and of the processes through which such law acquires constitutional status, both nationally and beyond national jurisdictions. Notably, this book contributes to the sociology of human rights law by examining the causes of the increasing interpenetration between domestic public law and international human rights law, and it aims to uncover the structural benefits for national states resulting from the domestic assimilation of international human rights law. In this regard, the book also

<sup>12</sup> Classically, sociology was very sceptical about international law, which, owing to its detachment from common patterns of social action, it saw as essentially formalistic and *asocial*. Famously, for instance, Weber (1921: 18) refused to accept international law as law. Geiger (1964 [1947]: 221) described international law as a system of merely 'purported legal norms'. See similar claims in Ehrlich (1989 [1913]: 19). In the 1960s, no lesser authorities than McDougal, Lasswell and Reisman argued (1968: 261, 266–7) that the 'founders of modern sociology [...] rarely engaged in critical examination of international law. The early sociological jurists manifested a similar tendency.' They added to this criticism the important observation that perhaps 'the most striking and recurring feature of sociological approaches is the non-sociological quality of what has been done in its name'. This criticism was a little reductive. Before the 1960s, there had been notable attempts to construct a sociology of international law (see Starke 1965: 121). For example, there had been some realist attempts to establish a sociological approach to international law (Huber 1928; Morgenthau 1940). In the USA in the 1920s, Roscoe Pound had also called for a sociological re-orientation in international law. Pound claimed that international law must deal with the 'concrete claims of concrete human beings', putting aside its conventional attempt to deduce legal norms from 'the perfect abstract state' and the 'perfect abstract man' (Liang 1948: 375). Other American jurists suggested that 'the future of the law of nations' should be built around influences from other disciplines – 'from history, from political science, from economics, from sociology and from social psychology' (Hudson 1925: 434). Some interwar European theorists of international law also used very general sociological principles (see Scelle 1932: 1–2; Politis 1927: 13–4). Moreover, some recent publications have endeavoured to outline a sociology of international law based on the analysis of elite interactions (Dezalay and Madsen 2012: 442). There are also recent sociologically oriented accounts of motives for states to accept constraint through international human rights norms (see Wotipka and Tsutsui 2008: 725, 737). For a very important macro-sociological account of international law, see Brunkhorst (2014: 415–31). For a general survey of sociological research on international law, see Hirsch (2005). Despite these innovations, however, it is surely the case that there is only a very small body of research addressing the sociology of international law; as a result, we still lack an encompassing theory that examines the structural forces within national societies that shape the rise of international law. This chapter endeavours to elaborate a perspective of this kind.

<sup>13</sup> For evidence of this, see the recent programmatic collections: Blau and Frezzo (2012) and Madson and Verschraegen (2013). See also notable contributions in Anleu (1999: 198), Sjöberg, Gill and Williams (2005: 12) and Gregg (2012: 213, 222). For other selected examples, see Turner (1993), Barbalet (1998: 140) and Alexander (2006: 34, 69).

shares thematic ground with research that considers the incentives for states to comply with international human rights norms.<sup>14</sup> The distinctive sociological outlook of this book, however, lies in the fact that it examines how states create and constitutionally enshrine international human rights norms, not for deliberated interests or motives, but because of functional pressures within national societies, caused by systemic demands for inclusion. Even the most sociologically refined inquiries into international law observe domestic law and international law as originally separate entities (see Benhabib 2009: 695; Brunkhorst 2014: 416). This book, by contrast, argues that domestic laws of sovereign states and international human rights law do not have distinct origins. Unlike other sociological approaches to international human rights norms, it claims that international human rights are generated by inner-societal pressures and claims for inclusion, and, once internalized in domestic legal systems, they greatly enhance the inclusionary structure of domestic societies, allowing national political institutions to function more autonomously and more effectively. As such, the book advances the theory that, in many cases, international human rights ought to be viewed – more accurately – as transnational rights, as their origins lie deep in the formative history of national societies, they gain constitutional purchase in different societies for different internal reasons, and they are always simplified if viewed as abstract elements of the inter-state legal domain. To give weight to these claims, the book utilizes and expands classical–sociological theories of rights, which also observe rights as institutions that reflect underlying demands for societal inclusion.<sup>15</sup>

The position which this book assumes in relation to the growing body of *transnationalist* literature on global constitutionalism is somewhat more complex. Notably, much transnational-constitutionalist inquiry locates itself expressly at the sociological end of the spectrum of legal research. Unlike the internationalist research on global constitutionalism, therefore, it evidently cannot be accused of legal formalism.<sup>16</sup>

<sup>14</sup> See Henkin (1979a: 48), Franck (1995: 30–46), Koh (1997: 2659), Chayes and Chayes (1998: 4), Risse and Sikkink (1999: 37) and Goodman and Jinks (2004: 630–56).

<sup>15</sup> The idea that rights act as *instruments of inclusion* has a long history in sociology and in the sociological margins of constitutional theory. It was expressed, diversely, in Durkheim (1950), Smend (1965 [1928]: 265), Parsons (1965), Luhmann (1965) and Marshall (1992 [1950]: 28). However, the idea advanced here that international human rights perform specific functions of inclusion for and within national societies is new.

<sup>16</sup> The emergence of a ‘sociology of transnational law’ was originally announced twenty years ago (Friedman 1996).



Moreover, the major theorist of transnational constitutional law, Gunther Teubner, must be regarded as one of the world's leading legal sociologists, and this book has not even the slightest desire to devalue the importance of his work. However, for a number of reasons, this book distances itself from established pluralist or private-legal constructions of transnational constitutional law.

First, the argument in this book runs counter to much analysis of transnational constitutionalism because it defines constitutions as normative constructions whose primary role is to frame the use of political power, as a determinately *public* phenomenon, such that constitutions are distinctively related to the political system. To be sure, this book accepts transnational pluralism as a defining fact of contemporary legal order, and it acknowledges that constitutional norms now derive force from multiple sources, located in and beyond national environments. As mentioned, we can observe the formation of constitutional law at very different points in the political system of global society – constitutional norms are formed in national societies, in the interstate domain, and in more uncertainly defined transnational interactions. However, this book specifically disputes the claim that in global society constitutions are no longer primarily defined by their focus on the political system, and that they have lost their more classical characteristic of publicness. Instead, it seeks to show that, even in the pluralistically decentred conditions of global society, constitutional norms (perhaps more than ever) remain oriented towards the construction of political power as a recognizably public phenomenon, and society preserves a requirement for constitutional norms precisely because it relies on the abstraction of certain political functions and certain political decisions as relatively autonomous and determinately public. Constitutional norms, even in their most fragmented form, still provide support for a political system, and they make it possible for society to perform acts of inclusion at a certain degree of public generality. Quite essentially, in fact, the formation of transnational constitutional law often leads to a *thickening* of the public/political domain, and it commonly extends the penetration of public law into society.<sup>17</sup> One primary task of the sociology of transnational constitutional law, therefore, is to discern the processes through which, despite the weakening of classical constitutional law, some laws define themselves across society as categorically public and

<sup>17</sup> See especially [Chapter 7](#) below.



to examine how social demands for inclusion create new patterns of public law to support new modes of political-systemic formation.

The position which this book assumes toward research on the changing role of judicial power in contemporary society is also not simple. In proposing a sociological explanation of the changing order of constitutional norms, this book necessarily addresses the rising standing of judicial institutions. In particular, this book devotes much space to examining ways in which inter-judicial interactions form binding, effectively constitutional, norms for national societies, and indeed for global society at large. However, this book claims a certain distinction in the rapidly expanding mass of research on global judicial practice because of its use of a sociological method to understand transnational judicial exchanges. Self-evidently, this book is not alone in approaching these phenomena sociologically; other current research on judicial power also contains an important sociological dimension. For example, some commentators on recent patterns of judicial transformation have observed the growing constitutional force of international judiciaries and international human rights law as the result of hegemonic monetary interests (Hirschl 2007: 223; Schneiderman 2008: 4). Such literature builds on the classical critical view of judicial power as shaped by counter-majoritarian interests, but it expands this view, sociologically, by arguing that judiciaries apply human rights law within domestic settings in order to stabilize neoliberal legal forms, against embedded traditions of solidarity-based democracy. Moreover, research on courts and inter-judicial engagement already possesses a quite pronounced sociological dimension (see Vauchez 2008; Commaille and Dumoulin 2009; Madsen 2010: 22–31).<sup>18</sup> In contrast to other research on judicial institutions, however, this book tries to set out a more comprehensive sociology of transnational judicial power, which is based on a broader historical construction of different national societies. It addresses ways in which court-driven law production relates to structural forces within national societies, and it observes the reasons for the interlocking between national and international judiciaries as part of the formative history of national institutions. Above all, it assesses the significance of courts and judiciaries as powerful transnational norm providers as a consequence of changing demands for legal and political inclusion, impacting, primarily, on the inclusionary structure of national societies.

<sup>18</sup> For an overview see Madsen (2013).

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This book, in short, responds to a number of bodies of recent research, and it reacts in a distinctive fashion to all of them. In one respect, however, this book reacts to these separate lines of inquiry in the same way. What connects all (or virtually all) contemporary views on transnational constitutional law is that, almost unthinkingly, they account for the growth of transnational law as a process that occurs externally to national societies and national political institutions, and that takes place after the consolidation of national societies.<sup>19</sup> In particular, different lines of literature addressing the constitution of global law are connected by the fact that, with variations, their exponents tend to identify the emergence of global law as a development that marks a break with processes of law production in national societies. The defining perspectives in these different lines of inquiry all presuppose that the rise of the global law brings to an end, or at least very dramatically transforms, the national domain of legal construction. Moreover, with variations, all accounts of transnational constitutional law follow wider conceptions of globalization as socio-political process,<sup>20</sup> and they suggest that such law forms a countervailing force to institutions created in national processes of formation, applying potent normative constraints on national states and their powers of national sovereign autonomy. In different ways, across these fields of research, it is difficult to identify positions that do not, however remotely and implicitly, articulate an account of global law which re-iterates the original positivist view of international law: namely, that global law forms an antinomy to the classical terrain of national society.<sup>21</sup> This view is quite explicit in internationalist examinations of global constitutional law.<sup>22</sup> It is also quite central to accounts of the changing position of judicial bodies, which stresses the growing force of transnational legal limits on national democratic self-determination (Hirschl 2004: 46). However, much literature on transnational constitutional law also replicates some aspects of classical theories of international law, which still

<sup>19</sup> One exception to this is Kjaer (2015: 22). One important book with similar, although only remotely related, implications is of course Milward (2000).

<sup>20</sup> In most standard accounts of globalization, it is seen as a process that substantially diminishes the sovereign power of state institutions. See Held (1997: 261), Beck (1997: 13, 183), Shaw (2000: 186) and Archibugi (2008: 98).

<sup>21</sup> Though for a notable exception see Nicolaidis and Shaffer (2005: 314).

<sup>22</sup> See pp. 12–13 above.

operated within the dualism/monism distinction of the positivist canon.<sup>23</sup> In particular, although intended as a radical critique of dualistic theories, the transnationalist literature insistently repeats the classical claim that transnational law develops outside national societies, and it diminishes the power of states to dictate consistent legal hierarchies for their populations (Zumbansen 2006: 744; Viellechner 2013: 99). Most theorists of transnational constitutionalism approach current legal conditions through residually positivist categories, identifying global society as a legal order in which ‘nation-state sovereignty’ is fundamentally ‘called into question’ and replaced by multiple centres of law-giving agency (Hamann and Fabri 2008: 482–3). It is common ground in much of this literature that transnational law results from and is configured by, ‘ongoing changes of traditional forms of statehood’ (Zumbansen 2002: 410), as a result of which classically defined powers of sovereign states are superseded.

One central sociological claim in this book, by contrast, is that, if we wish to appreciate the emergent shape of the global constitution, we need to abandon the idea that this is a legal form that results from a socially external process, or that it in some way restricts the existing power of political institutions in domestic societies. This book argues that the norms of global constitutional law originate in pressures on the inclusionary structure of national states, both in their external dimensions and, still more importantly, in their internal dimensions: in both dimensions, the rise of global constitutional norms enhances the power of states.

Of course, at a very superficial level, it would be rather absurd to suggest that the constitutional force of extra-national laws did not curtail certain competences of national states. This is an almost universal source of controversy – whether we look at controversies over compliance with the American Convention on Human Rights (ACHR) in Venezuela, whether we consider reticence over ratification of human rights instruments in China, whether we examine the hostility to the 1998 Human Rights Act (HRA) amongst some political groups in the UK or whether we think of the impact of directives of the World Trade Organization (WTO) on national jurisdictions. At the level of everyday politics, therefore, it is undeniably the case that there exists a tension between international law and state sovereignty.

<sup>23</sup> See the classical theory of dualism, stating that ‘international law and national law’ are categorically defined as ‘two distinct legal orders’, in Triepel (1899: 156). For a paradigmatic distillation of this view see Kahn (2000: 2, 5, 18).

If we look further into the sociological bases of legal formation, however, the converse often appears to be the case: the transnational constitution of the global political system has often provided structurally vital support for national political systems. In many cases, the rise of global law, refracted into national jurisdictions, resulted from weaknesses inherent in national societies, and it formed the effective inclusionary precondition for the consolidation of national law and national political institutions. In many cases, it was only as global law penetrated national societies that these societies were in a position to establish an autonomous legal structure, able to generate discernibly national patterns of public law and to support national patterns of political inclusion and organization. Accordingly, it was only as political institutions were constructed on a transnational basis that they were able to solidify their position, nationally, as stable centres of political sovereignty. Generally, in fact, the rise of *inter-* or *transnational* law can be explained, sociologically, not as the *external cause*, but as the *internal result*, of a deep and widespread crisis of national states and their institutions. The literal approach to international or transnational law, claiming that such law emanates from an abstracted, external social domain, simply replicates early positivist preconceptions, and it obstructs full sociological comprehension of global law. Instead of persisting in late positivist thinking, we need to renounce the presumption that national societies and their political institutions were in some way fully formed or that they had reached a fully evolved inclusionary condition, prior to the rise of global law or the global political system. Moreover, we need to relinquish the claim that the origins of global law were shaped in a legal domain outside the realm of national jurisdictions. This book is shaped throughout by the assertion that the relation between national and global law should be examined through a lens that is sensitive to the dialectical interpenetration of these legal domains, and that observes national public law and transnational public law as, in many cases, *reciprocally formative*. Many elements of transnational or global law, it is claimed here, have evolved precisely because they facilitate the completion of trajectories of public-legal structure building and institutional formation, which were originally fundamental to the fabric of national societies. Indeed, the fusion of domestic and international law in the global political system has often produced a transnational basis for the inclusionary structure of national societies, and transnational constitutional law has often formed an indispensable precondition for the

stabilization of national systems of public law and national political systems more widely.

At the centre of this book is the argument that national societies produce demands for legal and political inclusion, which, often, their political systems cannot fulfil. As discussed in [Chapters 2 and 3](#), this is clearly reflected in the *external* dimensions of national societies; as soon as national statehood became common, national societies began to rely externally on global legal norms. But this is equally evident in the *internal* dimensions of national societies. National societies first evolved towards their contemporary form as different societal interactions spilled beyond the segmented local boundaries of early modern social order, and as political institutions were expected to construct and generalize legislation for these interactions across the widening spaces which these societies contained. Paradoxically, however, in most cases, nations, and national institutions have proven incapable of completing the inclusionary processes that originally defined them. The original expansion of societies as nations initiated pressures of inclusion that could not be absorbed by nations, and national political institutions, alone. On this account, the national state was always an *interim* evolutionary form, and it inevitably produced, and it was in turn exposed to, inclusionary pressures which, using normative resources exclusive to national society and national legal and political institutions, it could not resolve. The pressures created inherently by *nations* inevitably necessitated *transnational* legal solutions; it was only by incorporating and internally reconfiguring extra-national legal norms that national societies were able gradually to adjust to the inclusionary pressures, which, at their origins, they released. The transnational constitutional form of contemporary society becomes explicable, sociologically, on that basis. The constitutional order of contemporary society has developed, not through a breach with national legal trajectories, but as one tier within a multi-layered structure of legal inclusion whose formation commenced with the beginning of national societies, but which could not be sustained by national laws alone. To this extent, the transnational constitutional order usually reinforces the powers of national states, and it helps to stabilize the basic inclusionary structures on which states depend, both in their international functions and in their domestic actions. The global political system as a whole, therefore, is produced by pressures on the inclusionary structures of national societies, and transnational constitutional norms evolve spontaneously

as national political systems struggle to preserve inner stability in face of the embedded pressures and antagonisms which they engender and encounter.

On this basis, the book claims that, for inner, sociological reasons, national societies have engendered a transnational legal order – especially in the domain of constitutional law. This is mainly due to the fact that national constitutions, over a longer period of time, were unable to support an adequate inclusionary structure for political systems in national societies, and they did not allow national political systems to react adequately, at a sustainable level of differentiation, to the demands for legal inclusion and legislation, which national societies generated. National political systems thus increasingly presuppose transnational legal norms to elaborate an adequate inclusionary structure, and as a result, they increasingly constitute a global political system. Naturally, the reliance of national states on extra-national law is clearest in their inter-state interactions: international law provides a vital inclusionary structure for states in their external dimension. In many cases, however, states have also assimilated international law in their legal systems because this has allowed them to cement an inclusionary structure for their domestic functions: transnational law provides a vital inclusionary medium for states in their internal dimensions. In particular, transnational law has assumed a structure-building role in national societies because it has helped political institutions to insulate themselves against traditionally destabilizing pressures, and above all, to consolidate their inclusionary autonomy in relation to powerful domestic actors, which traditionally vied for, and weakened, the power of the national state.

Of course, it is notoriously difficult to assess the autonomy of political institutions, and there are many measures of the institutional autonomy of a national political system.<sup>24</sup> However, it is proposed here that there are *four* key indicators of the autonomy of a national political system in its domestic environment. *One* is that the political system can produce

<sup>24</sup> Some theories identify the state's autonomy in its directiveness (Gurr, Jagers and Moore 1990: 88). There are theories which link the state's autonomy to its independent capacity (Barkey and Parikh 1991: 526). Some theories associate the state's autonomy with its capacity for mobilization and transformation of society (Gurr 1988: 45; Davidheiser 1992: 464). Other theories see infrastructural power as a sign of state autonomy (Mann 1984). My view is that we need to see the political system, not solely the state, as part of a system of inclusion, and the autonomy of this system is measured by the extent to which, from within its own resources, it can *positively* produce and distribute law across society. This is likely to occur where the national political system interlocks closely with an extra-national legal order.

authority for legislation, if necessary, in independence of potent organizations standing outside itself, exercising influence in society at large. A *second* is that the political system can penetrate deeply and inclusively into society, and its legislative acts reach into the local, regional and familial structure of society, in relatively even fashion, without extreme variations caused by the social or regional positions of persons addressed by law. A *third* is that the political system is recognized through society as a primary addressee in the regulation of social conflicts, and social actors show some confidence in the political system as a provider of decisions, superior to local and sectoral sources of authority. A *fourth* is that the political system can easily accelerate its production of laws, and, where required, it can use internal normative principles to satisfy the escalating demands for legal inclusion in complexly structured societies. On each point, the autonomy of a national political system is primarily expressed in its capacities for *effective legislative inclusion*: in its ability independently to produce, to distribute and to gain compliance for law, across different parts of society and different social groups. On each point, the national political system presupposes a relatively autonomous inclusionary structure, through which it can authorize and reproduce law through society.

On each count, it is proposed throughout this book that the ability of a national political system to act autonomously commonly depends on the existence of constitutional norms constructed through the interaction between national and international laws. Typically, the authority of national political systems is contingent on their assimilation of international norms and on their recognition of some international norms as having higher-order normative force within domestic constitutional law. Most notably, the filtration of international law into domestic constitutional law tends to have the following beneficial consequences for national political systems: (a) it allows national political systems to support their functions across society, establishing standard procedures and principles of legitimacy for new acts of legislation and standard procedures and principles for judicial rulings; (b) it provides an internal legitimational grammar in which national political institutions are able to reduce the intensity of social conflicts, in which conflicts with potential to drain the legitimacy of the political systems are partly neutralized, and in which many conflicts can be stabilized outside the political system; (c) it unifies the legal system of a society in its entirety, often bringing local regions and actors into a closer relation to the political centre; (d) it produces a rise in litigation, both public and private,



which allows central organizations to scrutinize local institutions, and it places citizens, as litigants, in more immediate relation to organs of central states. In each of these respects, deepening interpenetration between national and international law typically creates an inclusionary structure for national political systems, which substantially raises their autonomy and their capacities for law making and general inclusionary power. For this reason, the rise of global constitutional law and a global political system is deeply rooted in the fundamental structure of national society, and one reason why national states lock themselves into a global political system, and into a set of global constitutional norms, is because this constitutionally consolidates their functions as national states, in national societies.

It is often argued that constitutions derive force, energy and legitimacy because they embody a specific *sovereign national will*, or even enact a national constituent power, such that constitutionalism loses meaning when transferred beyond the horizon of the nation state (see Grimm 1991: 31; Loughlin 2009; Rabkin 2007: 70). From the perspective set out above, however, this claim can be fundamentally disputed. If we approach constitutions more sociologically, we can observe that constitutions were not in the first instance formed as texts that gave articulation to the will of a given national people. Instead, constitutions evolved as vital parts of an inclusionary structure, which supported the rise of a relatively autonomous political system, able to legislate, positively and inclusively, for society as a whole. If observed in this way, the correlation between constitutions and nationhood need not be seen as a definitive aspect of constitutionalism, and it need not imply that constitutions are fundamentally defined by a particular national location or by a particular national will. On the contrary, as discussed below, national constitutions originally expressed a formula that was adapted to the inclusionary demands of modern society at a particular point in its evolution, and it supported the abstraction of an inclusionary structure for the political system as society reached a certain stage of geographical and temporal extension. This was an adequate form, at a particular historical juncture, for the abstracted and inclusive circulation of power and law across society. National constitutions, however, were always *essentially transient* structures of inclusion, and they merely stabilized society's political system at a certain point in its increasing social expansion, as demands for legislation exceeded the capacities of local authorities and personal legitimacy, but had not yet reached a level of intensified complexity. Quite inevitably, however,



national constitutions, and the legal norms that they contain, must eventually become redundant, or at least subsidiary elements of inclusionary structure. Overall, the association of constitutions with nations and nation states contradicts the deep inclusionary function of constitutionalism, and it rather unreflectingly links constitutional functions to social and historical preconditions which they are in fact internally bound to exceed. At one level, most classical/national constitutions were not very effective in producing a reliable inclusionary form for the political system, and most national political systems only evolved an inclusionary structure as national law was increasingly underpinned by international law. At a different level, contemporary society gives rise to endlessly multiplying claims for legal inclusion, which are not anchored in geographically identifiable persons, locations or demands, and it encounters pressures for legislation, which arise in highly unpredictable, geographically dislocated fashion. The contemporary constitution is thus increasingly required to address demands for autonomous inclusion that states alone cannot regulate, and by which their adaptive apparatus is overstretched. In both respects, the contemporary form of the constitution is necessarily severed from the original form of the nation, and the constitution of the contemporary political system depends on norms which are not defined by national populations, and whose inclusionary functions are not restricted to a national society. This constitution, however, does not mark a break with classical constitutional law. On the contrary, it transfers the inclusionary functions of classical constitutions onto new societal realities.

The internal logic of constitutional law can be most adequately captured if we interpret constitutions as essentially formative, neither of states nor of nations, but of *political systems*. Constitutions first evolved as inclusionary structures, abstracted in relatively autonomous legal form, which allowed early modern societies to abstract a differentiated political system, enabling society to produce and normatively to authorize political power across widening social terrains. The national state can be seen as an early form of the differentiated political system, supported in its inclusionary functions by classical principles of constitutional law. But the national state need not be seen as the final form of the political system. In fact, as mentioned, the national state is – necessarily – an interim construction of the political system. In contemporary society, constitutions still act to stabilize and differentiate a distinct political arena. They extract norms from multiple sources in order to preserve an autonomous inclusionary structure for the political system,

in face of a range of varied, contingent and often unsettling inclusionary challenges. However, they preserve an inclusionary structure for a political system which is no longer homologous with a national society, and whose centration on a national society and a national population was always precarious, and always temporary. Observed in this way, we can see that the recent transformation of constitutional law reflects a deep functional continuity with earlier patterns of constitutional norm formation. Constitutional law always condenses an inclusionary structure for the political system of society. But the inclusionary pressures to which the political system is now exposed necessitate legal norms that cannot be explained through reference to a single national will. As discussed, the task for sociological analysis of constitutions is to interpret the changing form of constitutional law as a refraction of changing pressures for inclusion, and to observe constitutional law as a set of norms that are adaptively produced, under particular circumstances, by society's need to preserve a distinctive political domain.

## CHAPTER ONE

# THE NATIONAL POLITICAL SYSTEM AND THE CLASSICAL CONSTITUTIONAL FORMULA

### CLASSICAL CONSTITUTIONS AND SOCIETY'S FUNCTIONAL STRUCTURE

Analyses of contemporary constitutionalism normally explain the emergent constitutional law of global society by contrasting it with the classical constitutions of national societies. As mentioned, accounts of global constitutional law, whether critical or affirmative, usually presuppose that classical constitutions were inextricably linked to the concept of *national sovereignty*, and they assumed force as they expressed the will of one sovereign nation, both, internally, as the source of legislation, and, externally, as the basis of the state's territorial unity.<sup>1</sup> In much inquiry into global constitutional law, classical constitutions appear, simply and literally, as single normative documents, in which, in Alexander Hamilton's words, 'societies of men' establish the foundation of 'good government', using rational capacities of 'reflection and choice' (Madison, Hamilton and Jay 1987 [1787–88]: 87), and in which states derive legitimacy from the aggregated will of a national society. Against this background, most established literature on global constitutions claims that there exists a deep caesura between classical/national and contemporary/global patterns of constitutional norm formation.

The analysis below argues that research on contemporary constitutionalism has often interpreted transnational constitutional law in rather simplified fashion. One important reason for this is that it has

<sup>1</sup> See above p. 22.

tended to misconstrue national constitutional law, and its perception of classical constitutionalism has stood in the way of an adequate analysis of contemporary constitutional tendencies. To understand the constitutional law of global society, it is necessary to revise widespread accounts of classical constitutionalism, and to develop a more sociological analysis of the origins and functions of constitutions in their original national environments. In particular, it is necessary to abandon *methodological literalism* in observing classical constitutional norms, and to renounce the principle that constitutions originally produced legitimacy for the political system by articulating simple processes of will formation for different national societies: this belief obstructs comprehension of both classical and contemporary constitutional norms. Constitutions first gained effect, most importantly, in a dimension of social organization that is not easily captured in literal analysis. Classical constitutions can be seen, not solely as literally objectivized normative agreements, but as adaptive instruments, through which, beneath the level of practical deliberation, societies consolidated their functional exchanges, and through which, above all, they learned to elaborate and preserve structures of general political inclusion. Constitutions, and the norms that they contain, thus, possess functional meanings alongside their literal meanings, and their functional meaning is expressed, not as literally agreed 'objects of public good' (Tomkins 2003: 5), but as formative elements in the inclusionary structure of society. In fact, we can observe the normative core of classical constitutions as a set of principles produced by, and within, the political system of society, through which modern society generally consolidated an inclusionary structure for its political functions, and through which, progressively, the political system insulated itself against the increasingly complex demands for legislation that it encountered. If we elucidate this non-literal, societally embedded meaning of classical constitutions, we can also gain fuller understanding of the constitutional law of global society.

This submerged dimension of constitutional law can be approached, most simply, through a sociological discussion of the rise of classical constitutionalism. It can be illustrated through observation of the different constitutional revolutions, which, beginning in 1688 in England and ending in 1795 in post-Thermidorian France, marked the division between the inclusionary forms typical of early modern society and those typical of a modern, relatively differentiated social order. Accordingly, this chapter proposes a dual foundation for sociological inquiry

into classical constitutions, which provides the premise for the examination of transnational constitutional norms in later chapters. First, it proposes a sociological reconstruction of the *basic norms* of classical constitutions – that is, of the norms by which classical constitutions, created in the revolutionary époques in Europe and America, brought legitimacy to their political systems. It offers a sociological analysis both of the implications of these constitutions, and the norms expressed through them, for the inclusionary structure of society at the time of their foundation. Then, second, it proposes a sociological analysis of the implications of classical constitutional norms for society in its changing contemporary form. In both respects, it sets out a historical-sociological perspective for understanding the origins of transnational constitutional law in contemporary society.

### **i Norm 1: Constituent power and national sovereignty**

The primary norm by which classical constitutions distilled legitimacy for the political system is associated with the concept of *constituent power* and with the closely related concept of *national sovereignty*. Indeed, classical constitutions were almost invariably founded in some variation on the theory of national sovereignty and national constituent power. Obviously, the concept of national sovereignty has a range of quite distinct implications, and its meaning differs when applied to the international actions of a political system. In relation to the domestic constituency of a polity, however, the concepts of national sovereignty and constituent power imply that legitimate public order must be established through common processes of popular will formation, and that a political system derives its legitimacy from demonstrable acts of collective self-legislation, by a given people, in a given society, at a given historical moment. The concept of constituent power, in particular, implies that a polity only obtains authority to pass laws insofar as it gives immediate constitutional expression to the sovereign will of a particular people (or nation), so that the basic institutional order of the political system can be traced back to an original act of political volition, with some claim to express objectives shared by all society (Böckenförde 1991: 91). The classical theory of constituent power suggests that the legitimacy of a political system is derived from an *ex nihilo* moment of foundation, in which the national will, albeit perhaps mediated through representative actors, enunciates the original constitutional norms by which the polity as a whole is to be governed, and by which later acts of legislation are pre-determined. The

nation, thus exercises constituent power as a sovereign agent, which is not subject in advance to any given constitution. In this founding position, the nation is ‘freed from all constraint’, and the constitutional form that it chooses to confer upon itself becomes binding, as higher law, on all subsequent legislation (Sieyès 1789a: 20), determining and bringing legitimacy to all later governmental acts – especially statutes. Naturally, the concept of constituent power has been repeatedly modified. In its post-classical expression, this theory allows for more flexible forms of higher law making, incremental constitutional revision, and discursive re-direction of the polity (Ackerman 1991: 19–21). However, even such variations on the original doctrine contain the clear implication that constituent power constructs legitimate political order through exceptional moments of collective re-direction, in which the popular or national will is elevated above ordinary acts of law making, giving binding constitutional orientation to the polity as a whole. Throughout the history of modern political and constitutional reflection, the process of constituent authorization repeatedly figures as the condition *sine qua non* of a legitimate political system, and law enjoying legitimacy is almost invariably perceived as a directly authorized constitutional enactment of a national or popular will (see Carré de Malberg 1920–22: 490–91; Schmitt 1928: 23; Habermas 1992: 349; Loughlin 2013: 218).<sup>2</sup> Of course, more recent theorists of constituent power do not imply that legitimate order is invariably created through some manifest display of collective law making; the theory of constituent power or popular sovereignty now typically conceives of constituent power as a basic *procedure of justification* (see Habermas 1992: 466). However, the classical concept of constituent power is still echoed in the common theoretical claim that the legitimate political system draws legitimacy from a set of constitutional norms in which the people recognize themselves as the original source of law’s authority: the constitution is still widely seen as a legal order in which the nation publicly enshrines its own primary authority.

The genealogy of the concept of constituent power is highly contested, and its emergence is visible in different ways at different points in modern history. The origins of this doctrine are perennially associated with the writings of Sieyès (1839 [1789a]: 45), who, in the months before the French Revolution, modified Rousseau’s doctrine of

<sup>2</sup> This is perfectly exemplified by Grimm (2012: 223), who observes the ‘distinction between *pouvoir constituant* and *pouvoir constitué*’ as ‘constitutive’ of modern constitutionalism.

the general will to claim that only the single and unified will of the sovereign nation, admitting no privileges or distinctions of standing, can bring legitimacy to the state.<sup>3</sup> Notably, this theory gained intense influence in summer 1789, as the convention of the Estates-General, summoned by the Bourbon king to address the fiscal problems of the monarchy, collapsed, and the Third Estate, acting independently of the other Estates, claimed authority to reform the monarchy and to write a new republican constitution: Sieyès's theory of national sovereignty thus formed the original legitimating premise for the reconstruction of monarchical government in revolutionary France (see Sewell 1980: 83; Fehrenbach 1986: 75). Despite the importance of Sieyès, however, the doctrine of constituent power did not belong solely to the French Revolution. Something close to a constituent power can be perceived in the English convention parliament of 1688/89 (Pincus 2009: 283–6). Although it did not give rise to a new state in any strict sense, this parliament acted outside pre-constituted juridical constraints to draft a series of basic laws, which then became, and today still remain, binding on subsequent acts of the legislature and the executive. Moreover, it is often argued, especially by theorists standing in intellectual proximity to Sieyès, that the American Revolution (defined here as the period between the Declaration of Independence in 1776 and the interim completion of the Federal Constitution in 1791) did not produce a consistent theory of constituent power. This is usually ascribed to the loosely integrated federal substructure of the early American polity, and to the absence of a clearly unified nation, during the Founding era (see Schmitt 1928: 76). As a consequence, purportedly, the American people(s) could not be palpably imagined as the authors of public laws, and the public order created in the revolution could not be explained as the result of one concerted national will. Nonetheless, in the state legislatures prior to 1787 and then both in the Philadelphia Convention and the subsequent state ratifying conventions (1787–88), a constituent power, albeit pluralistically assembled and voiced, clearly shaped the rise of the constitutional state in America.<sup>4</sup> The concept of constituent

<sup>3</sup> Sieyès defined the nation (people) as 'the origin of everything [...] the law itself' (1789a: 79).

<sup>4</sup> Lafayette himself declared in his reflections on Sieyès that the distinction between *pouvoir constituant* and *pouvoir constitué* had already been established in the American Revolution. He concluded that the French Revolution actually weakened the force of this concept owing to its recurrent 'mixture of constituent and legislative functions' (1839: 50). On the anteriority of the American Revolution in elaborating the principle of constituent power, see additionally Laboulaye (1872: 381), Zweig (1909: 2), Klein (1996: 15), Boehl (1997: 26) and Adams (2001: 63).

power had in fact been theoretically formulated in revolutionary America some years before Sieyès (see Tucker 1983 [1784]: 610). While drafting the Federal Constitution, then, Madison himself expressed a classical doctrine of constituent power, differentiating between ‘a Constitution established by the people and unalterable by the government, and a law established by the government and alterable by the government’ (Madison, Hamilton and Jay 1987 [1787–88]: 327). The theory of constituent power as a higher, and specifically protected, source of law thus obtained particularly prominent expression in the American Revolution. Overall, therefore, it is perhaps most appropriate to adopt a broad construction of the doctrine of constituent power, which can be defined as the claim that the state owes its legitimacy to its public enactment of the collective will of the nation (or people). On this broad construction, constituent power, with wide variations, was at the core of classical constitution making, and even the most cautious processes of early national constitution writing contained some reference to the prior sovereignty of the nation as the sole source of legitimacy.<sup>5</sup>

In many ways, clearly, the constitutional revolutions in England, America and France in the period 1688–1795 reflected a deep conceptual disjuncture between early modern and modern patterns of social formation. Moreover, these constitutions clearly articulated deliberated agreements between powerful actors in society about the conditions of government, and they declared strict normative principles to which politically relevant actors in society publicly acceded. For instance, the constitution of England resulting from the revolutionary Civil Wars of the seventeenth century and cemented in 1688/89 established a system of restricted parliamentary government. This constitution permitted some degree of popular representation, showing respect for clearly delineated rights, and it probably reflected convergent opinions in society about the desirable aims and limits of government, at least amongst politically participant elites. Later, the constitutions of the US-American states and then of the early American Republic as a whole sanctioned some degree of popular- or national-sovereign will formation, and (in most cases) they accorded entrenched status to certain prior rights (natural, civil or human). As such, these documents projected a founding normative consensus in society, and we might feel inclined to presume that they condensed a broad resentment fostered by the suppression of colonial liberties and fiscal conventions by the

<sup>5</sup> See Art 3 of the Spanish Constitution of 1812.



Westminster parliament prior to 1776. By the same token, the constitutions of revolutionary France can be seen as documents, impelled by collective acrimony regarding the unaccountable use of power by the Bourbon monarchy, which distilled normative ideas about singular rights, the separation of powers, and popular participation, as essential components of legitimate government. As such, the constitutions introduced in France in 1791, 1793 and 1795 can be interpreted as texts that formulated normatively determined alternatives to the personalistic modes of government used under the pre-1789 monarchy. Viewed from this perspective, all classical constitutions possessed a certain literal, objective reality; all formalized common ideals of societal organization, and they framed the use of public power in terms giving immediate expression to shared political goals in one national society. Seen literally, classical constitutions were obviously written as normative documents by reflexive political agents, whose ideas were shaped both by a historical discourse of constitutional rationality, and who endeavoured to place the powers of government onto publicly accepted and inclusively legitimated conceptual foundations. To this degree, the revolutionary idea of constituent power or national sovereignty expressed a clear *literal norm*, which, in many settings, obtained foundational value for the general form of the political system (see Loughlin 2010: 228). Overtly, this norm imprinted on the emergent form of modern society the presumption that political power must originate in collective acts and general interests, and it cannot be applied to agents in society in the service of purely private prerogatives.<sup>6</sup> Many institutional structures – for example, national statehood, separation of powers, general rule of law, political representation of social interests – which are now viewed as invariable normative characteristics of modern society, were objectively devised, or at least solidified and justified, through this norm.

Notably, however, the early concepts of national sovereignty and constituent power also reflected a set of less manifest, more subliminal functional or sociological processes in society. The constitutional importance of national sovereignty was linked to less visible evolutionary tendencies underlying emergent modern societies, which, in Europe in particular, were in the process of dramatically transforming the position of the political system and of reconfiguring society's structure as a whole. To this degree, the norms distilled through the ideas of constituent power and national sovereignty were articulated, not solely in

<sup>6</sup> See the classic formulation of this view in Kant (1976 [1797]: 569).

the diction of manifest public argument but also at a more submerged level, *for and within* the inclusionary structure of society. These concepts helped to cast a new inclusionary form for the political system as it was confronted with new demands for legislation, and with pressures released by deep-lying processes of social change. Accordingly, these norms possessed a deep sociological meaning outside the positive sphere of deliberated discussion, and they had a structural impact on society for reasons quite separate from their literally intended content.

The sociological significance of the concepts of national sovereignty and constituent power resulted, first, from the fact that they imputed the authority of the political system to a collective will, standing outside the political system. These concepts defined this will, distinct from the interests of mere physical persons such as regents or magistrates, as a force that transmitted generalized social imperatives through the state. This meant that, as states were founded as constitutional states, defining their legitimacy as arising from a national constituent power, they were able to present themselves as institutions in possession of a distinctively apersonal, or *public* authority. In turn, this meant that, in constitutional states, holders of political power could distinguish themselves more strictly from other sources of coercion, and the essential differentiation of the political system in society was increased. The rise of constituent power as a norm of political legitimacy was deeply linked to the abstraction of a categorically *political* sphere in society, marked by a distinct body of public law, and capable of producing decisions with distinctive political authority.<sup>7</sup> Second, the sociological importance of the concept of national constituent power resulted from the fact that it instilled a principle of higher legitimacy in the state. As states were founded as *nationally constituted* states, they became a focus of distinct and superior legitimacy, claiming distinct authority to carry out regulative acts for all society, and for all members of society. As a result, the ideas of constituent power and national sovereignty created a societal condition in which states, once formed as constitutional states, proposed themselves as centres of *collective inclusion* in society, able to subject exchanges in all parts of society to uniform laws, so that, at least in principle, all actors in society were transformed into actors subject to laws enforced by the state. Political institutions extracting legitimacy from constituent power were able

<sup>7</sup> Tellingly, one eminent historian of early modern Europe observed that societies before the revolutionary constitutional caesura in the eighteenth century *did not possess politics* in the modern sense of the word (Sonenscher 1989: 46).

rapidly to introduce new laws, and – equally – importantly – to clear away old laws, and they acquired the power autonomously to define the basic legal/normative form of society as a whole. Most notably, where political systems claimed to embody constituent power and national sovereignty, they were able to assume authority endorsed by all society, and they could make, implement and transmit laws across society in rapidly accelerated, internally legitimated fashion. In both respects, the concepts of national sovereignty and constituent power led to a profound reinforcement of the political system and its inclusionary structure: these concepts greatly heightened the law-making capacities of the political system, promoting, simultaneously, an increased differentiation of the political system, an increased centralization of societies around political institutions, an increasing inclusion of society in the legal/political system and a rapid growth in the volume of law that the political system could make available for society. Overall, therefore, the concept of constituent power provided a basic inclusionary structure for modern society's political system at a decisive historical moment – at the moment at which the political system finally assumed the form of a state. Once explained as entities based in constituent power, states obtained a central position in their national societies, and they declared clear principles to underscore their monopoly of power across society. In this respect, the core concepts of early constitutionalism reflected a wider process of differentiation in society, and they evolved as norms that allowed the political system to separate itself from other social functions, to harden itself, in differentiated form, as a state, and to perform collective functions of inclusion for society in relatively autonomous fashion.

To illustrate these points, first, in revolutionary France, the emergence of the doctrine of constituent power rapidly intensified both the societal abstraction and the inclusionary reach of the national political system. The fact that the constitutional state created after 1789 claimed a foundation in a general will meant that it could easily give validity to new legislation, and it could impose uniform laws across the pluralistic legal design of society under the *ancien régime*. After 1789, therefore, assemblies claiming authorization through constituent power stripped away the remnants of local and seigneurial legislation, and they introduced legal codes to bring uniformity to agrarian customs and relations. In so doing, they brought historically localized spheres of social practice far more comprehensively under the jurisdiction of the national state than had been the case under the

(purportedly) ‘absolutist’ system of the *ancien régime* (Sagnac 1898: 36; Markoff 1996: 555). After 1789, moreover, the revolutionaries, claiming authority from constituent power, introduced laws to limit the power of corporations and intermediary organizations, which had traditionally stood between single persons and the state, and obstructed the growth of sharply defined political institutions.

The anti-corporatism of the French Revolution was clearly reflected in the blanket prohibition of economic corporations in the 1791 Constitution, and, most notably, in the *Le Chapelier* law of 1791. This law accused corporations, especially professional and artisanal associations, of splitting national society into pluralistic sectors, and it denounced corporations generally as ‘seditious’. This law’s author and Chairman of the Constitutional Committee, Le Chapelier, justified it in the following terms: ‘There are no corporations in the state; there is only the particular interest of each individual and the general interest. It is not permitted to anyone to inspire intermediary interests in citizens or to separate themselves from the public interest [*la chose publique*] by a spirit of corporation’ (Buche and Roux-Lavergne 1834: 194–5). However, the anti-corporatism of the French Revolution had its most significant outcome in the suppression of the *parlements* in 1789/90: *parlements* were the corporate judicial institutions of the *ancien régime*, whose offices had historically been obtained and traded as venal goods, and which had traditionally fractured the unity of the monarchical state by cementing private corporate interests at the core of the public domain.<sup>8</sup> As an alternative, the French revolutionaries created, or attempted to create, a single judicial order, and they invoked the undivided will of the nation to concentrate judicial authority in vertically accountable institutions, in which private monopolization of judicial offices was prohibited. This was spelled out quite clearly in the provisions for judicial power in the 1791 Constitution.

In each of these laws, the concept of constituent power was used by the revolutionaries to eradicate obstructions to the inclusionary force of the state, to link the state more immediately to its societal constituencies and to intensify its penetration across society as a whole. Such inclusionary implications of revolutionary concepts were not lost on other early modern states, which soon borrowed judicial norms and procedures from revolutionary France to cement their institutional

<sup>8</sup> Jaume (1989: 365) argues that the *parlements* acted to ‘decentre royal sovereignty’. He also (1989: 5) states that, due to its association with pluralistic rights, the ‘term corporation was particularly reviled’ in the revolution.

integrity (Schubert 1977: 521). In Prussia, notably, leading administrators in the state established a legal order based on appeals to nationhood, albeit without any primary revolutionary act, and they invoked the general authority of the nation specifically to legislate against entrenched corporate interests (see Rohrscheidt 1898: 316).

In revolutionary America, the concepts of national sovereignty and constituent power impacted on the political system in a rather different, yet still analogous manner. In this setting, first, the ideas of national sovereignty and constituent power were used to legitimize the new single-state polities as entities distinct from the British Empire, and, in different forms, these concepts appeared in a number of state constitutions.<sup>9</sup> By the late 1780s, however, these concepts began to underpin the political system of the emergent American Republic as a whole. Notably, the Federal constitution was legitimated by a two-stage drafting and ratification process, conducted, first, in the Federal Convention in Philadelphia and, subsequently, in specially convened state assemblies. Once ratified by the state assemblies, the constitution was proclaimed, in itself, as a repository of national/popular sovereignty, standing above all other laws, customs and conventions, as the 'supreme law of the land'.<sup>10</sup> The fact that the constitution could claim to be publicly authorized by the people underpinned a legal system in which the inherited colonial order could be flexibly redesigned and many colonial laws annulled, and new laws could be introduced with persuasive claim to authority, even across the highly disaggregated and often recalcitrant territories of the new Republic.<sup>11</sup> Moreover, responsibility for enforcing the national will expressed in the constitution was vested – in part – in the Supreme Court, which performed its duty by seeking to define highest laws for all component parts of the Republic (Burt 1992: 53). Although the day-to-day conduct of government was defined by a diffuse and concurrent partition of sovereign powers between the national government and state-level institutions, therefore, the Federal Constitution became a central and overriding source of legal authority, promoting equal citizenship under national law for enfranchised members of the American nation (Kahn 1997: 29; Bradburn 2009: 82). As in

<sup>9</sup> By way of example, see the preamble to the 1780 constitution of Massachusetts, which states: 'The body politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen and each citizen with the whole people that all shall be governed by certain laws for the common good'.

<sup>10</sup> See the Supremacy Clause, Art 6, 2 of the Constitution.

<sup>11</sup> During the longer period of revolution, constitutionally authorized legislatures assumed vital powers of legal repeal (see Nelson 1975: 90–92).

France, the concept of constituent power played a vital role in thickening an inclusionary structure for the new American state, which then evolved, at least by eighteenth-century standards, as a system of relatively even, uniformly penetrative, social inclusion.

It is evident on these grounds that the core normative vocabulary of early constitutionalism impacted in a deeply transformative fashion on the broad shape of early modern national societies. Beneath the literal discursive implications of classical constitutionalism, the concepts of constituent power and national sovereignty expressed a series of functional meanings for society at large. Above all, the rise of the *constitutional state*, which was able to account for itself as founded in collective constituent acts, refracted a deep shift in the inclusionary structure of society's political system. On one hand, constitutional concepts brought an increase in the differentiation, abstraction and centralized consolidation of state institutions, and they created a premise for the exercise of autonomous political functions – that is, functions of legislative, judicial and fiscal character – by the state. Notable in the process of constitutional formation in Europe was the fact that constitutionally ordered states, in reducing the societal role of corporations, concentrated directive and extractive powers in central state institutions, and, in so doing, they greatly reduced the authority of bodies based in private authority, positioned between the state and society.<sup>12</sup> On the other hand, constitutional concepts distilled a normative diction in which the political system was able to extend an inclusionary structure beyond the localized, personalized patterns of organization typical of early modern social organization. These concepts enabled the political system more easily to generate binding decisions, and to construct laws in a form that could be rapidly applied and reproduced across the growing spaces of modern societal order, in relative indifference to personal standing and local prerogatives.

On this basis, if observed sociologically, the early norms of constitutional theory appear as principles bound to deep structural processes in society. These norms were articulated, at least in part, because of their utility in allowing the nascent modern political system to adapt to its position in a widening, increasingly differentiated society, in which the historically localized shape of society was disappearing. Beneath the level of literal discourse, in fact, it is uncertain whether constituent

<sup>12</sup> For example, the abolition of corporations in France was inextricably linked to fiscal politics and the need to centralize instruments of fiscal extraction (see Martin Saint-Léon 1922: 615). For other contexts see Rohrscheidt (1898: 375–6), and Vogel (1983: 135).

power or national sovereignty ever existed as actual objective phenomena; these concepts appear instead as rather fictitious norms, from which society drew profound inclusionary benefits, but which existed more fully in society's functional domain, in the substructure of the political system, than as any factual reality. Indeed, if we seek to identify the exercise of national sovereignty or constituent power as a factual process or an objective historical occurrence, serving materially to underpin the power of national political systems, we are confronted with a series of deep paradoxes. These paradoxes cast doubt, generally, on the standing of constituent power as a literal norm of constitutional debate, and on the persistent theoretical claim that constituent power is a source of real legitimacy for the political system. In particular, these paradoxes cast doubt on constitutional outlooks which examine contemporary constitutional norms in light of classical ideals of national sovereignty,<sup>13</sup> or which observe the absence of national sovereignty as a particular feature of contemporary constitutional laws – this absence was, in fact, already a feature of classical constitutional laws.

First and most obvious among the paradoxes of constituent power is the fact that, in revolutionary France, supposedly the moment in which national sovereignty and constituent power were first fully expressed in constitutional law, constitutions created by the manifest exercise of constituent power – the monarchical constitution of 1791 and the Jacobin constitution of 1793 – did not become a factual basis for the state. The 1791 constitution, resulting from the Constitutional Assembly convened in 1789, was a very temporary document, and it became redundant with the demise of the Bourbon monarchy. The 1793 constitution, devised (arguably) as the foundation for a constitutional order in which the people were actively implicated in government,<sup>14</sup> was never enforced. The 1795 Constitution then proved slightly more durable. However, this document was conceived quite overtly as a counter-revolutionary constitution. Its aim was, not to activate any national political will, but to dampen the direct effects of any immediate constituent acts of the people. Notably, this constitution restricted suffrage through a property-based franchise, it provided for a semi-detached elite executive, and it curtailed the more expansive political rights granted (notionally) under the Jacobin Constitution of 1793, instead giving strict primacy to rights defined by elite economic interests (Gauthier 1992: 299). The drafters of the 1795 constitution, most

<sup>13</sup> See p. 28 above.      <sup>14</sup> This common view is contested in Jaume (1997: 133).



prominently Sieyès, considered establishing full judicial protection for constitutional rights, thus suppressing uncontrolled re-enactment of constituent power (Rolland 1998: 67, 75; Troper 2006: 525, 537; Goldoni 2012: 23). Most importantly, the Napoleonic era after 1799 intensified the expansion of state authority and the extension of the law's inclusionary force first set in motion by the revolutionary rupture in 1789 (Church 1981: 110). However, Bonapartist constitutional practice shifted the source of constitutional legitimacy from constituent power to controlled plebiscite. For these reasons, although in the French Revolution the principle of constituent power was expressed as a founding norm of constitutional authority, and it undoubtedly promoted an accelerated dynamic of institution building and political-systemic differentiation, the constituent power of the nation scarcely became a material foundation for the political system. The political order of revolutionary and post-revolutionary France was specifically *not* determined by original acts of constituent power, and the formation of a secure and delineated political system in post-revolutionary France was clearly marked by a measured suppression of constituent power (Rosanvallon 2000: 257). Long after the French Revolution, leading constitutionalists continued to express dismay about the metaphysical reductivism implied in the founding concepts of national sovereignty and constituent power (Duguit 1921: 495).

The paradoxical quality of the concepts of constituent power and national sovereignty is apparent, second, in the fact that the more enduring constitutions which accompanied the rise of modern statehood during the nineteenth century did not derive their legitimacy from extensive socio-political inclusion. For example, most European constitutions that survived through the earlier nineteenth century (i.e. in post-Napoleonic France, some of the German states after 1815, and post-Napoleonic Spain) were conceived as instruments to harden the administrative structure of the political system, and to consolidate the state as a centre of legislative authority. They did this by adopting some procedural norms and some formal rights from revolutionary constitutionalism, but they did not express any meaningful commitment to national or popular sovereignty. These constitutions were intended at once to secure the structure-building, inclusionary benefits which national political systems derived from revolutionary constitutional norms but also to ensure that the functions of the state were not widely opened to society, and were not disrupted by onerous processes of democratic integration and national representation. Constitutions



based in constituent power re-emerged temporarily in 1848, albeit with little long-term impact. In fact, however, it was only after 1870, in the era of high Imperialism, that constitutionalism fully took hold in European societies, and in societies influenced by European constitutional ideals. By this time, however, few constitutions had any emphatic concern for constituent power or inclusive national sovereignty. By this time, most states constructed the legitimacy of the state in *positivistic fashion*: that is, they defined legitimacy as a basic condition in which executive acts were bound by simple set of legal rules, and the state's wider engagement in society was limited.<sup>15</sup> Unlike their revolutionary predecessors, many constitutions created after 1870 remained in force for long periods of time. Yet, these constitutions were designed quite consciously *not* to enact any original will of the people or nation. Instead, they were intended to display legitimacy through thin processes of legal inclusion and equal juridical recognition,<sup>16</sup> and to solidify a semi-representative executive above the increasingly intense divisions in national civil societies. In Europe, in consequence, constituent power did not act as a meaningful objective force in post-revolutionary constitutional practice. As constitutionalism was gradually established as the general premise for political order in the later nineteenth century, states began to use constitutional norms in strategic fashion, and they projected an inclusionary order which, although stabilizing the state executive above society, was designed only for the minimal inclusion of national populations.

Third, the concepts of national sovereignty and constituent power appear most paradoxical because of the basic inner vocabulary in which these norms were first formulated. In America, for example, the doctrine of popular (or, more properly, *national*) sovereignty was placed at the conceptual heart of post-1776 constitutionalism. The idea that the will of the people had to be manifestly enacted through public institutions described a deep symbolic division between American statehood and the colonial constitution, against which it reacted (Wood 1969: 266). However, in American constitutionalism the notion of the sovereign people as the objective source of state power was always wilfully fictionalized. In fact, the constitutions of revolutionary America, once realized, actively ensured that constituent power never became

<sup>15</sup> For the paradigmatic example of European positivism, see Laband (1901: 195–6). For comment on positivism in France, see Nicolet (1982: 156, 164).

<sup>16</sup> Primary examples, one monarchical, one Republican, are the constitutions of Germany (1871) and France (1875).

a real presence within existing political institutions. At one level, the very first American constitutions, written in different colonies before and after the Declaration of Independence, advocated strong legislative power, situated close to the constituent people. However, these early constitutions were rarely founded in any primary constituent acts. They were usually transcribed from a fixed template, and they were hurriedly pieced together as skeletal frameworks for the assumption of political power by sitting colonial administrations (Baum and Fritz 1997: 208–9). Early American state constitutions were not expected to be in force for very long, and concerns for constituent power were peripheral to their conception (Kruman 1997: 7; Adams 2001: 3). After the first feverish wave of constitution writing, then, state constitutions were normally drafted in more measured style. In this context, too, although popular sovereignty was routinely invoked as the source of legitimate government, constituent power was not exercised as a basis for constitution drafting. Only two of the pre-1789 state constitutions were directly ratified by the people.<sup>17</sup> Moreover, post-1776 constitutions quickly renounced any enthusiasm for strong legislative authority. State constitutions written after 1776 began to promote strong executives, reducing the influence of popular delegates. They also allocated growing powers to judiciaries, authorized by lengthy bills of rights, which were designed both to check unconstrained exercise of constituent power by the people and to ensure that single acts of legislation were consonant with the principles stabilized in the constitution (Lutz 1980: 51; Gerber 2011: 93, 222). In this classic constitutional setting, therefore, rhetorical enthusiasm for popular sovereignty was normally accompanied by devices to ensure that the people did not factually act as sovereign.

These paradoxes then persisted, and were in fact accentuated, in the writing of the Federal Constitution of the USA.<sup>18</sup> As mentioned, the Federal Constitution presumed legitimacy as a condensed articulation of national sovereignty, and, as such, it projected itself as the highest, sovereign law for the new American nation in its entirety (see Farber 2003: 4). This was reflected quite clearly in both the Preamble and the Supremacy Clause of the constitution. However, the sovereign acts conferring authority on the constitution were (at best) acts of devolved power, in which, not the people, but the single states, formed the constituent body: the authenticity of the claim that the constitution could

<sup>17</sup> These were the constitutions of Massachusetts (1780) and New Hampshire (1784).

<sup>18</sup> For discussions of the fictitious quality of popular sovereignty in the American Founding see Hulsebosch (2005: 229), Fritz (2008: 150–1) and Frank (2010: 10).

speak for the people – or the nation – was widely contested during its drafting and its ratification.<sup>19</sup> Moreover, once established, the constitution incorporated a number of instruments to prevent recurrent exercise of constituent power, and to stabilize the constitution against its constituents (the sovereign people). The main example of this is the Bill of Rights (1791), which was enforced precisely in order to avoid the convocation of a new constitutional assembly in Philadelphia (see Amar 1998: 289; Maier 2010: 285, 295, 421, 444). Subsequently, the judiciary increasingly acquired a defining role in interpreting the constitution, and higher courts were expected to ensure that the rights contained in the constitution prevailed over momentary popular demands, and even to elaborate binding norms for all society (see Ides 1999: 512). The idea that constituent power should be entrusted to the courts had been formulated by Hamilton, who claimed in *Federalist* 78 that it was the duty of courts to protect ‘the intention of the people’ underlying the constitution as a whole (Madison, Hamilton and Jay 1987 [1787–88]: 439). By the early 1790s, American judges claimed primary responsibility for protecting the will of the whole nation, originally voiced through the constitution; in fact, they expressly derived powers of judicial review from the concept of the original sovereignty of the people (see Casto 1995: 232).<sup>20</sup> Later, this view became axiomatic in the jurisprudence of John Marshall, who argued that the constitution was a superior, paramount law for the nation, and that the Supreme Court, speaking for the ‘original and supreme will’ of the people (Hobson and Teute 1990: 182), was obliged to obstruct any act ‘repugnant’ to the constitution (Smith 1996: 322). In America, in short, the national constitutional order was judicially entrenched to a far greater degree than in revolutionary Europe, and the years after ratification saw a rapid transfer of the constitutional will from the people to the courts. The result of this was, in effect, that courts could determine those interests in society that could be translated into legislation,<sup>21</sup> they filtered interests in society gaining

<sup>19</sup> The use of the term ‘We the People’ to present the constitution as authorized by constituent power was ridiculed by Patrick Henry in the Virginia ratifying convention of 1788 (Elliot 1941: 72).

<sup>20</sup> See the views of the Justices in *Chisholm v Georgia* (1793), especially the following: ‘Whoever considers, in a combined and comprehensive view, the general texture of the Constitution, will be satisfied, that the people of the United States intended to form themselves into a nation for national purposes. They instituted, for such purposes, a national Government, complete in all its parts, with powers Legislative, Executive and Judiciary; and, in all those powers, extending over the whole nation’.

<sup>21</sup> Courts effectively acted as filters for social interests and defining decisions of the Supreme Court dictated that certain interests, at a certain time, could or could not enter the legislative

access to sovereign power, and they assumed responsibility for defining the emergent inclusionary form of the polity: courts, interpreting the constitution, became the bearers of sovereignty. Indeed, in the longer aftermath of 1789, courts played a leading role in giving real flesh to the idea of the American nation (Skowronek 1982: 23, 25, 27–8; Kersch 2004: 68, 112, 141). As a result, the first emergence of a national legal/political system, able to overarch the territories and peoples forming the American nation, was mainly driven, not by primary acts of national will formation, but by the extension of the judicial apparatus. Although it was the only revolutionary constitution of any permanence that had a plausible claim to be founded in acts of constituent power, the U.S. Constitution only referred to constituent power in a thin, dialectical fashion. It invoked the national will as a source of sovereignty, inclusion and systemic authority. But it also used the principle of constituent power as a barrier against uncontrolled popular inclusion or sporadic political reform. Even in this case, national sovereignty and constituent power ultimately appeared as concepts without firm objective reality – or even as concepts that actually obstructed their own realization. Once placed in the hands of the courts, national sovereignty was reconfigured as an *internal* legitimating principle for the political system, and the possibility that it could be objectively or manifestly enacted was lost. Madison himself made this quite clear by stating that American government had the distinct advantage that it, although it obtained its legitimacy as a Republic, also promoted ‘*the total exclusion of the people in their collective capacity*’ from actual processes of governmental administration (Madison, Hamilton and Jay 1987 [1787–88]: 373).

In revolutionary France, the ideas of national sovereignty and constituent power had a similarly fictitious quality. In fact, these concepts were originally little more than a deliberate self-projection of one of the Estates gathered in Versailles in 1789. Prior to 1789, the French nation had only been very loosely conceived, and the patchwork corporate structure of society meant that few aspects of society were perceived in national categories or subject to nationally generalized laws (Fehrenbach 1986: 85–9; Vergne 2006: 90). During the convention of the Estates-General in 1789, however, the Third Estate, prompted by Sieyès, declared itself the incarnation of the nation as a whole,

system. Milestone examples of this process are *Fletcher v Peck*, *Dred Scott*, *Lochner*, *Brown v Board of Education*. This process of filtration was expressed through constructions of rights.

entitled to speak for the living will of the entire French people. Although soon proclaimed as an indivisible organic substrate for the French state, the nation was initially produced through a simple conceptual artifice, through an act of collective 'self-recognition' on the part of the Estates, and the constituent power of the nation was then exercised on that artificially constructed foundation (Kutzner 1997: 139). In addition, the construction of the nation in revolutionary France always implied, in the spirit of Adam Smith, that the exercise of the national will had to be partitioned along functional lines, such that all citizens of the nation obtained protection through a national constitution, but only active, educated, property-owning citizens could factually participate in expressing the constituent will (Sieyès 1789a: 21). Notably, Sieyès himself advanced a very 'attenuated conception of sovereignty', which was tied to a theory of restricted suffrage, and in which only active citizens (those with sufficient money) could lay claim to immediate exercise of constituent power (Deslandes 1932: 488).<sup>22</sup> This principle, with variations, was applied throughout the whole period of revolutionary constitution writing. Once endowed with primary law-giving authority, the French National Assembly employed the doctrine of constituent power to ensure that the nation, although symbolically present in the political system, remained external to the actual practice of government. Even in France, therefore, constituent power evolved as a projective concept. This concept legitimized the state's inclusive hold on society. Yet, it also cemented the distinction of the state from those persons and acts on whose inclusion its legitimacy factually depended. As discussed, the French nation was eventually constructed and unified, not by a popular constitution, but by a Bonapartist executive.

Overall, in sum, the first basic constitutional concepts of constituent power and national sovereignty were originally formed as fundamentally paradoxical principles. These concepts evolved as principles through which the modern political system imagined the sovereign nation as its own deepest source of legitimacy, promoting a greatly expanded inclusionary structure for its functions on that basis. This doctrine, however, was primarily an inner construction of the political system, and its correlation with objectively manifest facts or practices

<sup>22</sup> Sieyès decided that only those with 'active rights' (rights of property) were allowed to play a role in political will formation (1789b: 19, 21). Eventually, in 1795, he also proposed the establishment of a constitutional jury to oversee conformity of statutes with the original norms of the constitution.

in society at large was very restricted. In most instances, these concepts referred to a *nation that did not materially exist*, and although they summoned the nation into being as a norm of inclusion, they ensured that the reality of nationhood which they proclaimed (the factual inclusion of national society in the political system) could not become reality. As Kelsen (1950: 6–7) observed much later in a different context, the idea that the constitutional state was willed by the constituent nation was always a fiction, as the nation only emerged post factum: the nation only became a real entity after the state, extracting its legitimacy from an imagined nation, had been constitutionally organized. To a large degree, the concept of constituent power remained a self-construction or an *internal formula of inclusion* for the emergent modern political system and for modern society as a whole. It is implausible to suggest that this concept was entirely bereft of material reality; some measure of original popular approval attached to classical constitutions, and some popular acclamation was instrumental in defining their legitimacy and inclusivity. However, the functional reality of this formula for and within the political system was greater than any factual reality that it possessed outside the political system. Above all, seen sociologically, the formula of national constituent power evolved as an inner precondition for the extension of an inclusionary structure for society's political system. It provided a basic cohesive structure to sustain a political system capable of complex acts of legislation, and it offered functionally vital support for acts of legal and political inclusion as society experienced a reduction in the standing of local power, a decline in personal-corporate status as a basis for legal order and a resultant demand for centralized, easily iterable legislation. This formula helped to underpin the basic autonomy of the political system. Yet, it should not be seen as a literal norm for measuring the legitimacy of different constitutional systems.

## ii Norm 2: Rights

The second basic norm of classical constitutionalism was expressed in the principle that state authority gains legitimacy if those persons subject to it are recognized, constitutionally, as citizens with common legal entitlements – that is, as *holders of rights*. As is widely documented, the original standing of constitutions as documents bringing legitimacy to public institutions depended on the fact that they allocated a limited set of rights to all persons in society, such that the subordination of these persons to state power was only considered acceptable if this power did not prevent their exercise of certain basic liberties, defined

as *rights*. This was reflected in many early American state constitutions, some of which contained separate Bills of Rights, strongly influenced by the Virginia Declaration of Rights of 1776. This was also reflected in the first amendments to the Federal Constitution, in 1791. All revolutionary constitutions in France contained catalogues of rights, appended as preambles to the main trunk of the constitution.

In the first instance, such classical constitutions formulated certain *subjective rights* as the precondition for legitimate rule, stating that persons should be treated as equal under law and as endowed with like claims to dignity. On this basis, classical constitutions dictated recognition of select rights of judicial and procedural equality and, within constraints, of personal inviolability as a normative precondition for the legitimate use of power. In some cases, classical constitutions also formalized certain *positive rights* of political participation and political representation as principles of legitimate government. In addition, classical constitutions formulated certain rights as *negative freedoms*, and they insisted that a legitimate government must protect certain rights, such as freedom of ownership, devotion, mobility, labour, exchange and contractual autonomy, which they defined as withdrawn from arbitrary constraint by the state. In this respect, early constitutions placed limits on the ability of states to expand their power into spheres of society and areas of social exchange not directly accountable to the political system. Early constitutions, in fact, attached quite particular emphasis to rights of independent property ownership and contractual autonomy, and they typically provided particular protection and entrenchment for property rights. This was illustrated by early American constitutions, which were expressly designed to protect independent property from unwarranted fiscal depredation. The Virginia Declaration of Rights, for example, clearly defended ‘the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety’ as a core right, foundational for human society. The Federal Constitution itself only contained limited express guarantees of property rights. However, the contract clause was soon interpreted as a declaration of absolute prior rights, giving primacy to property rights over other rights.<sup>23</sup> This was further exemplified by the

<sup>23</sup> See *Sturges v Crowninshield*, 17 U.S. 4 Wheat. 122 122 (1819). Note in this regard Marshall’s claim, albeit in a dissenting opinion, that ‘individuals do not derive from government their right to contract, but bring that right with them into society; that obligation is not conferred on contracts by positive law, but is intrinsic, and is conferred by the act of the parties’. *Ogden v Saunders*, 25 U.S. 12 Wheat. 213 (1827).



constitutions of revolutionary France, which made extensive provision for the protection of property, and whose assault on the remnants of feudal law was intended to institute free ownership and free circulation of goods as protected economic principles. Notably, for example, tentative projects for a new Civil Code, reflecting ideas of proprietary autonomy, were drafted in the height of the revolutionary period in France.<sup>24</sup> By 1795, the principle of monetary autonomy was clearly a dominant source of constitutional rights in France, behind which other rights had lost much of their initial importance (see Gauthier 1992: 299). As a result, rights securing economic freedoms, such as freedom of contract, freedom of exchange and freedom of employment, assumed increasing primacy over other rights. This was eventually reinforced in the Napoleonic Civil Code of 1804, later emulated in much of Europe, which enshrined uniform property rights, freedom of contract and individual self-reliance as the legal basis for civil society. Tellingly, in fact, the main initial drafter of this code, Jean-Étienne-Marie Portalis, was very sceptical about the active exercise of national sovereignty as a foundation for government. However, he clearly insisted (Portalis 1827: 317, 365) on the inviolability of rights of property ownership, which he saw as ‘inherent to the existence of each individual’. This process of codification in France was closely correlated with the dissolution of single persons from their previous attachment to estates and corporations, whose fabric of rights based in local and sectoral privilege, had prevented free exchange of contract and free movement of money, goods and labour (see Fehrenbach 1974: 12).

In many ways, the construction of rights as principles of constitutional legitimacy for the political system was immediately connected with the concepts of constituent power and national sovereignty, and the concept of rights has a similarly paradoxical nature. Indeed, constitutional rights acted in a close functional homology with constituent power and national sovereignty to establish a basic inclusionary structure for the political system of nascent modern societies. On one hand, for example, the fact that classical constitutions explained the legitimacy of the political system by conferring rights on those subject to power – that is, by defining all members of society as equal rights holders, and as evenly subject to legal and judicial procedures – helped to consolidate the political system as an inclusive sphere of functional

<sup>24</sup> The revolutionary French civil code (1793) was intended to regulate ‘civil rights’, which were strictly separated from the ‘political rights’ regulated by the constitution. This code, drafted by Cambacérès, is reprinted in Barzetti (1894: 313–451).



exchange, able to define and transmit its power across society as a clearly public resource. Recognition of persons subject to power as holders of similar basic rights meant that the political system could authorize and distribute power, in very different social contexts, in easily reproducible procedures, applied equally (in principle) to all persons and to all places. Moreover, the fact that power was applied to rights holders meant that laws contained an inner account of their public origin, so that laws enforced by the state could be immediately acknowledged as having publicly inclusive authority, in many different social settings. Rights, constitutionally instilled in the political system, greatly simplified its functions of legislative and judicial inclusion, and the constitutional construction of the state as a legal order based in rights rapidly intensified the penetration of the state into society. On the other hand, as mentioned, the fact that persons were recognized as rights-holding citizens meant that these persons experienced a weakening of the local or particular rights, attached to status and corporate association, which had previously defined their freedoms and obligations, and they were placed in a more immediate relation to the state. This also meant that the political system was able to position itself in a relatively uniform social environment, and it could transmit laws straightforwardly and in easily reproducible fashion across the social terrains over which it assumed jurisdiction. In both respects, rights formed a general inclusionary structure for the political system, connecting it closely to other parts of society. In both respects, rights did much to construct the persons located in societies around the political system as uniform nations, susceptible to relatively even legal inclusion by the emerging national political system.

To illustrate these points, for instance, in revolutionary America, the insistence that all citizens were holders of identical rights brought enhanced uniformity to the legal/political order of the emerging American political system and the emerging American nation more widely. Clearly, the assumption that laws acquired legitimacy from recognition of rights meant that laws, at least in principle, were applied in similar form in different parts of society, and persons were constructed and addressed by the law in broadly consistent fashion. In particular, however, the unifying role of rights was evident in the fact that citizens could challenge laws through the national courts by appealing to rights, guaranteed equally to all citizens in all states, and the national courts could invoke rights to determine certain national laws as having precedence over local or state laws. Through this process, courts placed

individual persons in an increasingly direct relation to central organs of public power, and individual legal claims intensified the standing of federal norms alongside more customary legal practices.<sup>25</sup> In consequence, individual persons across the Republic defined their claims and obligations in a more immediate national context. As a result, courts implanted rights in American society as instruments of nation formation, and judicial actors, applying constitutional rights, played a core role in establishing the American Republic as a factual inclusionary reality. In both respects, rights acquired a very distinct importance in establishing a consistent inclusionary structure for the national political system.

In revolutionary France, yet more strikingly, the doctrine of constitutional rights was proposed specifically to consolidate the inclusionary power of the state. It was stated quite clearly during the revolution that, as the state guaranteed constitutional rights, rights allocated by other persons or legal entities were not legitimate, and rights could not be secured outside the state: the state was defined as an *exclusive source of rights*.<sup>26</sup> In this respect, formal constitutional rights were applied to eradicate institutions, notably corporations, which had traditionally allotted particular rights of status and affiliation to their members, and to cut away the structures standing between the state and the citizen, heightening the immediacy of the relation between persons and the state. Anti-corporate legislation in fact had a long history in pre-revolutionary France. Such policies had already been enforced in the late sixteenth century, and they culminated, initially, in Turgot's edict of 1776 (Turgot 1844: 302–18) to suppress corporations, which, indicatively, was clearly shaped by Lockean ideals of personal rights holding. After 1789, however, uniform conceptions of rights were widely enforced to reduce the influence of professional monopolies, privileges and corporations, and the constitutional assumption that all persons, qua citizens, were holders of identical civil and monetary rights was enforced to diminish the significance of rights derived from corporate status or membership.<sup>27</sup> The result of this was that the political system was able to harden its peripheries against private arrogation of public

<sup>25</sup> The expansion of federal power by the American courts was specifically justified by reference to constitutional rights, especially rights of contract (see Currie 1985: 128).

<sup>26</sup> Speech by Chapelier in 1791. Quoted in Martin Saint-Léon (1922: 623).

<sup>27</sup> See Jaume (1989: 50). Sewell argues (1980: 136) that the granting of simple property rights in the French Revolution 'changed the French nation from a hierarchical community composed of corporate bodies' into an 'association of free individual citizens'.

power, which had proved a formidable obstacle to the construction of strongly abstracted political institutions. In turn, this meant that society converged more evenly around the political system, and the political system, dispensing equal rights to all persons, was able to implement laws and distribute power across society in simplified, inclusive fashion, without unsettling regard for variable local and corporate hierarchies.

In the constitutional revolutions in both America and France, therefore, the circulation of rights gradually transformed localized societies into extensive and evenly inclusive environments for the political system – into societies taking the form of *nations*. In the French and American revolutions, in fact, nations first evolved as such as rights pierced through the local/corporate order of early modernity and bound different parts of society together in a generalized order of political inclusion, and the construction of persons as *rights holders* was a core element in the formation of society's underlying political structure. As has often been intuited in sociological literature,<sup>28</sup> nations and rights were to some degree co-original: rights were deeply formative of the first inclusionary structure of modern societies, and they constructed the basic stratum of norms around which historical communities began to form, and account for themselves as, uniformly integrated national societies.

Notably, however, the functions of constitutional rights in creating an inclusionary structure for emergent national political systems were not restricted to the positive promotion of societal integration. Rights also supported the inclusionary functions of the modern political system because they placed limits on the quantity of exchanges in society that the political system was obliged to internalize.<sup>29</sup> As mentioned, the most important rights guaranteed under classical constitutions were in fact, neither subjective rights of equality, nor positive rights of participation, but *negative rights*, covering freedoms to be exercised outside the immediate jurisdiction of state power, which categorized certain spheres of societal activity as exempt, or *excluded*, from the intrusive use of state authority. The fact that the first modern constitutions contained lists of rights, sanctioning freedoms relating to economic

<sup>28</sup> For example, Durkheim (1950: 93–6) argued that the modern national state, of itself, creates rights, and it operates as a differentiated body because it allocates rights to individuals, as they become disaffiliated from organic corporations. Parsons (1965: 1015) also conceived of rights as institutions that give effect to the inclusionary dynamics inhering in the national social system.

<sup>29</sup> This theory is elaborated more fully in Luhmann (1965: 135)

exchange, religious disposition, mobility and expression, which were largely immune to state control, meant, initially, that exchanges in the economy, religion, publishing, academic teaching, science, etc., could only become relevant for the political system in exceptional circumstances. In this respect, the allocation of rights involved the formal inclusion of persons in a system of legal protection, but, in practice, it meant that the political system was relieved of authority and functional responsibility in many parts of society. In fact, the inviolability of negative rights meant that the political system could claim legitimacy by including members of society, through legal recognition of their negative rights, while also stabilizing the factual position of these persons outside its own functions and reducing its accountability for the objective regulation of interactions between members of society. At one level, therefore, constitutional rights may have supported the emergent political system by heightening its normative *inclusivity*. Dialectically, however, constitutional rights also sustained the political system by allowing it to explain its inclusivity without being forced objectively to integrate persons in its functions or to promote inclusion as anything more than a thin legal reality. Indeed, the recognition of negative constitutional rights allowed the political system to restrict its inclusionary acts of legislation and legal protection to a very narrow sphere, and to obviate extensive absorption of social agents or exchanges.

Overall, early constitutional rights provided a vital inclusionary formula for the modern political system because they allowed it to limit and differentiate its functions against other spheres of interaction, and to promote legal and political inclusion without exposing itself to broad social demands, to improbable extension of its responsibilities or to excessively unsettling conflicts. Rights provided a balanced inclusionary structure, which heightened the basic autonomy of the political system, and which enabled it to perform inclusionary acts without renouncing its essential functional distinction. This secondary role of rights in forming the inclusionary structure of modern society is most clearly in evidence in the manner in which rights (as the second founding norm of constitutionalism) interlocked with national sovereignty (as the first founding norm of constitutionalism). The integral fusion of these two concepts, in fact, formed the most fundamental inclusionary structure for the early form of modern society and its political system.

In the first instance, it needs to be noted that, in the strict conceptual categories of classical constitutionalism, the two primary constitutional norms – national sovereignty and rights – were originally

conceived as antinomies. The classical constitutional doctrine of constituent power implied that constituent power created and legitimated the political system by enacting the sovereign will of the nation without any prior normative constraint. As such, the concept of constituent power imagined the nation as the source of a sovereign power that was *absolutely prior* to all rights, so that rights could only assume validity to the extent that they were expressly willed by constituent power. In revolutionary France in particular, rights not constituted by the manifest will of citizens were always objects of suspicion: rights of citizens were expressly designed to replace the disordered mass of plural, venal and status-defined rights characterizing the landscape of the *ancien régime* (Ray 1939: 367). For this reason, rights could only become legitimate as elements of *constituted power*, and they could only impact on legislative procedures if formally willed and prescribed by the constituent power. If scrutinized beneath the purely conceptual level, however, rights acquired a significance in classical revolutionary constitutionalism that did not appear in the literal terms of constitutional doctrine. Although rights were posited in a partly antinomial relation to constituent power, they actually evolved as normative institutes that occupied a position between the strict categories of constituent and constituted power, and, in this position, they had a profound impact on the inclusionary structure of the political system. In this intermediary position, in fact, rights moderated the standing and the authority of the sovereign nation, and, in so doing, they abstracted the most essential inclusionary formula for the political system of modern society.

To illustrate this point, first, in the main cases of classical constitution making, rights *pre-defined* national constituent power. In both revolutionary France and revolutionary America, the context in which constituent power was first exercised was internally shaped by rights, and rights provided normative principles which clearly dictated the content and the scope of national sovereignty. In revolutionary France, for example, the assertion of constituent power in the National Assembly in 1789 derived impetus from a twofold conception of rights: rights formed something close to an implied constitution, to which the actual exercise of constituent power was supposed to give effect. On one hand, the exercise of constituent power was motivated by a deep hostility to the variable fabric of rights, based in corporate exemptions and privileges, which underpinned late Bourbon society, and it was expected to supplant this with a uniform system of rights (see Sewell 1980: 85). On the other hand, the assertion of constituent power was

impelled by strong conceptions of natural law, which insisted on the equal and uniform imputation of rights to all members of society. Both these conceptions were directly expressed by Sieyès, who saw the constituent nation as a nation of equal rights holders, actively negating all special rights or privileges.<sup>30</sup> In both respects, the revolution proposed a theory of national sovereignty in which the nation became sovereign by willing certain common and generally binding rights, and in which certain prior rights were constitutively co-implied in the exercise of sovereignty. Common rights, therefore, formed a higher implied constitution, and it was only by activating such rights that constituent power became a source of legitimate government. This theory eventually culminated in the thought of Robespierre, who clearly argued that rights formed prior limits on the exercise of constituent power, such that the constituent power could only legitimately will if it *willed rights*. In 1793, Robespierre stated simply (Robespierre 1957: 507): ‘The Declaration of Rights is the constitution of all peoples; other laws are by their nature changeable, and subordinate to it. It must be present to all spirits, it must shine at pinnacle of your public code, and its first article must be the formal guarantee of all rights of man’. In revolutionary America, similarly, rights were very deeply embedded in national society, and they pervasively pre-formed the exercise of constituent power. In fact, the first stirrings of constituent power in America were shaped by the perception that the American colonies possessed *de facto* a common-law constitution, based in manifest rights. In particular, it was claimed at this time that the Westminster parliament had imposed laws, typically fiscal levies, which encroached on rights to which all inhabitants of the colonies could self-evidently lay claim. As a result, the earliest revolutionary documents – for instance, the resolutions of the Stamp Act Congress (1765) and then of the Continental Congress (1774) – authorized popular resistance to the English crown through reference to rights, which were observed as already formally constituted and protected elements of the constitutional order. In some instances, prior to the Declaration of Independence, resistance to unwarranted legislation was actually initiated and authorized by courts of law, which specifically refused to implement Westminster tax levies on *constitutional grounds* (see Morris 1940: 431; Williams 1978: 126; Grey 1978: 880). Early state constitutions then also explained their revolutionary legitimacy by underlining how British taxation laws had been *repugnant* to the rights

<sup>30</sup> Sieyès argued that the nation, as constituent power, is a people ‘all equal in rights’ (1789b: 19).

guaranteed by the inherited common-law constitution.<sup>31</sup> In America, in short, the demand for rights became the elemental *language of revolution* (see Rakove 1997: 288–338; Levy 1999: 253; Bradburn 2009: 29).

In both classical constitutional revolutions, rights existed prior to constituent power, and in many respects they pre-determined or even *pre-constituted* the specific volitional content of this power. This meant that rights invariably subjected the constituent power to prior constraint, and they proportioned constituent power towards particular normative objectives: they defined what constituent power could actively will, and, to some degree, they prescribed the conditions under which the national will could become sovereign. This was especially notable in America, where the constituent process was strongly focused on preserving rights of free property ownership, immunity against depredatory taxation and rights of fair trial and fair judicial redress. By identifying such goods as primary values, the discourse of rights removed certain areas of social activity from the reach of constituent power, and it ensured that the transformative force of constituent power was restricted. In this respect, ultimately, the theory of constitutional rights provided dialectical service for the emergent inclusionary structure of modern society. In particular, the principle that the political system owed its legitimacy to the recognition of prior rights meant that, although it extracted its authority from the constituent power, the political system always engaged with the national people in highly selective, filtered fashion. Indeed, it was only required to include the people in those specific practices covered by rights, and it was able to perform this function by offering and underwriting a relatively small number of legal guarantees. As a result, the political system preserved a clearly differentiated position towards the people in whose inclusion its authority was founded, and it was able to extract authority from the people in a highly simplified manner, through the simple recognition and legal protection of a small body of rights. In fact, rights transformed the sovereign nation into an inner construction of the political system; the political system internalized the nation, not as a mass of people, but as a body of rights holders, entitled to legal inclusion and protection in a limited set of practices and it authorized its inclusionary functions through reference to this simplified inner image of the people. From the outset, therefore, the inclusionary structure of national societies evolved through the

<sup>31</sup> For comment see Bilder (2004: 187). Notably, the 1777 Constitution of Georgia declared British tax levies ‘repugnant to the common rights of mankind’.



circulation of rights both as *media of inclusion* and as *media of selection*, and rights stabilized the political system in society by allowing it to proportion its acts to a simplified model of the persons from which it derived its power, and to a series of quite limited functions and obligations.

If rights helped to consolidate the inclusionary structure of the political system by *pre-defining* constituent power, however, this selective function became far more evident through the standing of rights *after* the initial exercise of constituent power. This is illustrated, in complex fashion, by circumstances in revolutionary France. Rights of course assumed great symbolic importance in the French Revolution, and the Declaration of the Rights of Man and Citizen, attached to different constitutional texts, was surely the most prominent statement of intent in the whole revolution. However, after 1791, rights were given only limited formal protection in the course of the French Revolution. Each of the revolutionary constitutions was committed, in point of principle, to defending the primacy of the legislature, and to constructing an approximate identity between the national people and the political system as a basis for legitimate power (Rosanvallon 2000: 20). None of these documents accepted prior formal restriction on acts of popular will formation. Moreover, because of the association of the Bourbon judiciary (in the corporate *parlements*) with venal privilege, the French Revolution reflected a deep contempt for independent judicial bodies (Jaume 1989: 365), and the constitutions of 1791 and 1793 placed strict limits on the exercise of judicial power, avoiding any blurring of legislative and judicial functions. During the most intense periods of revolutionary activity, further, normal judicial procedures were routinely suspended and laws were introduced by executive fiat, with little regard for even the most emphatically declared natural rights. The moderation of constituent acts, in consequence, always remained fragile in the French Revolution, and systemic counterweights to national sovereignty were weak. Despite this, nonetheless, rights retained a certain moderating significance during the revolutionary era. Notably, rights played an important role in the formal shaping of legislation, and they were reflected in the strict separation of powers in the early constitutions, which was promoted, notionally, to protect rights through society from executive violation. From 1795 onwards, the idea also surfaced intermittently that rights could be invoked by a designated court to police the content of parliamentary legislation (Rolland 1998: 67, 75). As discussed, moreover, both in revolutionary France and in the



extended sphere of Napoleonic influence singular/personal rights were used to underpin the system of civil law, and these rights were secured in relatively apolitical form, outside the constitution of the state. In each of these respects, constitutional rights placed certain formal constraints on the political will of society.

In revolutionary America, rights obtained much higher formal standing than in France, and they clearly determined the conditions under which constituent power was activated. In this setting, a nexus between rights and constituent power was galvanized, which proved deeply influential for subsequent patterns of constitution writing. This is reflected in particular in the rising importance of judicial power in the early years of the American Republic, both within the political system and in society at large. As mentioned, in pre-revolutionary America judicial scrutiny of legislation was not unknown. Distinctively, however, after 1789, the status of rights in the Federal Constitution meant that the powers of the courts increased, and courts assumed great salience in the control of legislation. As discussed, the Bill of Rights was introduced in the first instance as a measure to counteract demands, voiced by anti-federalist factions in state assemblies after 1787–88, to re-convene a constituent assembly in Philadelphia, in order to thoroughly revise the Federal Constitution. As such, the Bill of Rights was clearly designed to moderate the exercise of constituent power. Gradually, then, the Bill of Rights, along with the more general rights expressed through the constitution in its entirety,<sup>32</sup> created a legal framework in which the judiciary began to review legislation to ensure its conformity with rights protected in the constitution. In notable early rulings, the Supreme Court began expressly to refer to rights norms, often derived, somewhat informally, from the law of nations, to assess the acceptability of statutes and to adjudicate in contested cases. In many early decisions, for example *Chisholm v. Georgia* (1793) and *Vanhorne's Lessee v. Dorrance* (1795), judicial opinions were expressly sustained through reference to basic rights of individuals (Paust 1989: 572).<sup>33</sup> During Marshall's tenure as

<sup>32</sup> Hamilton claimed, in *Federalist* 78, that the constitution as a whole was a collection of 'political rights'. In *Federalist* 84, he argued that the constitution was of 'to every useful purpose, a Bill of Rights' (Madison, Hamilton and Jay 1987 [1787–1788]: 437, 477).

<sup>33</sup> Note Cushing's opinion in *Chisholm v Georgia*: 'Further, if a State is entitled to justice in the Federal court against a citizen of another State, why not such citizen against the State, when the same language equally comprehends both? The rights of individuals and the justice due to them are as dear and precious as those of States. Indeed, the latter are founded upon the former, and the great end and object of them must be to secure and support the rights of individuals, or else vain is government'.

Chief Justice, the principle was clearly stated, for example in *Fletcher v. Peck* (1810), that judicial tribunals were appointed to ‘decide on human rights’,<sup>34</sup> and they acted, to some degree, as custodians of the original power of the people, whose first exercise had been proportioned to rights, deciding which new laws were consonant with the popular will declared through the constitution. In many cases, the American courts specifically interpreted constitutional rights to give primacy, nationally, to monetary rights and contractual rights, whose expansion heightened the legal cohesion of the new Republic.<sup>35</sup> Through this process, rights were articulated both as primary expressions of the constituent will – that is, as elevated norms instituted by the people as national constituent power – and as objective checks on the laws that could be willed by the people in its constituted form (see Paust 1989: 571). This meant that, just as rights had originally pre-defined the content and the reach of constituent power, they also, in many ways, insulated the political system of the new Republic against the renewed assertion of this power, and they curtailed the factual impact of the sovereign national people on actual processes of legislation. Rights ensured that the will of the nation could only be re-admitted to the polity in strictly measured fashion, and that certain areas of activity (those expressly covered by rights) could not be freely subject to legislation. Courts, with authority to apply rights, were transformed into concentrated repositories of constituent power, and they demarcated the boundaries of the political system against social actors seeking to introduce new constituent interests into the political system.

In both classical constitutional revolutions, therefore, constitutional guarantees over basic rights (especially private, economic and monetary rights) separated the emergent political system from the national society in which it was situated, and it offered a means of national inclusion without factual integration. In so doing, it hardened the boundaries of the political system against the sovereign nation from which it purported to receive legitimacy. At a functional level, this moderating quality of rights had vital importance for the emergence of the modern political system. It meant that society obtained a political system which was able to derive authority from a public inclusionary structure, based in the authoritative will of the people. But it also meant that the

<sup>34</sup> *Fletcher v Peck*, 10 U.S. (6 Cranch) 87 (1810).

<sup>35</sup> *Fletcher v Peck* is the obvious illustration of this tendency. But see also *Sturges v Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819).

political system was able internally to regulate its processes of inclusion, and to check its boundaries against any uncontrollable integration of objective social interests. This meant that the constituent power of the national sovereign people, although always of the highest significance as a source of normative legitimacy for legal acts, only existed as an *implicit* force within the political system. The political system could refer to the people to sustain inclusionary acts without factually incorporating the people as an existing entity: inclusion occurred through the recognition of persons as protected in their rights.

On this basis, constituent power and rights fused to form the first wellspring for the inclusionary structure of modern society. Together, these concepts projected a formula that was able to produce legitimacy for the emergent political system at a relatively high degree of autonomy and recursivity. This formula – constituent power and rights – constructed an inclusionary basis for the political system as the form of society as a whole widened beyond its historical local boundaries, as society directed an increasing volume of demands for legislation to centralized institutions (the state) and as the political system began to acquire a specifically differentiated form. This conceptual fusion supported the emergence of a political system able to claim encompassing authority for society and to legislate across different societal domains at a heightened level of inclusivity. However, this formula created a normative structure for a political system whose inclusionary functions were always limited, and it ensured that society as a whole emphatically *did not* enter the political system as a unified national sovereign agent. In this respect, ultimately, the fusion of national sovereignty and rights in classical constitutions only promoted political inclusion for a relatively thin domain of society. In fact, this formula projected an inclusionary structure for the political system in a society in which general consumption of law was still low, in which the inclusionary demands addressed to the political system were limited and in which the political system was not required to penetrate deeply into society. In France, in particular, the primary function of the classical constitutional formula was that it established an inclusionary structure for a political system that replaced corporations as dominant centres of organization. In post-revolutionary America, despite the salience of the rhetoric of constitutional rights, the factual exercise of rights by citizens remained very curtailed.<sup>36</sup> Far

<sup>36</sup> A recent analysis of America after the Civil War states that ‘only a minority of Americans actually exercised full civil and political rights. Restrictions in state and local laws placed most

from presenting an objective reality of popular sovereignty, there, classical constitutional doctrine can be seen, sociologically, as merely the first stage in a long process of national inclusion. Of itself, classical constitutions merely established an inclusionary structure for a political system at a very rudimentary stage of differentiation and inclusionary formation. Seen sociologically, in fact, classical constitutionalism articulated inclusionary principles, which would only approach reality through a long subsequent process of social and constitutional formation.

## CONCLUSION

In conjunction with each other, the principles of rights and national constituent power began in the later Enlightenment to form the normative foundation of modern statehood. Together, these principles constructed a formula of inclusion for the political system of a society whose pluralistic local or sectoral form was beginning to be eradicated. From this point on, in particular, national sovereignty became a dominant *norm of inclusion* for society's political order. National political systems were centred on the principle that they perform inclusionary functions for all society: they were defined as institutions that legislate with some degree of uniformity across all society, that presuppose generalized normative support in society and to which most persons and exchanges enter an even, relatively immediate relation. Subsequently, these principles were repeatedly contested and ignored. However, few political systems after 1789 conclusively rejected the idea that they were created for purposes of national representation and integration. After the revolutions of the eighteenth century, most societies, or at least those not directly subject to imperial control, began, slowly, to assimilate elements of this constitutional formula, and they used this formula to design political systems which were able to obtain and preserve legitimacy in face of expanding (national) societal environments. Through this formula, the political system was able to articulate a sustainable inclusionary structure for its functions, and it initially experienced a substantial increase in its capacities for producing and distributing laws, across the increasingly widening and complex environments that it controlled. On this conceptual foundation, the modern political system was first formed as an essentially separate, autonomous functional

people somewhere on a very broad middle ground, removed from slavery on one side, but also distant from the full range of rights on the other side' (Edwards 2015: 153).

domain, able to produce and re-generate its power from within itself, and to extend laws beyond the local fissures of early modern society. National societies more widely were then defined and *constituted* by the inclusionary structure of the political system, and they began to converge, as nations, around national political systems.

Despite this, however, the norms of classical constitutional government should not be seen as an objective measure of governmental legitimacy. In fact, neither the concept of constituent power nor the concept of rights was fully correlated with an objectively given reality. Both concepts, although not entirely illusory, assumed their highest significance as adaptive principles *for* and *within* the inclusionary structure of society's political system. As discussed, the concepts of national sovereignty and constituent power did not genuinely imply that all national society was implicated in founding the political system. Likewise, the concept of rights did not truly indicate that all members of society were equally respected or recognized in acts of legislation. Together, however, these concepts combined to enunciate a specific inclusionary formula, through which the political system was able to instil within itself an authoritative, yet sustainable, declaration of its legitimacy. This construction meant that the political system could purport to derive legitimacy for law making from outside itself (from the people, in the form of the sovereign nation), while in fact distilling its legitimacy in highly internalistic form, to which the people as a factually existing entity or group of agents was only symbolically admitted, through the exercise of a select group of pre-defined rights. If national sovereignty became the *norm of inclusion* for the modern political system, in other words, rights became the *medium of inclusion* for the modern political system. After the constitutional revolutions of the Enlightenment, constitutions acted as normative premises for political inclusion, in which laws were authorized by the presumption that they were produced by the sovereign people, and the people were selectively integrated in the political system by guarantees over rights. *The balance between these concepts meant that the nation was defined as the founding inclusionary norm for society, but the nation only became real, and it only entered the political system, through the medium of rights: rights became the inclusionary medium of the nation, and rights translated the idea of national sovereignty into a meaningful inclusionary structure for the political system. The nation became the basis for the functions of the political system only insofar as the nation was translated into rights.* The ability of these concepts to establish an inclusionary structure for the political

system, however, depended on the fact that they did not possess a full material reality. Both concepts in fact acquired their primary meanings in the projective, functional dimension of society.

Viewed sociologically, further, classical constitutions created an inclusionary formula for a political system which was only at an incipient level of differentiation and social penetration, whose inclusionary functions still had limited reach and which, accordingly, did not presuppose extensive support through society. The formula of national sovereignty and rights first appeared as a formula of *minimal inclusivity*, to support the functions of a political system which was only gradually beginning to perform extensive inclusionary functions and whose hold on society was not deep. The first fusion of national sovereignty and rights was in fact manifestly proportioned to the structure of a society, in which the political system needed to proclaim inclusive authority for certain laws, but in which the quantity of exchanges actually subject to central legal control was low. Clearly, the prominence of private and economic rights in classical constitutionalism restricted the inclusion of the nation to a small set of practices, and it ensured that the political system could integrate persons, in their quality as rights holders, without great administrative challenges. As early constitutional states integrated persons by guaranteeing and enforcing economic rights, in fact, most functions of inclusion were focused, paradoxically, on ensuring that persons whose rights were protected by the state were not subject to excessive state interference. The primary rights allocated by classical constitutions specifically acted to prevent the factual inclusion of persons in society; classical constitutions gave recognition to persons as holders of economic rights, but, in so doing, they ensured that these persons placed few demands on the political system. As discussed, the inclusionary formula of classical constitutionalism used rights to include the nation in highly measured, selective fashion, and the people were admitted to the political system only in dimensions defined largely by economic rights: in fact, legal inclusion of the people through economic rights did not require their factual inclusion. The formula of classical constitutionalism thus merely distilled the *first layer* of modern society's inclusionary structure. Through this formula, the political system derived authority from a national society. But it only included this nation through the restricted medium of private, monetary and economic rights, and the nation only entered the political system through such rights.

Despite the limited reach of classical constitutional norms, national constitutionalism ultimately instilled a distinct formative dynamic within the inclusionary structure of modern society. After the creation of the first national constitutions, general inclusion became the main source of legitimacy for national political systems. From this time on, societies commonly articulated their inclusionary structures through the formula of national sovereignty and rights: their political systems, acting at an increasing level of differentiation, penetrated further and further into society by using this inclusionary formula. After the first emergence of national constitutions, the political systems of modern societies were enduringly defined by this inclusionary model, and, having called the nation symbolically into being, these political systems were required, slowly, to give reality to the nation from which they drew authority, and to make the nation meaningful in their own acts. As the localistic fabric of society became weaker through the nineteenth century, in particular, political systems experienced greater need for wide societal support, and they began to give stronger expression to the idea of the sovereign nation as a real source of legitimacy. Gradually, states began to incorporate the nation in the political system by allocating thicker, more extensive, strata of rights, alongside the small body of private, monetary and economic rights guaranteed in the revolutionary era, which acted as less ephemeral inclusionary media for the sovereign people. As discussed in [Chapter 4](#), the norm of national sovereignty eventually compelled political systems to elaborate an extensive, multi-tiered system of rights in society, located on top of the *first tier* of private, economic rights established in the revolutionary era. As the political system reached gradually more deeply into society, it was forced to allocate different strata of rights – initially, more substantial political rights; then other supplementary rights, including social-material and even ethnic rights – to ensure that it could obtain support amongst the social groups subject to its power, and thus to expand its basic inclusionary structure. National sovereignty eventually became a more palpable material reality, and it was slowly realized through the construction of an expansive system of rights around the political system. Through the stabilization of different strata of rights, constitutionalism ultimately established a more complex inclusionary structure for national society, able to integrate the population in the political system as a material presence – albeit often with unintended and fateful outcomes. In its initial classical form, however, constitutionalism created a very



simple inclusionary formula – constituent power and basic rights – which underpinned a political system whose functions of national inclusion were still very limited and whose penetration into society was curtailed.

The early normative form of constitutionalism, accordingly, should not be seen as an objective reality, and it should not be taken as a standard for the observation of other patterns of constitutionalism. It should be seen, rather, as the first stage in the emergence of modern society's inclusionary structure. From the eighteenth century onward, the political system designed its inclusionary structure through a combination of national sovereignty and rights, using rights to integrate the nation within the political system. The formula of classical constitutionalism thus marked the beginning of a long process of inclusion, in which contemporary constitutional norms are still implicated. The positing of a strict dichotomy between classical and transnational constitutional norms is usually the result of an excessively literal interpretation of classical constitutions.



## CHAPTER TWO

# CONSTITUTIONAL RIGHTS AND THE GLOBAL POLITICAL SYSTEM

If the constitutional formula of rights and constituent power, expressed in the revolutions of the eighteenth century, defined the original inclusionary structure for the political systems of national societies, national political systems were ultimately consolidated through a very different constitutional formula, which resulted from a second – equally revolutionary – process of constitutional norm formation.<sup>1</sup> As discussed further, the original formula of national sovereignty and rights eventually proved unable to establish an enduring foundation to support the political systems of complex modern societies. In fact, most societies only began to develop consistently inclusive political systems at a historical juncture in which this initial constitutional formula had, in part, been abandoned. In most societies, it was only in the decades following 1945 that reasonably generalized political structures began to take shape, able to incorporate different social sectors and spheres of exchange, and it was only at this time that national political systems, albeit still incompletely, began to extend their power over all parts of society. In this period, however, the classical constitutional formula lost effect as the basis for societal inclusion. Tentatively at first, this period distilled a new formula of legitimacy for the national political system, and it produced a new inclusionary structure for society as a whole. Eventually, this new formula proved a more sustainable basis for the patterns of legal and political inclusion required by complex, often integrally antagonistic, national societies, and this formula facilitated a

<sup>1</sup> On the revolutionary character of this process see Brunkhorst (2014: 427).

general growth in the stability and societal penetration of national political systems.

Central to the consolidation of national structures of political inclusion after 1945 was a transformation in the role of international law. The post-1945 period saw an exponential rise in the force of international law, and most especially of that branch of international law focused on promoting human rights norms.<sup>2</sup> The growing authority of international law, and most notably human rights law, was clearly visible in general international law – for example, in laws created by the United Nations (UN). But it was also visible in regional regimes of international law, such as the European Convention on Human Rights (ECHR).<sup>3</sup> In particular, this period slowly saw a growing acceptance of the principle that international law, especially international human rights law, could in some circumstances assume primacy over domestic law. This had a profound impact on the classical norms of constitutional legitimacy, and it deeply altered the standing of *national sovereignty* as a norm of constitutional practice. On one level, the rise of international human rights law reduced the significance of national sovereignty as an *external* attribute of states: progressively, international law imposed certain restrictions on the autonomy of national states in their interactions with other states.<sup>4</sup> On a different level, the rise of international human rights law changed the extent to which states were *internally* legitimated by national sovereignty: it implied that certain primary norms, derived from external sources, could have higher legitimating force than sovereign powers exercised by a national people, and that legislation could not be authorized exclusively by domestic acts of popular will formation. In both respects, the rise of international law after 1945 meant that the political systems of national societies began to extract some of their authority from relatively formal, abstracted foundations, and the role of popular volition as a source of norm construction was relativized.

<sup>2</sup> One commentator (Simpson 2001: 333) observes that, up to 1939: ‘There was no general international law of human rights’. After 1945, however, this gradually became a core branch of international law.

<sup>3</sup> Throughout, I define the ECHR and other regional instruments as international law. Although the judicial bodies applying such instruments form regionally focused regimes, their jurisprudence is close to general international law, and it actively shapes the wider formation of an international legal system (see Forowicz 2010: 23, 48).

<sup>4</sup> For standard accounts of this transformation of sovereignty in inter-state relations at different points since 1945, see Jessup (1946: 914), Falk (1970: 13), Delbrück (1982: 572), Henkin (1995: 38), Franck (1995: 3), Koh (1998), Jackson (2008: 22), Bryde (2005: 109), Nollkaemper (2010: 66) and Kahn (2000: 11).

As discussed in [Chapter 4](#), after 1918, a model of constitutional law had become widespread, in which states explained their legitimacy through their *closeness* to the constituent power of their national populations. After 1945, however, human rights laws, often of international provenance, slowly began to displace national or popular sovereignty as the leading justification for the legal and political systems of national societies. In this process, notably, internationally constructed rights were usually defined as rights held individually, by *singular persons*. To be sure, early human rights documents were never solely focused on a liberal, singular construction of rights, and they made clear provisions for social rights. For example, the Universal Declaration of Human Rights (UDHR, 1948) established some advanced social rights, including the right to work and the right to a decent standard of living. International instruments then placed greater emphasis on social rights from 1960s onwards. This began with the approval of the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966). As discussed further, human rights instruments in Latin America and Africa ultimately gave very extensive recognition to social rights. Generally, however, the international human rights instruments devised after 1945 placed primary emphasis on individual rights; social rights were originally only weakly enforceable, and of questionable legal status (see Vierdag 1978: 105). Even in international courts giving high salience to social rights, some such rights have not easily proved justiciable.<sup>5</sup> At different points in the post-war political system, therefore, neither national sovereignty, nor constituent power, nor collective interests, but single international human rights began to form the basic constitutional mainstay for acts of legal/political inclusion. In different contexts, singular rights slowly became the primary normative premise for the legitimacy of legal and political functions.

This chapter examines this progressive shift from national sovereignty to international human rights in the constitutional fabric of the emerging global society, or the emerging *global political system*, after 1945, and it outlines the main changes in global normative order at this time. [Chapter 3](#) then attempts to elucidate the material forces that propelled the growing importance of international human rights in the wake of World War II, and it examines ways in which the

<sup>5</sup> For example, the first case in which a failure to meet social rights obligations has been found justiciable in the Inter-American System has just passed through the Inter-American Court of Human Rights (IACtHR). The case in question is *González Lluy (TGGL) y familia v Ecuador* (2015).

rise of rights produced a new inclusionary structure for modern society, more finely proportioned to the legislative demands which society encountered. In this respect, although mainly concerned with the constitutional standing of international human rights, these chapters also seek to contribute to the general development of a sociology of international law, and to explain international law as part of the constitutional fabric of society as a whole.

## THE TRANSFORMATION OF INTERNATIONAL LAW

After 1945, the growth of international law, and especially international human rights law, was stimulated in particular by the rise of powerful international organizations. Most notably, the founding of the UN in 1945 as a multi-laterally constructed legal and political entity, with relatively independent law-making and treaty-making functions, greatly increased the authority of international law, and the UN soon began to consolidate a diction of human rights law across international society. To be sure, the promotion of human rights was initially only a secondary function of the UN; the UN was mainly conceived as an organization to help prevent renewed international warfare. However, the UN was also designed as an organization to promote the enforcement of international law and human rights norms. In fact, the high standing of human rights in the post-1945 international order had been anticipated in the Atlantic Charter (1941), which had cleared the ground for the founding of the UN. In Arts 1(3) and 55(c), the UN Charter itself gave unprecedented salience to human rights norms as concepts of positive law; it proposed a set of basic principles for international society, in which the consolidation of human rights had an important place, and which, as stated in Art 103, had primacy over all other international agreements. The importance of international human rights law was then reinforced in the early policies of the UN – first, in the establishment of the Human Rights Commission (1946), and, second, in the promulgation of the UDHR. Moreover, a number of UN bodies were soon established, which possessed supranational authority to legislate over matters relating to human rights. These included the UN General Assembly itself, the Economic and Social Council (ECOSOC), and UNESCO. In addition, the core human rights provisions of the UN acquired objective positive form through the jurisprudence of international courts. This was reflected in

part in the jurisprudence of the International Court of Justice (ICJ). Rights norms did not immediately assume prominence in ICJ rulings; only much later did it openly engage in active promotion of human rights.<sup>6</sup> Progressively, however, in addition to ruling on particular questions of international law, the ICJ consciously promoted a general observance of human rights norms, which permeated both international law and national law more widely (Kamminga 2009: 21–2). Today, leading tribunals, both national and supranational, commonly acknowledge that other laws must usually be interpreted in conformity with the UN Charter, according UN law and UN human rights provisions, in principle, a basic constitutional authority across global society.<sup>7</sup> Soon after their creation, in fact, the UN and its judicial organs assumed positions of norm-giving power traditionally reserved for states, and they began to apply international laws, partly anchored in rights, to impose normative limits on the acts of national polities (see Wouters and De Man 2011: 192, 212).

More important than the UN and the ICJ in the reinforcement of international law in the decades after 1945, however, was the fact that a number of regional conventions for safeguarding human rights were established, which also eventually obtained judicial bodies. Following the end of World War II, a series of core multi-lateral instruments were drafted which gave supra-constitutional status to human rights in international society, and under which international courts and commissions were established to oversee the cross-national protection of human rights. The year 1948 saw the formation of the Organization of American States, whose Charter contained several provisions concerning human rights. The American Declaration of the Rights and Duties of Man was then adopted in 1948, and the Inter-American Commission on Human Rights was established as a separate body in 1959. In 1953, the ECHR entered into force, and the European Court of Human Rights (ECtHR) was established in 1959. Each of these systems envisaged an international order of rights, possessing some obligatory autonomy in relation to the national states that ratified them. Increasingly, moreover, the judicial interpretation of these legal frameworks was shaped by principles of general international law, and

<sup>6</sup> See, for example, ICJ Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004).

<sup>7</sup> Case T-315/01, *Kadi v. Council and Commission* [2005] ECR II-3649

they were slowly elaborated as part of a broad, partly cohesive, system of international law, giving central position to human rights.<sup>8</sup>

After 1945, in sum, a legal/political order began to emerge outside national societies that incorporated a number of powerful international organizations and institutions, which, in different spheres, assumed authority to promulgate and enforce powerful primary norms. In this legal order, notably, international judicial bodies acquired competences for resolving disputes between, and then reviewing the actions of, constituent national states, and for promoting legal norms, typically based in human rights, as overarching guidelines for inter-state activity. To this degree, the norms underpinning this legal order began gradually to assume constitutional force for international society, standing notionally above national states. Of course, international judicial institutions predated 1945; the Permanent Court of International Justice (PCIJ) was already established as an influential judicial actor in the interwar era. However, the distinctive constitutional significance of the post-1945 legal order resulted from the fact that the fabric of international law was transformed, some of its core principles were intensified and international organizations were constitutionally endowed with growing authority to interpret and to apply it. In consequence of these changes, international law assumed greatly heightened autonomy in relation to national states.

Most obviously, for example, after 1945 international law was, to some degree at least, directed away from classical positivist principles of state voluntarism: that is, international law progressively lost its foundation in the presumption that international norms were merely agreements between sovereign states, and they were constrained by state consent and bilateral treaty obligations (Partlett 2011: 7). Positivist constructions of international law had been widespread in inter-war legal thought and practice.<sup>9</sup> To be sure, positivist ideas did not have

<sup>8</sup> Notably, Art 31(3)(c) of the Vienna Convention on the Law of Treaties eventually implied that the ECHR had to be interpreted as part of international law. Consideration and use of general international law in the ECtHR were evident in *Chahal v. UK* (1996); *Kurt v. Turkey* (1998); *Bankovic and Others v. Belgium* (2001).

<sup>9</sup> My definition of positivism is relatively common, but it is neatly condensed in Simma and Paulus (1999: 304), who see positivism as a legal stance in which: 'Law is regarded as a unified system of rules that . . . emanate from state will'. Similar to this is Schmitt's earlier (1940 [1939]: 264) account of positivism as reflecting a 'completely statist-decisionistic' account of legal authority. Tellingly, Schmitt saw positivism as implying that 'the state alone is a subject of inter-state law' and that 'the private individual is naturally excluded from the realm of international law' (1940 [1939]: 262).

unchallenged status between 1918 and 1945, and they were always countervailed by presumptions in favour of customary international law as an enforceable system of norms. Most obviously, Art 38(3) of the statute of the PCIJ bound the court to apply general principles of the laws of civilized nations. Moreover, powerful challenges to positivist ideas were expressed by some of the most influential interwar theorists, notably Hersch Lauterpacht and Alfred Verdross. Tellingly, at this time, Verdross (1937: 574) developed a notion of *jus cogens*, based in the general duty of states to protect certain fundamental rights of their citizens. Indeed, Verdross (1926) developed the most systematic precursor of contemporary accounts of global constitutionalism. Jean d'Aspremont (2016) has clearly argued that constructions of international law as a distinct legal system were quite advanced before 1945, and indeed that 'systemic thinking permeated almost all traditions' of international law. Nonetheless, positivist principles still ran deep through much interwar legal thinking and case law. For example, a positivist position was adopted in the famous *Lotus* decision (1927) of the PCIJ, which ruled: 'International Law governs relations between independent states. The rules of law binding upon States therefore emanate from their own free will'.<sup>10</sup> Similar principles were also enunciated by the PCIJ in *Chorzów Factory* (1928).

After 1945, however, the growth of international organizations meant that international law began to be defined as a universal and increasingly autonomous field of law, or even as a separate legal system, with formal constitutional authority. In its first conception, to be sure, the role of the UN was partly defined in accordance with core positivist ideals, and its judicial functions were focused on resolving inter-state disputes between its constituent members. In fact, in Art 2.1 of the Charter, the UN initially acknowledged single sovereign states as the most essential units of international society, and it recognized inter-state treaties as the primary elements of the new legal order. To this degree, after 1945, international law still echoed the positivist principle that it was based in the consent of sovereign states, and it could be abrogated by these states, largely at will. In Art 38(1)(a), the ICJ statute, reflecting its origins in the statute of the PCIJ, provided that rules applied by the court were only binding if 'expressly recognized' by consenting states, and in its early opinions the ICJ

<sup>10</sup> S.S. "Lotus" (*France v Turkey*) [1927] PCIJ Series Rep A No 10.



insisted on state consent as the basis for all international law.<sup>11</sup> Even the most fervent advocates of a unified system of international law denied that UN laws had a mandatory quality (Kelsen 1950: 29–30). Despite much protest and intermittent retrenchment by different parties, nonetheless, the assumption progressively gained ground in international legal thinking after 1945 that, in the UN, there existed a *constituted community* of states, possessing some legal independence from the consensual will of its constituent members, and that some conventions and norms contained unqualified obligations for all states (see Fitzmaurice 1953: 15). The UN Charter itself, for all its selective focus on state sovereignty, emphasized the principle that international law contained certain non-derogable norms, to which municipal legislation was invariably subordinate; this was especially the case in Art 103, and in Art 55, which implied human rights obligations for member states. This principle was then implicitly accentuated in the UDHR, and it was clearly established in the Genocide Convention (1948), which indicated that certain norms had non-derogable status for all societies (Byers 1997: 212). As a result, the conviction became pervasive after 1945 that certain principles of international law, primarily distilled in human rights instruments, could lay claim to supra-positive status, implying *erga omnes* obligations for all states. Moreover, in 1950, the ICJ began to define individual persons as having rights under an international legal system, existing in relative independence of the national states in which they were located; ultimately, this became an important principle in ICJ jurisprudence (see Peters 2014: 341).<sup>12</sup> This principle was more boldly declared in more specific regional human rights instruments, which, as binding conventions, were quite sharply distinguished from treaties in the classical sense of inter-state accords. The concept of immutable personal rights then ultimately assumed pronounced expression in the human rights covenants of 1966, most notably in the International Covenant on Civil and Political Rights (ICCPR).

Incrementally, therefore, the presumptions underlying the international conventions established after 1945 were slowly interpreted to consolidate a doctrine of international *jus cogens*, in which certain directives of international law, either directly or obliquely related to

<sup>11</sup> Note the observation in the ICJ's opinion *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*: 'It is well established that in its treaty relations a State cannot be bound without its consent': [1951] ICJ Reports 21.

<sup>12</sup> This was finally illustrated in the ICJ case *LaGrand (Germany) v United States of America* (2001).



human rights, acquired peremptory standing for all exchanges between states in international society. Although it did not conclusively articulate this doctrine until much later,<sup>13</sup> the ICJ in fact moved towards advocating a concept of *jus cogens* in 1951, even while acknowledging state consent as the basis for treaties.<sup>14</sup> A theory of *jus cogens*, protecting certain select human rights, was also set out in a dissenting opinion, in an otherwise very restrictive judgment, in 1963, in the *South West Africa* case.<sup>15</sup> The concept of *jus cogens* was eventually formalized, most importantly, in 1969 in the Vienna Convention on the Law of Treaties (in force from 1980). In Arts 53 and 64, the Vienna Convention designated certain norms and certain rights as having inviolable status for global society (that is, as existing in a normative sphere independent of the single interests or mutual obligations of particular states),<sup>16</sup> and it implied that states have a duty not to recognize sovereign acts of other states if these were in breach of peremptory norms, especially regarding human rights.<sup>17</sup> In Art 27, it stated that domestic law cannot justify derogation from a treaty. In these respects, international human rights norms were progressively elevated above other treaties and declared binding for all inter-state acts. To be sure, the status of the *jus cogens* principle in these instruments was not categorically clarified, and it long remained a matter of dispute. For instance, after the approval of the Vienna Convention, the ICJ first refused to pronounce on the question of norms possessing *jus cogens* standing. However, in its advisory opinion in *Namibia* (1971), regarding South Africa's imposition of apartheid in Namibia, the ICJ re-emphasized the status of certain fundamental human rights norms as core elements of international law, and it declared that the UN Charter imposed obligations concerning human rights on members of the UN. At this point, the ICJ stated that all UN members were legally bound by the aims of the UN Charter, including the preservation and promotion of human rights.<sup>18</sup> Above all, through reference to the idea of certain human rights norms as parts of an international *jus cogens*, the ICJ was

<sup>13</sup> In *Democratic Republic of the Congo v Rwanda* (2006), the ICJ claimed jurisdiction 'to settle disputes arising from the violation of peremptory norms (*jus cogens*) in the area of human rights, as those norms were reflected in a number of international instruments': [2006] ICJ Reports 10.

<sup>14</sup> [1951] ICJ Reports 23. See Fitzmaurice (1957: 291).

<sup>15</sup> In his opinion, Judge Tanaka argued that the 'protection of human rights may be considered to belong to the *jus cogens*': [1966] ICJ Reports 298.

<sup>16</sup> For this definition of *jus cogens*, see Verdross (1966: 249), Meron (1986: 249).

<sup>17</sup> For a very optimistic view of this see Orakhelashvili (2006: 375).

<sup>18</sup> [1971] ICJ Reports 57.

ultimately able to differentiate between voluntary treaties between one state and another state and binding obligations of states *vis-à-vis* the international community as a whole (MacDonald 1987: 128; Bassiouni 1996: 72). This approach was made clear, after the Vienna Convention, in *Barcelona Traction* (1970), in which it was argued that there are certain norms in which all states, simply as part of the community of states, have an interest in preserving, and which bind states, not as actual parties to treaties, but simply *qua* states (Thirlway 2013: 148). These obligations, it was declared, constitute obligations ‘towards the international community as a whole’, and have *erga omnes* force.<sup>19</sup>

This growing conception of international law as an independently binding legal system moved closer to reality in the course of the 1970s. The persistent rights abuses in South Africa under apartheid and rising political repression in post-1973 Chile and other states in Latin America meant that, by the mid-1970s, the UN had increasingly claimed the power to respond to reports of violations of human rights, even in political crises which contained no specific international dimension or dispute.<sup>20</sup> In fact, as early as 1946, the UN had approved inquiries into political conditions in Spain under Franco. This approach consolidated international law as a system of norms standing above states, in which multiple actors, including both single persons and NGOs, could seek remedies and submit complaints (see Tardu 1980: 568; Kamminga 2009: 6). After the 1970s, the distinct systemic quality of international law was progressively reinforced, and its autonomy in relation to treaty law was more frequently expressed. For example, the International Law Commission (ILC) declared in 1985 that inter-state norms relating to human rights could not be deemed attributable to singular states, but belonged to the entire international community.<sup>21</sup> By 1989, the Institute of International Law felt able to a Resolution stating that ‘obligations in the sphere of human rights law’ can never be seen as exclusive elements of domestic jurisdiction, and that national actions with relevance for human rights are always immediately subject to international law.<sup>22</sup> After the Vienna Convention, moreover, the presumption in favour of basic human rights as non-derogable principles of international law, with obligatory standing for national states,

<sup>19</sup> [1970] ICJ Reports 32.

<sup>20</sup> The basis for this was expressed in ECOSOC resolutions 1235 of 1967 and 1503 of 1970, which allowed the UN to investigate complaints about gross violations of human rights.

<sup>21</sup> ILC Yearbook (1985) DOCUMENT A/CN.4/389, p. 8.

<sup>22</sup> Institute of International Law ‘The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States’.

was solidified through other, more free-standing, developments in international human rights law. This was expressed most notably through the Helsinki Accords of 1975, the establishment of the Inter-American Court of Human Rights (IACtHR) (1978–79), and the entry into force of the African Charter on Human and Peoples' Rights in 1986. The binding force of international human rights instruments was then greatly reinforced by the Vienna Declaration and Programme of Action (1993), after which the supranational force of human rights conventions was widened and elevated. After 1989, in fact, the force of international human rights law was intensified throughout Europe. This was particularly the case because, after the collapse of the Soviet Union and the processes of systemic redirection in former Soviet-controlled states, observance of international human rights norms became a core precondition for full recognition of new independent states. Clearly, many post-authoritarian states in Eastern Europe in the 1990s saw accession to the Council of Europe as a secure pathway to full political recognition, independence and stability, and they were keen to comply with the ECHR for that reason.

On these separate grounds, international law was slowly consolidated, after 1945, as a distinct, relatively free-standing, legal order, providing the formal substructure for a growing global political system.<sup>23</sup> Classical international law had been primarily based in the principle of inter-state consent as the dominant principle of legal recognition. This principle had been widely questioned in the interwar era, but it had not been supplanted. Accordingly, classical international law had lacked an inner foundation for any universal hierarchy of norms, and it was mainly deducible from the interests and commitments of single states. After 1945, however, the elevation of certain human rights to principles with *erga omnes* quality transformed international law, or at least that part of international law with relevance for rights, from an aggregate of agreements founded in treaty law and resultant state liability into a formal system of (at least partly) autonomous legal norms. As a result, international treaties increasingly implied that all members of the international community had certain general obligations under rights norms, which, at least in principle, were higher than duties towards single states (Amerasinghe 1990: 81).

<sup>23</sup> This characteristic had been imputed to the UN by Kelsen (1950: 706) shortly after the World War II. But it probably only became a real feature of the UN in the 1970s.

To be absolutely clear, it is not suggested here that a comprehensive and effective system of international law was instituted in the wake of 1945. It barely requires emphasis that, even in its core objectives, such as minority protection and prevention of aggressive war, the UN and other international organizations only had limited effect on global politics. The UN Charter, still today, has not developed fully as a constitutional document for global society, and other instruments have not acquired more than declaratory standing.<sup>24</sup> Much of this is due to the fact that, after its founding, the UN quickly became caught in the geopolitical realities of the Cold War, which prevented the formation of a neutral system of international rules. Many observers have argued that international rights norms were initially little more than chimera, and they only became politically relevant in the 1970s, or even the 1990s, largely due to changing constellations of international power politics (Hoffmann 2011: 2; Moyn 2012: 3). There are good reasons to support this view, albeit in qualified fashion. It is quite clear, first, that the enforcement mechanisms of the international community originally possessed only variable intensity (see Petersmann 2002: 625). In areas with less entrenched regional human rights instruments, the ability of international law to penetrate national political systems remained weak throughout the entire second half of the twentieth century. Further, the international apparatus for monitoring rights abuse was, initially, not strong; the UN's Human Rights Commission did not acquire powers exceeding an admonitory role, and, 1947, it was formally acknowledged that it could not take prohibitive action against states violating human rights (Tardu 1980: 560). Later reinforcements of the UN's monitoring functions did not create a legal system able to issue bindingly enforceable directives, and states could easily close their jurisdictional borders to the effect of international law. Furthermore, although regional human instruments provided for a judicial order to oversee compliance, neither the UN Charter, nor the UDHR, nor the ICCPR was protected and enforced by a court with specialized powers of review, and the distinction between these covenants and other interstate acts and treaties could easily be disputed (Aust 2000: 410; Conforti 2005: 10, 14): a hierarchical distinction between simple treaties and obligatory *jus cogens* was not always legally self-evident. It was only in the late 1990s, with the negotiation of The Rome Statute

<sup>24</sup> Some commentators claim the contrary, emphatically so in some cases (see Fassbender 1998), with certain qualifications in others (see De Wet 2000: 192–4).

and the foundation of the International Criminal Court (ICC), that international courts began to obtain more mandatory authority. Of course, tellingly, the ICC was not created as part of the UN. Equally, second, primary texts of international law reflected a distinct uncertainty about their standing with regard to national states. As mentioned, Art 38 of the Statute of the ICJ specifically upheld positivist ideals, declaring that states were only bound by international laws to which they had given express consent. In fact, early human rights instruments often contained the ambiguity, even where they stipulated supra-positive norms, that they also recognized positivist constructions of state sovereignty, and they defined states as primary sovereign actors in international society. As late as 1970, the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States* emphasized that ‘the territorial integrity or political unity of sovereign and independent States’ and the ‘sovereign equality of states’ were, normally, inviolable constructions of international law.

For all these restrictions, however, if taken together, the growing body of human rights instruments and conventions instituted in the decades after 1945 contained at least the formal-normative implication that international treaties could produce certain norms for international society with a higher-order, generally obligatory rank, clearly distinct from single inter-state treaties (Jessup 1947b: 388). These instruments contained norms neither distilled from, nor reducible to, particular acts of state consent, and they formed sui-generis declaratory documents (see Schwelb 1967: 957; Klabbers 2002: 82–3). Indeed, in Art 2(6) of the Charter the UN ascribed to itself some implied authority for non-signatory states (Doyle 2012). Moreover, in its advisory opinion in *Reservations to the Convention on Genocide* (1951), the ICJ began to construct some law of the UN as relatively autonomous, containing global obligations. This clearly implied that, in some of their actions, states could be not only normatively but also *constitutionally* bound by an independent system of justiciable norms,<sup>25</sup> with force greater than traditional principles of customary international law (Lowe 2007: 59). In principle, at least, certain human rights became a free-standing ground for international condemnation and intervention. Human rights were designated and internationally recognized as prescribing transnational maxims for the conduct of global social life,

<sup>25</sup> See Byers (1997), Bryde (2003: 66), De Wet (2006: 64), Kadelbach (2006) and Milewicz (2008: 422, 432).

and international judicial bodies were transformed into primary norm-setting, constitutional agents.

The principle that international law, in some areas, has a normative quality that is independent of the volitional acts of states marked the first important, constitutional change in the international legal order after 1945. This principle began to create a new foundation for political legitimacy, in which the ultimate authority for political institutions and decisions was partly disconnected from the sovereign will of national populations, expressed through states. Alongside this, however, the traditional positivistic fabric of international law was gradually transformed after 1945 by the fact that international organizations began to promote the view that states are not the only entities subject to international law. In classical international law, of course, states were commonly seen as the exclusive subjects of international law. On the conventional positivist account, persons other than states could only claim legal personality and seek remedies under domestic constitutional law, and treaties entered by states applied only to the inter-state domain, without conferring separate rights on persons within state jurisdictions. This view, originating in Austinian positivism, was famously formulated by Lassa Oppenheim,<sup>26</sup> and it retained influence through the earlier part of the twentieth century.<sup>27</sup> After 1945, however, international law underwent a process of manifest *individualization*: that is, the principle gained recognition that, beside states, multiple agents, including single persons, could be imputed responsibilities under international law, and even, albeit more tentatively, that multiple actors might lay claim to justiciable rights under international law.<sup>28</sup> By consequence, this implied that international law could be applied directly to different agents in national societies, and single persons could be addressed by international law in isolation from their domestic legal system; the positivist principle that the obligations prescribed by international law give rise to duties exclusively for states was widely discredited (see Jessup 1947a: 408; Friedmann 1962: 1150). Important early observers even concluded that, after 1945, the ‘individual human being’ had become an ‘effective participant in the world power process’ (McDougal and Bebr 1964: 611).

<sup>26</sup> Oppenheim (1905: 18) claimed that ‘states solely and exclusively are subjects of international law’. See also Partlett (2011: 14–15).

<sup>27</sup> See, as example, Brown (1924).

<sup>28</sup> See the excellent analysis, defining the individual as the ‘primary subject of international law’ in Peters (2014: 173).

These assertions obviously need some qualification. On one hand, the uniqueness of statehood as a source of responsibility in international law had already been extensively disputed before 1945 (Peters 2014: 15). One important commentary (Bederman 1995: 335) notes tellingly that this view was ‘on the wane’ by the interwar era. Influential jurists of the earlier twentieth century had already proposed individual responsibility as a principle of public international law (see Duguit 1921: 560; Politis 1927: 79; Scelle 1932: 42). Such views in fact formed part of a wider growing critique of positivism at this time. Moreover, positivist ideas had already been questioned in international courts and organizations. For example, in 1922, the Upper Silesian Convention of the League of Nations had held that an individual national could bring a case against his or her state. Similarly, an Advisory Opinion of the PCIJ in *Jurisdiction of the Courts of Danzig* (1928) stated that an international agreement could create ‘individual rights and obligations’ which are ‘enforceable by the national courts’.<sup>29</sup> Furthermore, on the other hand, after 1945 the standing of the individual as a subject of international law did not even begin to acquire force as a conclusively binding norm. Many leading theorists retained clearly positivist outlooks and even among advocates of individual rights recognition of individuals in international law was often decried as lip-service (St Korowicz 1956: 56). Significantly, express recognition of individuals as subjects of international law was very tentative in the UN Charter.<sup>30</sup> Moreover, many international courts did not originally, and some, notably the ICJ, still do not, permit individual persons or organizations to act as parties to a case (see Kelsen 1950: 483; Shelton 2004: 612).<sup>31</sup> For this reason, international law cannot simply circumvent national states in imputing rights and duties to subjects of law other than states, and the direct effect of international law within national societies is not easily realized. Despite these qualifications, nonetheless, before 1945, international law had not yet been constructed as a categorical legal framework to position other actors alongside sovereign states, and it was only after 1945 that the state was dislodged as the sole holder of rights and duties under international law (see Bederman 1995:

<sup>29</sup> *Jurisdiction of the Courts of Danzig*, Advisory Opinion, 1928 P.C.I.J. (ser. B) No. 15 (Mar. 3) 37.

<sup>30</sup> This statement is made despite the fact that Lauterpacht (1950: 33) was able to claim: ‘It is in the Charter of the United Nations that the individual human being first appears as entitled to fundamental human rights and freedoms’.

<sup>31</sup> Also identifying limitations to remedies for private persons under international law, see Galligan and Sandler (2004: 42).



367). Although some of its normative elements were anticipated in pre-1945 legal discourse and practice, the legal order that has developed since 1945 is distinguished by the fact that, in addition to states, other actors can claim legal personality, and other actors, including singular persons, can claim rights under international law, which are derived directly from international instruments.<sup>32</sup> As a basic point of principle, the construction of some international norms as having *erga omnes* status necessarily means that rights and duties of individuals are defined and protected under international law (Shelton 1999: 49; Nollkaemper 2003: 632).

This change in the essential emphasis of international law found expression, first, in the principles of criminal law used to prosecute perpetrators of war crimes in the aftermath of World War II. One inevitable result of the war crimes trials in Nuremberg and Tokyo was that the traditional positivistic account of international law as a body of norms generated by states and obligatory only for states was relativized. However cautiously and variably, these trials gave weight to the idea that international law can reach beyond and into state law.<sup>33</sup> They indicated that some international law applies directly to other actors apart from states, such as organizations and individuals, and that, both alongside and within states, a number of very different bodies possess a legal personality, entailing rights against abuse and obligations not to abuse, under international law (Broomhall 2003: 20; Partlett 2011: 274). It was clearly argued in the background to these trials that laws of national states that are repugnant to individual rights do not protect guilty parties from criminal penalty and retribution (Finch 1947: 22; Weil 1963: 805; Peters 2014: 15). In the Charter and judgment of the Nuremberg

<sup>32</sup> For classical analysis see the following claim: 'We can safely say that international law applies to states in their relationship with each other. But that response is far from complete. I will say only that international law today applies directly to individuals (for example, in their responsibility for their conduct in war, or in their rights regarding fundamental freedoms); and in some circumstances indirectly (as when they are required, through the intervention of necessary state legislation, to comply with UN trade sanctions against a particular country)' (Higgins 1994: 12–13). For further key discussion, see the following observation: '[O]ne nonstate actor that necessarily participates, directly and indirectly, sometimes formally but mostly informally, singly and with others in numerous ways, and that has rights and duties under international law, is the individual' (Paust 2011: 1001). On the international legal personality of individuals see Cançado Trindade (2011: 17, 110). See also exemplary analysis in Partlett (2011: 278). On the earlier origins of this concept, see Portmann (2010: 126). In support of the claim that private individuals have claim to immediate rights and duties under international law, see also Sieghart (1983: 21), Paust (1992: 51, 62), Buergenthal (1997: 722) and Kälin and Künzli (2009: 15).

<sup>33</sup> This was expressed in Art 6 of the Charter of the Nuremberg Tribunal. For analysis see van Sliedregt (2012: 61).



Tribunal (1949: 41), it was expressly stated that crimes against international law are the work, not of 'abstract entities', but of single natural persons. Ultimately, the principles of singular personal responsibility for atrocity underpinning the Nuremberg trials were formalized by the ILC in 1950. Similarly, the Genocide Convention (Art IV) implicitly identified individuals as holders of inalienable actionable rights under international law.

This change of emphasis in international law was reflected, second, in the fact that the main human rights instruments taking effect in the decades after 1945 began to construct individuals as holders of rights in relation to the states to whose jurisdiction they were subject, so that rights could be claimed by individuals against different branches of their own states. As mentioned, the ICJ did not hear complaints from individual persons. However, leading judges in the ILC interpreted Art 56 of the UN Charter as imposing duties on states to recognize and protect the rights of individuals (Lauterpacht 1950: 152–9). The principle of general singular rights holding was then articulated more clearly in later UN documents: notably, in Art 2 of the ICCPR, in Art 5 of the Convention on the Elimination of All Forms of Racial Discrimination (1965) (see Randelzhofer 1999: 23).<sup>34</sup> The ICCPR provided for individual petition to the UN Human Rights Committee. Moreover, the 1967 Protocol Relating to the Status of Refugees implied individual rights of protection against enforced refoulement. The principle of individual rights obtained particular emphasis under the ECHR, Art 1 of which allowed individual petition to the European Commission of Human Rights. In *Lawless* (1961), the principle was established that the Commission had standing analogous to that of sovereign states, thus facilitating individual access to the ECtHR (see Gormley 1966: 111). The consolidation of singular rights was then reinforced through a series of important cases heard by the ECtHR in the 1970s.<sup>35</sup> Singular rights were also cemented in Art 44 of the ACHR, which allowed any persons, natural or legal, to file complaints and petitions to the Inter-American Commission on Human Rights (Merton 1992: 170–72). In its second advisory opinion (1982), the IACtHR emphatically separated human rights conventions from conventional treaties, stating that, in entering such conventions: 'States can be deemed to

<sup>34</sup> Sohn (1982: 11–12) defines four stages in which individual persons acquired rights under international law. On this account, these stages were: (1) the U.N. Charter; (2) the UDHR; (3) the ICCPR; and the ICESCR; subsequent additional conventions.

<sup>35</sup> See below p. 410.

submit themselves to a legal order within which they [...] assume various obligations, not in relation to other states, but towards all individuals within their jurisdiction'.<sup>36</sup> The IACtHR thus indicated that the ACHR did not belong to the series of 'multilateral treaties of the conventional type', but that its 'object and purpose' was the 'protection of the basic rights of individual human beings [...] both against the State of their nationality and all other contracting states'.<sup>37</sup>

As implied, this expansion of the concept of legal subjectivity after 1945 was not restricted to single persons. Such widening of international legal subjectivity also became evident in the fact that various international organizations, including the UN itself, could acquire legal personality, and they could act as distinct bearers of legal rights and legal duties under international law (Kelsen 1950: 329). The legal personality of the UN was established in the seminal early opinion of the ICJ, the *Reparation* case (1949), in which the personality and obligations of the UN were deduced, in part, from its functions in maintaining public order and serving the international community (Arsanjani 1981: 134; Shelton 1999: 156; Hernández 2013: 28). This meant that the UN was able to bring claims against state actors in cases in which its representatives had suffered damage, and it could accept liability for wrongful actions by its own agents, for instance peacekeeping forces. To this degree, the UN assumed a personality distinct from the single states that it comprised and from the treaties that gave rise to it, and it acquired partly autonomous status in international law. The implications of this for the inter-state domain were far-reaching.<sup>38</sup> Progressively, moreover, other inter-state actors, alongside the UN, were able to claim some (at least derivative) legal personality.<sup>39</sup> This obviously included other intergovernmental organizations. For example, in 1980 the WTO was eventually certified as possessing legal personality under the ICJ's interpretation of its agreement with Egypt in 1951.<sup>40</sup> Yet, to some degree, this also included NGOs. In some cases, NGOs began to

<sup>36</sup> IACtHR Advisory Opinion OC-2/82 of 24 September 1982.

<sup>37</sup> IACtHR Advisory Opinion OC-2/82 of 24 September 1982.

<sup>38</sup> Bederman (1995: 279) sees this case as creating an idea with 'revolutionary' implications for the development of international law.

<sup>39</sup> See below pp. 404–7.

<sup>40</sup> The view expressed is that 'international organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties': [1980] ICJ Rep 89–90.

evolve after 1945 as entities with a certain legal autonomy in relation to their constituents, not fully bound a priori by the dictates of clearly defined political agreements and treaties, and operating in a sphere of international law that was relatively autonomous against single state objectives (White 2005: 55).

On these different counts, the decades after World War II witnessed a deep constitutional revision of the basic normative structure of international society. At the centre of this was a quite intense transformation of international law, and, as a result, a reconfiguration of the character and position of the national constitutional state. Most obviously, the transformation of international law altered the role of national states in the inter-state arena. As stated above, these processes were always rather uncertain, as core texts of international law after 1945 strongly endorsed the sovereignty of states. Nonetheless, growing impact of international human rights laws relativized classical understandings of states as fully sovereign actors, whose engagement with other states, through treaties and bilateral agreements, was freely determined. In addition, the transformation of international law altered the state in its internal constitutional formation, and, in this regard too, it modified constitutional constructions of state sovereignty.

First, the growing power of international law called into question the presumption, expressed in classical constitutional doctrine, that the public legal order of the nation state forms a single normative system, which governs the activities of all bodies and all persons within a given society. Instead of this, international law began to promote the idea of a multi-centric or overlapping constitution, in which the classical hierarchy of national public law could be either challenged or supplemented by norms originating, and enforceable, in the international domain. As a result, the growth of international law rendered fragile the classical constitutional principle that national states define the primary legal obligations for their subjects. Changes in legal doctrine and practice raised the possibility (however tentatively) that individual persons could be constitutional subjects of national and international law at the same time. This implied that rights inhering in international legal norms could prevail over obligations derived from national citizenship, and it meant that persons under law could operate within two legal systems at the same time, such that norms expressed by one system could be appealed through reference to norms expressed in the other system.

Most notably, however, the relativization of national sovereignty in the emergent system of international law began to cast doubt on the basic normative substructure of classical constitutional law. The transformation of international law began to express the cautious presumption that primary acts of national constitution making could only have restricted authority as sources of governmental legitimacy, and that certain norms (especially human rights), articulated at the level of international law, must pre-determine the essential scope and content of constitutional norms in national political systems. In other words, the transformation of international law had the result that national constitutional laws could only be seen as fully valid if they comply with international human rights law. This meant, in essence, that international law placed prior restrictions on the basic classical source of constitutional norm construction: *on national constituent power*. In fact, the transformation of international law had the clear implication that constituent power could not be exercised, even within national territories, in strictly free and spontaneous fashion, and that states could not derive their legitimacy exclusively from free acts of will formation of the sovereign nation. In this last respect, the rise of international law after 1945 suspended the primary and original norm of national democracy, and it meant that national governments were obliged to align their founding laws to pre-defined legal principles, especially principles distilled from human rights instruments. This was clearly visible in early UN practice. The early instruments of the UN expressly promoted the self-determination of national states and their populations as a political ideal. This was formally declared in UN Charter Art 55, although it only acquired real legal meaning in General Assembly resolutions of 1960.<sup>41</sup> However, the UN also placed powerful restrictions on this ideal. This was especially the case in Articles 2(2) and 6 of the Charter. These articles implied that self-determination could only be pursued within certain prior normative constraints, that legitimate polity building presupposed recognition of international norms, and that the unrestricted exercise of national constituent power could not be invoked on its own as a legitimate basis for a polity.

In consequence, the rise of international law after 1945 began to create a legal/political system in which international norms were able, progressively, to penetrate, and *constitutively* to determine the most essential processes of national political foundation. Most particularly,

<sup>41</sup> See p. 121 below.

this meant that national institutions increasingly explained their legitimacy, in part, not as the result of radically founding sovereign acts, but by translating into national laws norms that were already expressed and consolidated in realized legal form, in international law.<sup>42</sup> Accordingly, vital dimensions of new national constitutions were often designed through the transplanting of norms from international instruments and international case law into domestic constitutional documents. This was especially notable because the increasing intersection between international law and national constitutional law occurred at a time, after 1945, when few national states were reliably formed as such, and the rise of international law coincided with a rapid proliferation of states, caused by conjoined processes of post-authoritarian transition and decolonization. This meant that in many societies international norms became inextricably interwoven with original processes of state formation and polity building: international law often became a basic source of statehood.

Overall, after 1945, the rise of international law began to create a legal/political system in which national and international dimensions of law making were closely articulated, and international law shaped national constitutions in a number of ways. After 1945, national political systems were defined, albeit very gradually at first, by the fact that states drew at least part of their inner normative order from a legal domain that was elevated above national jurisdictions, and decision making in national society was guided, in part, by an external normative structure. Of course, needless to say, international law remained formally and doctrinally distinct from domestic law; the case law of national and international courts remained strictly separate, and courts in the national and courts in the international arenas applied very different doctrines. Underlying the political system that emerged after 1945, however, was a shift in the legitimational substance of the national political system. To an increasing extent, the external exercise of national sovereignty of constituent power was displaced as the primary source of constitutional legitimacy. To an increasing extent, already existing norms, instead of norms constructed *ex nihilo*, were defined as the basic constituent source of governmental legitimacy and legal inclusion. The legitimacy of national courts and institutions was, at least partly, constructed through a global constitution.

<sup>42</sup> See pp. 122–4 below.

## COURTS AND THE GLOBAL POLITICAL SYSTEM

In parallel to the rise of international organizations, the emerging legal and political system after 1945 was defined by the fact that, as states extracted some of their legitimacy from compliance with international norms and international judicial rulings, interaction between courts and judiciaries, positioned at different locations in global society, became an increasingly important source of legal norm construction. Indeed, communication between different international courts, between international courts and domestic courts, and between the domestic courts of different states, began to perform vital ius-generative, even constitutional, functions. This occurred both in the international domain and in national societies, and norms produced through inter-judicial exchanges were often accorded distinctively high standing. The period after 1945, generally, witnessed a broad transfer of political authority from legislatures to courts, and courts slowly assumed powers in relation to other branches of government, which would have been inconceivable in classical national democracies.<sup>43</sup> Quite uniformly, this gave rise to a general *judicialization* of political decision making and legislation, both in the international domain and within national states.<sup>44</sup> Increasingly, courts became vital sources of legal and structural formation at different points in the global political system, and they began to assume powers to make laws, sometimes with constitutional standing, and to perform general functions of normative inclusion, which had traditionally been reserved for strictly political institutions.

This global rise in judicial authority was most obvious in the growing number of international courts after 1945, which led to an increased judicial promotion of international law, and especially human rights law. Initially, this increase began slowly, and at first international courts had only rather limited reach. Nonetheless, the ICJ was founded in 1946, and the ECtHR was established in 1959, both of which assumed increasing impact on national legislation. The number of international courts was then augmented in the 1970s and 1980s, and

<sup>43</sup> Note the use of the term 'judicial review revolution' to describe these changes in the fabric of democratic polities in Renoux (1994: 892). Some political scientists have observed that pure parliamentary sovereignty has 'faded away' across the globe (Ginsburg 2003: 3).

<sup>44</sup> For selected near-classical literature on the judicialization of politics in recent decades see Tate (1995: 27), Hirschl (2000: 104), Baudenbacher (2003: 397), Wellens (2004: 1180–81), Commaile and Dumoulin (2009) and Teitel (2011: 216). On the more specifically national dimension of this see Hirschl (2007: 723). More generally see, Hirschl (2004). Additionally, see Ferejohn (2002: 41, 44) and Schneiderman (2008).

it escalated dramatically towards the end of the twentieth century. By the first decade of the twenty-first century, there were no fewer than twenty-five permanent international courts, covering different regions and different areas of law. Naturally, the jurisprudence of such courts was originally circumspect, and the ability of international courts substantially to penetrate national jurisdictions was severely restricted until the 1970s. Self-evidently, as discussed, the domestic reach of international courts still remains subject to clear limits today. However, even where they lacked broad powers of enforcement, international courts typically fostered a presumption in favour of human rights as essential elements of the global grammar of legitimacy, and they slowly spelled out norms that penetrated national legal systems, and cut through the historical boundaries between states. In particular, the fact that some international courts were entrusted with responsibility for interpreting human rights charters, and were in some circumstances able to hear cases referred upwards from national states, meant that these courts gradually produced a body of free-standing jurisprudence, which implied certain constitutional ground-rules for international society as a whole. In recent years, the authority of international courts has increased exponentially, and some courts are now even able to steer policy-making choices in national states.<sup>45</sup>

Of at least equal significance in the global growth of judicial power, however, is the extent to which the rise of international courts strengthened, and in fact often re-defined, the position of superior courts within national societies. The more sharp-eyed observers of the rise of international law after 1945 were aware that the impact of international law was not reserved to the strictly international sphere; they saw that international law began to confer elevated standing on domestic courts, and they quickly identified national courts as key instruments in the domestication, promotion, and even in the formation, of international law.<sup>46</sup> In particular, the increasing prominence of

<sup>45</sup> By way of example see the IACtHR ruling against Mexico in *Rosendo Cantú* (2010), which prescribed provision of special care services for female victims of sexual violence.

<sup>46</sup> In different ways, theorists of international law after 1945 argued that the conjunction between courts began to create a legal/political system situated between the distinctively national and the distinctively international domains, rendering classical positivist accounts of monism or dualism as legal-systemic characteristics rather outmoded. One early commentator (Falk 1964: 444) noted that domestic courts acquired a simultaneously 'national and international character' because of the rising power of international law and he used this to question the strict distinction between international and domestic law (1964: 170). Other key observers noted that, through the function of courts in applying international human rights norms, national courts began to play an active role in developing international law – or, more accurately, *transnational*



international courts placed national courts in a distinctive position in their own societies, and national courts often acted as *legal transformers*. That is to say, in many states, courts assumed increased powers in the reviewing of new legislation, and they were widely required to mediate higher laws from the international arena into authoritative principles to regulate national administrative practices and national constitutional interpretation. Through this process, courts often assumed heightened importance in the production of constitutional laws, assimilating and reconstructing principles of international law as domestically binding norms. This role of national courts was consolidated, most obviously, by the fact that, after 1945, national constitutions increasingly provided for the creation of Constitutional Courts, which were expected either to oversee the compatibility of new laws with domestic human rights provisions (largely based on internationally defined principles), or to ensure conformity between national laws and human rights law, either directly or indirectly based on international norms. international laws. Such formal commitment to the recognition of international law as a basis for national law making was not entirely novel. For instance, the German Constitution of 1919 (Art 4) and the Spanish Constitution of 1931 (Art 7) had both given some recognition to international law. This principle was also implied in the American constitution of 1789. In fact, long before 1945, the earliest experiments in constitutional organization that allowed courts to review legislation had reflected by the presumption that domestic courts should use norms of international law as a basis for authoritative review.<sup>47</sup> After 1945, moreover, this principle was not cemented overnight; obviously, it took decades until it was broadly established. From 1945 onwards, however, a constitutional model gradually began to become widespread in which international law underpinned key aspects of domestic jurisprudence, and superior national courts, especially Constitutional Courts, were given authority to check outcomes of legislative processes in the national domain, often using international law or principles derived from international law as a normative standard.

law – by virtue of their interaction with international tribunals. See, classically, Jessup (1959: 63). See recently Nollkaemper (2012: 1, 81, 301). Scelle (1932: 56) had already anticipated this phenomenon before 1945.

<sup>47</sup> For example, after 1918, Kelsen's Austrian constitution of 1920, which provided the basic design for later experiments in judicial constitutionalism, was in part shaped by the idea that one system of norms could pervade society in its entirety, with international law as the highest source of such norms. See the theoretical basis for this in Kelsen (1920: 215).



After 1945, consequently, the rise of judicial review usually led to a deepening interaction between domestic and international laws. In fact, as provisions for judicial review ordinarily implied that domestic courts could apply or consider international law to scrutinize acts of other branches, judges often saw the reception of international law as a device for increasing their own domestic authority. As a result, courts acquired very strong incentives to intensify the penetration of international law in domestic law, and they often locked domestic laws into the international legal system to maximize their own institutional and constitutional influence. For these reasons, national courts began to participate in shaping a cross-national jurisprudence, increasingly drawing authority from international law to act against other branches of government in their own polities (see Nollkaemper 2009: 75; 2012: 44, 67). Indeed, the prominent reference to human rights within the emergent legal order meant that, in many cases, authority for legislation was partly transferred, via human rights norms, from nationally mandated legislatures, to normatively authorized judicial bodies (Lauterpacht 1958: 156).<sup>48</sup> Overall, the growing power of international human rights law and the closely linked increase in judicial power meant, indirectly, that international norms and judicial rulings were often present or at least *co-implied* in national constitutional law and in acts of national legislation.

For these reasons, the rising importance of international law after 1945 slowly produced a legal/political system, in which courts became authors of essential constitutional norms in national polities. As discussed more extensively below, the constitutional force of judicial power ultimately became most pronounced in new democratic states, in which the ascription of extensive powers of review to national courts, linked to international courts, was almost invariable. In most recent transitions to democracy or broader processes of systemic transformation, courts often spontaneously invoked international law to alter, or even to initiate legislation, and to elaborate certain basic norms through society.<sup>49</sup> However, this judicial emphasis also became pronounced in established democracies, including political systems in which presumptions in favour of legislative supremacy had previously been constitutionally immovable. In such polities, notably France, and

<sup>48</sup> At the inception of the modern international-legal system, it was noted that many legislative functions, especially those regarding extra-national phenomena, could be entrusted to judicial bodies. This point is made in Lauterpacht (1933: 263, 267; 1958: 156).

<sup>49</sup> See discussion of Hungary, Poland at pp. 216–18 below.

some Scandinavian countries, the principle of legislative supremacy was only very gradually displaced. Yet, even in such cases, powerful courts of review, applying international law, came to sit alongside and limit the authority of parliamentary bodies,<sup>50</sup> effectively tying these polities into a multi-level legal/political order, in which courts acted as structural hinges between different tiers of an international judicial system.<sup>51</sup> Now, with variations, this transnational judicial emphasis has become almost universal, and it is able even to determine the constitutional shape of polities in which the immediate reception of international law has traditionally been very curtailed. For instance, this judicial emphasis penetrates polities (e.g. China) (Zhu 2010: 109), which have not yet evolved fully enforceable democratic constitutions and which historically rejected international law as Western imperialist artifice; it penetrates polities, for example in Southern Africa, whose basic domestic legal order remains uncertain, pluralistic and often informal (Prempeh 2006: 1241; 2007: 505); to some degree, it even penetrates polities, for instance in North Africa, where historical and cultural preconditions pull against easy acceptance of universal international norms (El-Ghobashy 2008: 613). Even common-law states gradually devised mechanisms for the judicial mediation of international law into domestic law, and, in some cases, they evolved hybrid constitutions, adding some elements of civil-law constitutional models to their basic common-law structure. In Canada, for example, the Supreme Court developed the general doctrine that interpretation of Canadian law should be informed by international instruments, even where these are not incorporated.<sup>52</sup> In the UK, a polity traditionally closed to absolutely binding higher norms, courts have expanded their capacities for influencing domestic public law and for reviewing administrative acts, and they have proportioned domestic public-legal norms to international human rights norms.<sup>53</sup>

<sup>50</sup> For instance, the end of legislative supremacy in France was closely linked to the entrenchment of international human rights norms, following the ratification of the ECHR in 1974. On the powers of review resulting from judicial reforms and human rights law in the UK, see Kavanagh (2009: 275). For penetrating discussion of the 'shift in power from politicians to judges' under the Human Rights Act see Woodhouse (2004: 152–3). On analogous ambiguous 'acceptance of judicial review' in Norway, see Follesdal and Wind (2009: 163). For a more general picture, see Lasser (2009: 24).

<sup>51</sup> See excellent analysis in Bamforth and Leyland (2003: 161).

<sup>52</sup> See *Baker v Canada (Minister of Citizenship and Immigration)* (1999).

<sup>53</sup> See pp. 385–7 below.

Quite generally, therefore, the growing force of international law after 1945 gradually created, at least in broad contours, a semi-autonomous transnational judicial order. Courts began to communicate with each other in partial normative independence of national legislatures and executives, and different national courts now cite international law or rulings of international courts to elevate their own constitutional position within domestic polities, to strike down legislation, to oppose executive acts, or even to promote new constitutional norms (Nollkaemper 2012: 44). After 1945, in short, national democracy was progressively refigured on a model of *transnational judicial democracy*, and this slowly became a common template for democratic political systems.

Owing to these tendencies, different courts, typically acting in conjunction with other courts, have often assumed powers close to those granted to constituent actors in classical constitutions. In this respect, too, constituent power has lost its classical standing as a primary source of national legal norms. In fact, courts applying international law and courts applying domestic law now often act together to dictate and transform the constitutional structure of national societies, and in fact to shape the constitutional structure of global society more widely. It is now quite commonly the case that courts, importing transnational legal principles, define constitutional norms for the polities in which they are located. However, the exercise of constituent power by courts is not one simple phenomenon. In fact, the filtration of norms from international courts into domestic constitutional law has taken place in a number of different ways, and for a number of different reasons.

First, the constituent role of courts developed because, simply, international courts acquired vertical powers to police national states, both through appeal verdicts and through advisory opinions. International courts, following positivist principles of state autonomy, had originally focused primarily on practical processes of dispute settlement and interstate arbitration. After 1945, however, international courts progressively promoted an independent system of jurisprudence, and – in so doing – they established themselves as quasi-constitutional bodies, able, relatively autonomously, to construct and promulgate norms of public order for subordinate actors. This tendency was heightened by the fact that many states after 1945 were new states, and they sought to demonstrate their legitimacy as states through membership of the

UN and through compliance with the directives of the ICJ, usually through assimilation of international norms in national jurisprudence. As a result, international courts increasingly re-defined their functions and typically assumed active responsibility for general standard setting, norm advancement and de facto legislation, giving directions to national states, or to courts inside national states.<sup>54</sup>

In making this claim, caution is required. The ICJ, for example, has no powers of review relating to national laws, and it cannot issue rulings that are binding except on parties to a single case. As discussed, further, Art 38 of the ICJ statute declares that the court can only apply rules recognized by contesting states, thus seemingly restricting the court's remit to adjudicatory functions. However, the same article of the ICJ statute also determines that judicial decisions are sources of international law, which implicitly ascribes law-making authority to the court. As discussed, the ICJ began in early opinions to suggest that its jurisprudence had obligatory force for all states.<sup>55</sup> Generally, the systemic nature of international law presupposed that courts were able to distinguish international law from the will of single states, and they were required to promote the law of different human rights instruments and conventions as norms that transcended the resolution of simple, single inter-state disputes. Moreover, the rising force of the concept of *jus cogens* of necessity conferred an overarching norm-constitutive role on courts. By the late 1970s, notably, regional international courts openly defined themselves as binding norm providers, often providing directives, not only for national single states but for courts within these states. For example, the ECtHR ruled that its functions extended beyond resolution of singular disputes, and it was obliged to 'elucidate, safeguard and develop the rules instituted by the Convention'.<sup>56</sup> As such, it assumed a position at the top of a hierarchically ordered cross-national legal system.

Second, the constituent role of courts evolved because the implementation of international instruments presupposed that national courts would play a key role in enforcing international norms, both norms established by the UN for the international community and those established by other international instruments (Amerasinghe 1990: 87–9; McGoldrick 1991: 13). As most human rights instruments attributed rights under international law to single persons, it was

<sup>54</sup> See on this change in the role of courts Ginsburg (2005: 25), Shany (2009: 81), Teitel and Howse (2009: 960) and Bogdandy and Venzke (2011: 980, 993).

<sup>55</sup> See p. 81 above. <sup>56</sup> *Ireland v United Kingdom* – 5310/71 [1978] ECHR 1.

commonly expected that cases with implications for international law would be filed, in the first instance, in domestic courts, and domestic courts would resolve most such cases. This created a situation in which national courts, sometimes even local courts, were required to consider international law and to decide human rights questions, and they were placed in a direct relation to, or even in a constructive dialogue with, international judicial bodies. In most international instruments, notably, it is implied that the universality of a legal norm does not entail universality of application, and domestic courts are expected to interpret and apply international law in distinct, context-sensitive fashion. For example, the ECtHR has repeatedly stressed the need for diversity of protection for human rights.<sup>57</sup> For the IACtHR, although much more reticent than the ECtHR in acknowledging a margin of appreciation, the Pact of San José gives states some latitude in defining the necessary measures to protect rights and liberties. Overall, moreover, international instruments have tended to promote doctrines of *proportionality* to give effect to international norms (see Legg 2012: 178). These doctrines, while leaving scope for nation-specific practice, have bound national courts into an overarching normative community, yet they have also designated national courts, within national contexts, as vital actors in the construction and enforcement of a system of inter- or transnational law. Perhaps unintentionally, this constitutive role of national courts has been widened through the common presumption that local remedies must be exhausted in national courts before remedies can be sought in international courts.

This principle was expressed in ECHR (Art 35) and in ACHR (Art 46).<sup>58</sup> For the UN, this was spelled out in *Interhandel* (1959), in which the ICJ described the ‘rule that local remedies must be exhausted before international proceedings may be instituted’ as a ‘well-established rule of customary international law’ (see Shany 2007: 27; Thirlway 2013: 611).<sup>59</sup> ICCPR Art 41(1)(c) also states that local remedies must be exhausted before referral of a case to the Human Rights Committee. Typically, such provisions have required that states offer remedies that reflect international expectations, and, in so doing, they lead to a direct transmission of international norms into domestic practices. Historically, of course, the customary law on exhaustion of local

<sup>57</sup> See *Sahin v Turkey* – 44774/98 [2005] ECHR 819.

<sup>58</sup> See also Art 11(3) of International Covenant on the Elimination of All Forms of Racial Discrimination.

<sup>59</sup> [1959] ICJ Rep 27.

remedies had been designed to preserve formal state sovereignty, and in many cases national states only acceded to human rights conventions if they were allowed to ensure compliance through domestic remedies (Amerasinghe 1990: 425). After 1945, however, the growing power of international courts meant that many states were pressured to adjust their provisions for remedies to extra-national norms, to guarantee heightened protection for singular rights, and so to position national courts in a transnational system of rights.<sup>60</sup> In some cases, national courts took international principles regarding domestic remedies as a basis for augmenting their independence and influence, using the insistence on national guarantees for remedies consonant with international human rights law to consolidate their own position in their domestic polities (Nollkaemper 2012: 36). In each respect, courts began to act as *structural hinges* between different levels of a transnational legal/political order, serving to translate international directives from the international to the national domain, to enforce compliance with international law within the national institutional order,<sup>61</sup> and, both within and above national jurisdictions, to elaborate a free-standing corpus of jurisprudence, with strong constitutional influence.

The constituent role of courts developed, third, because, across national boundaries, individual judicial bodies and members of different national judiciaries (judges, lawyers, advisors) began to show increasing regard for judicial rulings in other jurisdictions, both national and supranational. This had the result that, informally at least, laws with constitutional effect were transplanted from one jurisdiction to another, comparative law acquired additional weight across jurisdictions and presumptions in favour of certain norms became widespread. Through this process, an increasingly interlinked transnational or *trans-jurisdictional* judicial community evolved, in which judicial transplants impacted broadly on different dimensions of national legal formation – whether on constitution drafting, on legislation, or on results of litigation. Numerous examples of this can of course be found, even in jurisdictions that tend to view judicial borrowing as a dilution of national constitutional principles.<sup>62</sup> Central to this phenomenon, in general,

<sup>60</sup> See the classic case: *Velásquez Rodríguez v Honduras*, IACtHR. (Ser. C) No. 4(1988) 64, 66. See for analysis Cançado Trindade (1979: 742; 1983: 55, 127). A further example of this is *Smith and Grady v UK* (1999) 29 EHRR 493. See wider discussion of this process in Latin America on pp. 237–8, 246 below.

<sup>61</sup> For an explanation of this, see Benvenisti and Downs (2009: 60).

<sup>62</sup> For a thorough, level-headed study of this process in the USA, for example, see Cleveland (2006). See also Jackson (2010: 272).

is the fact that national courts are increasingly expected to consider for the normative directives of international courts, and that human rights norms are more uniformly accepted, at least in principle, as basic premises for legislation and judicial finding.<sup>63</sup> Acceptance of these general parameters has meant that extreme divergence between courts is less probable, semi-monistic cross-penetration between courts has been fostered and simplified and historically rigid distinctions between different bodies of national jurisprudence have been eroded. This has also been underpinned by the rapid rise of proportionality as a doctrine to support judicial ruling. Proportionality standards have locked together different national jurisdictions as they provide a generic, although flexible, measure for judicial validity across national differences.<sup>64</sup> In so doing, moreover, proportionality standards have opened broad channels of communication between different judiciaries, they have created a wide terrain for inter-judicial comparativism and dialogue and so generally intensified judicial authority (Cohen-Eliya and Parat 2013: 134–5; Stone Sweet and Mathews 2008: 161).

The constituent role of courts has been consolidated, fourth, because of the basic open texture of international law, and the importance that this imputes to judicial bodies in the development of the law. International law, clearly, is derived not in the fashion of classical constitutions, from original constitution-making processes, but rather from piecemeal interpretive procedures. As a result of this, courts have of necessity acquired key law-making functions, and, at different points in the global system, the practice of different courts has played a core, semi-constituent role in elaborating the foundations of international law (Strebel 1976: 319). Tellingly, for example, one commentator has observed that the framers of the UN Charter did not remotely envision that it would become the basis for a ‘vast and multifarious corpus juris’ (Schachter 1995: 2). The fact that it did so was the result of an ongoing judicial elaboration of its primary principles, in which many different courts participated. In the first instance, notably, UN law was promoted, not solely through the judgments of the ICJ, but also through its wider interpretive acts. This included the issuing of advisory opinions (Brown 2007: 74–5), which were not required to meet the test of state consent prior to their enunciation (Amerasinghe 2009: 202). However, principles of UN law and international law more generally then filtered into

<sup>63</sup> For general accounts of this see McCrudden (2000: 501), Slaughter (2003: 204, 210) and Waters (2007b: 636, 691).

<sup>64</sup> See pp. 395–403 below.



the jurisprudence of other courts, both international and national. As a result, a variety of judicial institutions have contributed, both formally and informally, to the continuing interpretation and expansion of international law. Indeed, domestic courts have at times constructed new high-ranking norms for their own national polities.<sup>65</sup>

In broad terms, the decades after 1945 saw the construction of a new model of legal order and law production, which substantially transformed the constitutional models that first characterized modern society and its inclusionary structure. The first defining feature of the slowly evolving post-1945 legal order was that much national law, including constitutional law, was in some respects pre-defined by international law. A further defining feature was the cross-national production of laws, often with quasi-constitutional rank, by judicial bodies. Of course, it is self-evident that, in both respects, this was initially a tentative and rather implicit process; still today, the entrenchment of international norms in national societies remains fragile and variable. However, at a formal level, the post-1945 period was marked by a revolutionary shift in the design of the global legal/political system. The normative implications of this shift were repeatedly, and often egregiously, denied, both by states and by theorists of law. But they did not disappear. This normative shift was twofold: it transferred the conceptual basis of legitimacy, in part, from the *constituent power* of national populations to internationally defined *human rights norms*, and it transferred the practice of constitutional legitimation, in part, from legislatures to judiciaries. In both respects, international human rights norms, applied by strong judicial bodies, began to act as principles in a *two-tier constitution*, which integrated national political exchanges into a global political system and enunciated normative principles to regulate both the national and the extra-national dimensions of this system at the same time. This constitution evolved, in an eminent sense, on a *transnational* foundation: it combined elements of national and international law to provide higher-order norms to support acts of legal inclusion, both in national societies and in global society more widely. At the centre of this constitution was a deep revision of the basic inclusionary structure, which had historically underpinned the emergence of society's political system. After 1945, notably, international human rights slowly supplanted national sovereignty as the ultimate reference for defining the validity

<sup>65</sup> See more extensive discussion and examples of such cases on pp. 282–90 below.



of law and for promoting law's inclusionary force. International human rights norms became primary norms of social inclusion, and international human rights increasingly formed the deepest sources of inclusionary authority, co-implied across all levels of the global legal/political system, and impacting deeply, through different sources, on national political institutions.

## CHAPTER THREE

# THE CONSTITUTION OF INTERNATIONAL LAW: A SOCIOLOGICAL APPROACH

As discussed, the rising importance of international law after 1945 was marked by growing hostility towards positivist interpretations of international legal order, which defined the sovereign nation state as the main unit of analysis in international society. This was especially visible in the widespread construction of single persons as rights holders under international law, which was perceived as a principle that pierced the classical order of national sovereignty (Jessup 1947a: 406–8). Naturally, positivist ideas did not disappear in the post-war period. Many theorists retained only slightly modified variants on the positivist model of state authority (St Korowicz 1958: 150–51). Even theoretical architects of the UN, who were conceptually sympathetic to monist concepts of international law, recognized national sovereignty as the cornerstone of international society. This was clearest in the relevant writings of Kelsen (1944: 208). Core documents of international law at this time also persisted in employing positivist constructions of sovereign statehood. As mentioned, the inviolability of state sovereignty was clearly enshrined in Art 2(1) and Art 2(7) of the UN Charter and, in Art 38 of the Statute of the ICJ. An enduring positivist bias was also reflected in the International Law Commission's *Draft Declaration on Rights and Duties of States* (1949), Art 1 of which declared as follows: 'Every state has the right to independence and hence to exercise freely, without dictation by any other state, all its legal powers, including the choice of its own form of government'. Moreover, the UN's residual commitment to national sovereignty was strongly reflected in documents pertaining to the process of decolonization, and to related rights

of national self-government. The *UN Declaration on the Granting of Independence to Colonial Countries and Peoples* (1960) endorsed classical ideas of sovereignty, and it stated that all peoples have an inalienable right to complete freedom, to the national exercise of sovereignty and to the integrity of national territory.<sup>1</sup> Later, Article 1 of the ICESCR (1966) also remained close to sovereignty-based ideas of statehood. Despite this partial persistence of positivist principles, however, after 1945, international law was increasingly conceived as a free-standing legal order, supplanting the system in which sovereign state volition formed the basis of international society. Leading observers of the post-1945 legal order defined their objective in creating a system of international human rights law as ‘the limitation of the sovereignty of States’, and they challenged the conception of the state as a dominant unit in international society (Lauterpacht 1945: 211; 1947: 77; 1950: 8; Winter and Prost 2013 350). Typically, many theorists ascribed to international law a position similar to the position of constitutional law in domestic societies, which they saw as creating ‘rights of man as against the State’ (Lauterpacht 1945: 123). Even theorists hostile to the ‘menace of internationalism’ viewed the imposition of external legal restraints on the ‘domestic jurisdiction’ of national government as a pronounced – in fact, ‘ominous’ – tendency in post-1945 legal politics (Finch 1956: 311). Across the spectrum of enthusiasm, therefore, international law was observed after 1945 as an increasingly powerful *constitutional* check on the power of sovereign nation states.

This reaction against positivism and its central category of state sovereignty has led many observers to claim that, after 1945, the growth of the international legal system was imposed externally on national states, and it marked a decisive breach with patterns of legal formation within historically formed societies. Indeed, the rise in the power of international law after 1945 is commonly observed as the result of a series of elite-led normative agreements, which were strategically designed to relativize national sovereignty, and constitutionally to curtail the powers of national state institutions.<sup>2</sup> In particular, it is habitually argued that the post-1945 system of international law was designed by the victorious allied forces after World War II to prevent the renewed collapse of national states into the extreme political

<sup>1</sup> On the re-emergence of classical ideas of sovereignty during decolonization, see Jennings (2002: 29).

<sup>2</sup> See p. 70 above.

authoritarianism that had been widespread in the interwar period (see Henkin 1999: 4; Normand and Zaidi 2007: 16; Tomuschat 2008: 22; Bates 2010: 8). This intention was of course declared in the preamble to the UDHR, which pledged to prevent renewed perpetration of 'barbarous acts', associated with interwar dictatorships. As a result, a large body of legal literature has been produced which analyses the growth of international law, and especially international human rights law, as an immediate response to the experience of European fascism between the wars (see Brownlie 1964: 450; Cassese 1989: 30). This literature usually interprets the extension of supra-positive laws in the international domain as the consequence of a wide turn toward natural-law theory after 1945, entailing a rejection both of the formal positivist principles that supported both national-constitutional and international law in the interwar era and of the monolithic ideas of state sovereignty associated with positivism.<sup>3</sup> In political theory, similarly, the claim is widespread that international human rights were promoted after 1945 for the 'guaranteed control and limitation' of national states (Vincent 2010: 106). Central to such literature, generally, is the suggestion that the period of history leading up to 1939 was the era of sovereign states, and, after 1945, national sovereignty was at least relativized by the rising force of international law, dictating a constitutional grammar for and within national states. This perception of international law has proved very enduring, and it is broadly revived in contemporary inquiry. As discussed, influential positions in contemporary legal debates claim that international law, and especially the rights of single persons prescribed by international law, have established an international countervailing power, imposing normative constraints on the powers of national state institutions, thus amounting to a *global constitution*. The rejection of state-centric positivism in post-war international law has now re-appeared in the body of literature concerned with global constitutionalism, which also construes international law as a legal order that supplants national sovereignty, and whose origins are essentially external to national states and national societies.

*Contra* such assumptions, it is proposed here that the constitutional power of international legal norms cannot be adequately comprehended if the widening force of international law, and especially international human rights law, is attributed to processes of legal formation

<sup>3</sup> See, for example, Zayas (1975: 208), Henkin (1979b: 408) and Falk (2008: 16). The natural-law basis for early UN laws was clearly formulated in Lauterpacht (1945: 49).

located outside national societies. Further, the rise of international law cannot be construed as a process that invariably *restricted* the power of national states. To be sure, at a reflexive level, the normative instruments established after 1945 through the foundation of the UN and the Council of Europe were guided by deliberate moral concerns, especially by the desire to prevent future tyranny and to promote humanitarian education. The resultant promotion of international norms also meant, as discussed, that some acts of national states were subject to international jurisdiction, and the formal autonomy of states was, in some respects, constrained. Nonetheless, if observed sociologically, the growing constitutional power of international law after 1945 also contained structural, or *inclusionary*, dimensions, and it was partly driven by inner pressures affecting national societies and their institutions. As a result, the increasing constitutional authority of international law after 1945 cannot be explained, conclusively, as an occurrence that was imposed upon national states through extra-national factors. In fact, there are clear structural reasons for the formation of a more constitutionally consolidated international legal domain after 1945, and these reasons are closely linked to classical sociological processes. At one level, most obviously, the rise of international law was propelled by pressures on the *external structure* of national states. That is, pressures on the external structure of states were registered in international law, especially human rights law, and international law helped states to organize their reactions to the changing external realities of global society. At the same time, however, the emergence of an international legal system integrating national legal and political institutions in a vertical constitution was shaped by pressures affecting states in the *internal structure* of national societies, and causes of the rise of international law can be observed in the inner inclusionary fabric of national societies.

The account of international law offered in this and subsequent chapters contains a sociological critique of the common assumption that the gradual constitutional consolidation of international law after 1945 was stimulated by normative principles, prescribed externally to national societies. Such views, it is argued throughout, are themselves too strongly obligated to positivist or dualist analyses of international law, and they separate international law too seamlessly from social and historical factors within national societies. [Chapters 5](#) and [6](#) offer a sociological account of the specific origins of international law in the inner-societal dimension of statehood, examining pressures on the inner inclusionary structure of a number of different states, which led

to the elevation of international norms to a constitutional position. This chapter, however, examines the pressures on the *external* structure of states that stimulated the growth of international law, and it proposes a sociological explanation of the constitutional force of international law by focusing on the inter-state domain of global society. On this account, by 1945, national states were becoming incapable of meeting the demands for legislation and legal inclusion generated by the external environments in which they operated, and the expansion of international law was propelled by the increasingly complex mass of relations and demands for legislative inclusion in the inter-state arena. International law was reinforced after 1945, first, because it helped national states to compensate for weaknesses *in their external dimensions*, and international legal norms allowed national states to remedy problems in their external inclusionary structure, which, as entities founded in simple assertions of national sovereignty, they struggled to resolve. After 1945, in fact, international human rights law increasingly formed an inclusionary structure for the external dimension of statehood, and, far from restricting state autonomy, this structure was often an effective precondition for the stabilization of states as sovereign actors, able to produce legislation to address the external phenomena that they encountered. Like national constitutions, the constitution of international law was produced in order to secure the inclusionary structure of the political system, both in its global and in its national dimensions, and the global constitution evolved as an external extension of national constitutions, expanding a legal order to insulate states against pressures (especially escalating demands for legislation) to which they were exposed in their external functions.

#### THE GLOBAL INCLUSIONARY SYSTEM: THE SPREAD OF GLOBAL LEGAL PHENOMENA

Observed in a sociological perspective, the rise of international law, and especially human rights law, after 1945 was induced by the fact that many national states struggled to manage their reactions to phenomena in the sphere of inter-state relations, and they were increasingly subject to strain in their external structure. After 1945, notably, inter-state society as a whole began to assume truly global dimensions, the international arena was populated by many new states and new organizations, and new legal phenomena presented unprecedented regulatory challenges to national states, both new and

established. This meant that single states were required to produce an increasing volume of law to address international phenomena, and global society as a whole witnessed an exponential growth in its basic demand for, and consumption of, law. One result of this was that classical methods for authorizing law between states were overtaxed, and states required more expansive and more easily extensible resources for producing laws and for regulating inter-state exchanges. The rise of international law, and of international human rights law in particular, becomes sociologically explicable as part of this process of structural transformation. After 1945, international law evolved as an aggregate of norms, constitutionally situated above the jurisdiction of national states, which made it possible for states progressively to meet the demands of an increasingly global society, and it helped to establish a basic inclusionary structure for the global domain as a whole.

At a most obvious level, the sharply increasing importance of international human rights after 1945 altered the inclusionary structure of society because it produced a normative basis for *intergovernmental institutions*, and it allowed states to delegate some functions to free-standing organizations. In this context, international human rights expressed a normative vocabulary to determine acts of, and between, the increasing number of organizations that acted exclusively in the international domain. In the decades after 1945, international human rights norms were widely internalized as ‘operational guidelines and directives’ by a growing range of international organizations, and they projected a normative order in which organizations operating beyond stable jurisdictions were able both to legitimate and to regulate their activities (Wellens 2002: 15). This directive function of human rights is visible, for example, in the fact that prominent international organizations, in particular the UN itself, explained their inner functions and order through reference to international human rights instruments. Notably, at its founding, the UN defined its legal basis by indicating that, under Art 24(2) of the Charter, its organs had an implicit obligation to act in accordance with guiding principles of the UN, including human rights norms (Reinisch 2001: 136; Paust 2010: 11). The UN’s legal personality was further formalized in the *Convention on the Privileges and Immunities of the United Nations* (1946). In the *Reparation* case (1949), accordingly, the ICJ construed the UN as endowed with a legal personality, able to assume and impute accountability in its exchanges with other legal persons. Even international organizations whose functions were not closely related to human rights, such as the International

Monetary Fund (IMF) and the World Bank, projected their functions, in part, as related to international human rights, and they proportioned their interaction with national states to the basic principles of public international law (see Skogly 2001: 192). To some degree, as discussed in Chapter 7, this function of rights can also be observed in large-scale economic entities, whose operations have a cross-jurisdictional dimension. At one level, the fact that international organizations defined their functions through reference to human rights meant that they could assume a legally founded personality, with corporate control over their members, and so participate in international governance in legally accountable fashion (Alvarez 2005: 264). At a different level, this use of rights by international organizations also meant that national states could easily transfer some responsibilities to inter-state organizations, and they could construct their delegation of functions to inter-state actors in legally determinate categories. In principle, this meant that inter-state bodies remained subject to legal control, and their functions were defined and regulated by a partial constitutional order.

On these points, to be sure, some caution is required. In their original conception, international organizations were not subject to human rights instruments, they were not bound by inter-state treaties, and they were not obliged to submit to formal review by judicial actors. Articles on the responsibility of international organizations were not promulgated by the UN until 2011,<sup>4</sup> and legal accountability for international organizations has traditionally been very difficult to guarantee. Indicatively, the ICJ has refused to review acts of other organs of the UN, and leading international organizations have claimed immunity from national courts. Moreover, where recognized, the international legal personality of international organizations has not been easy to translate into domestic legal personality (Reinisch 2000: 64). Notably, the UN itself still claims immunity from action in national courts under 105 of the Charter and under Art 2(2) of the 1946 Convention on the UN's privileges and immunities. Furthermore, national courts have repeatedly accepted the immunity of the UN, non-recognition of which would entail a breach of duties of national states under UN treaties.<sup>5</sup>

<sup>4</sup> In fact, the 2011 Articles on the Responsibility of International Organizations do not say anything about obligations on international organizations produced by human rights.

<sup>5</sup> See rulings in *Mothers of Srebrenica et al v State of The Netherlands and the United Nations*, Supreme Court of The Netherlands (2012); *Delama Georges, et al, v United Nations, et al*, U.S. District Court for the Southern District of New York, No. 1:13-cv-7146 (2015).



Despite this, however, the rise of rights as general international norms still produced a broad normative grammar for the emerging intergovernmental domain, which distilled principles of accountability for international organizations. This grammar in fact began to take shape at a relatively early stage, and some international organizations began to control their inner operations through rights quite soon after 1945.<sup>6</sup> This even, albeit somewhat implicitly, became visible in the UN itself, despite its special privileges in claiming immunity from suit (Reinisch 2000: 153).<sup>7</sup> In recent years, however, intergovernmental organizations, including the UN, have been more strictly held to account by inter- and supranational courts,<sup>8</sup> and they have widely been subject to supervision by human rights panels (see Peters 2014: 436). Moreover, both international tribunals and national courts have shown less deference in reviewing different international organizations.<sup>9</sup> Courts of different kinds have deemed it essential that intergovernmental institutions and intergovernmental directives should be amenable, in some matters, to some type of judicial review; in particular, they have insisted that persons employed by international organizations should have access to courts in cases of dispute.<sup>10</sup> This presumption has been widely constructed through reference to international human rights norms.<sup>11</sup> However incompletely, therefore,

<sup>6</sup> Reinisch (2008: 291) provides important support for this claim from the Administrative Tribunal of the International Labour Organization (ILOAT). Reinisch states: 'In 1957, the ILOAT held, in *Waghorn v ILO* (1957) ILOAT Judgment No. 28, that it is also "bound [...] by general principles of law". In *Franks v EPO* (1994) ILOAT Judgment No. 1333, it included alongside "general principles of law" also "basic human rights".'

<sup>7</sup> See ICJ Advisory Opinion [1954] ICJ Rep 57. Here, it was stated that, although the UN was not subject to judicial review, it could be seen as bound by express aims of the Charter, including promotion of human rights, to offer arbitral remedy for its employees.

<sup>8</sup> The claim that different courts of law are allowed to review acts of the UN acts for conformity with rights possessing *jus cogens* status was made in the *Kadi* cases in the EU courts. In 2008, the ECJ argued that laws implementing UN directives in the EU could be subject to judicial review for conformity with the rights norms contained in EU law. The ECJ used this case to harden the autonomy of EU law against international law, and to imply that the EU possessed higher human rights standards than the UN. Kingsbury (2008: 113) has explained this point, arguing that national and supranational courts can apply *jus cogens* against external governance bodies, including international organizations. Review of UN directives on grounds of derogation from human rights norms, albeit under domestic *ultra vires* provisions, is also expressed in the important UK case *Ahmed and others v HM Treasury* (2010). See below p. 308.

<sup>9</sup> For an important rejection of an international organization's claim to immunity from suit in a national court, see the Belgian Labour Appeal Court case, *Siedler v Western European Union* (2003).

<sup>10</sup> See the ECtHR rulings in *Waite and Kennedy v Germany* (1999); *Beer and Regan v Germany* (1999).

<sup>11</sup> Some observers (Reinisch and Weber 2004: 91) now see the right of access to courts as a global *jus cogens*, enforceable against all public bodies, including international organizations.

the construction of international human rights as general norms has provided elements of constitutional consistency and accountability for the inter-state domain, and it has created certain reasonably stable rules of conduct for the growing number of functions performed by international organizations (Alvarez 2005: 601).

This ordering of the intergovernmental domain through human rights played an important role in creating an inclusionary structure for global society. In particular, it meant that a number of bodies and institutions could play a role in global law making. Progressively, after 1945, the inter-state domain was populated by an expanding array of organizations, some international, some non-governmental, some political, some judicial, which assumed authority to create laws and binding norms, applicable both nationally and internationally. Such bodies typically placed their law-making functions in some relation to human rights norms. Over a longer period of time, obligations deriving from internationally defined fundamental rights norms helped to create a legal structure in which many functions could be accountably devolved to intergovernmental bodies, and these bodies could be regulated as they assumed legislative powers, classically assigned to states (see Alvarez 2002: 223; Mégret and Hoffmann 2003: 327). In these respects, human rights helped to cement an underlying legal structure for the nascent global political system, and the preconditions of the intergovernmental domain were partly based in rights.

However, the growing salience of international human rights norms had still greater implications for the global inclusionary structure because of their impact on *national institutions*. After 1945, international human rights law played a core role in allowing national states to adapt to pressures arising directly from global society. In fact, international human rights norms assumed rapidly increased prominence after World War II precisely because they promoted an inclusionary structure in which national states could address escalating demands for legislation, originating in the inter-state domain. Over a longer period of time, of course, international human rights law established a relatively hard legal structure for cross-border phenomena in many spheres of social practice, including diplomacy, road transport, medicine, sport, economic cooperation, education and scientific knowledge transfer. By the end of the twentieth century, many spheres of interaction were subject to international rules, with varying degrees of obligatory force, in which international human rights norms formed overriding constitutional directives. In the first instance, however, the growth of international

law after 1945 was induced by quite acute and immediate pressures on national institutions and national borders, and it resulted from intense challenges to national regulatory mechanisms: international law acquired increasing constitutional importance as national processes of legal authorization were overstrained. In general, the rise of international human rights law after World War II was propelled by the fact that the intensified global conflict during the war, and the accelerated geopolitical transformations following the war, had exposed national states to a mass of legal phenomena that were not specifically located in one given territory or jurisdiction, and over which, accordingly, they struggled effectively to legislate. States were increasingly required to conduct processes of law making, which extended beyond the confines of national societies, and which, in consequence, were often uncertain, and insecurely mandated. Moreover, the rise of international human rights law was propelled by the fact that, as society became more identifiably *global*, states confronted common external realities and external subjects, and they were faced with very similar external problems, and with very similar demands for legislation. On both counts, states were forced to construct their external environments in relatively generalized legal categories, and often to co-ordinate external acts around uniform legal norms. On both counts, this created a demand for a system of legal/political inclusion in which political institutions, in both national and international settings, could use transferable norms to address external regulatory demands. International human rights law thus developed as a normative system that rapidly heightened the inclusionary capacities of national states, and which insulated the inclusionary structure of national political institutions against international pressures. Indeed, the construction of the single person as a holder of legal rights formed a core construction through which states reacted to the growing legal complexity of their external boundaries. To this degree, sociologically, the rising force of international human rights law after 1945 was caused by deep inclusionary pressures on national states, and it allowed states to project a constitution in which they were able to stabilize themselves in face of external challenges presented by new global phenomena.

To illustrate these points, for example, one immediate factor behind the rise of international law after 1945 was that World War II had seen an immense expansion of airborne military conflict. This meant that, to a hitherto unknown degree, civilians in military conflict situations were placed at constant risk of injury and death. The fact that military

operations could easily traverse national boundaries meant that many states were confronted with single persons, claiming legal relevance, outside their own borders. This placed national states in an unprecedentedly immediate relation to individual persons in other societies, and it transformed traditional relations between belligerent nations, as states encountered notionally hostile populations in conditions not solely defined by adversity. This in turn created pressures on states which could not easily be absorbed by customary legal forms, and it meant that states were required to project legal constructions for single persons in circumstances in which clearly authorized jurisdiction and responsibility were difficult to determine. Indeed, in some respects, groups of civilians in military conflict zones formed an early *global subject*, existing, in almost all regions of the world, alongside the frontiers of established forms of state authority, and they presented a distinct challenge to the legal structures of all states. Owing to the rising vulnerability of the civilian, then, states began to ascribe more uniform rights to single persons, increasingly observing individual citizens in legal categories which could be generalized across jurisdictional boundaries, and they used rights to simplify their reactions to the emergence of legally unprotected external communities. Notably, early duties of the UN included defining legal principles for protecting and, equally importantly, identifying civilians, and for establishing rights for single non-combatant persons. This was formalized, most obviously, in the Geneva Conventions (1949), which gave enhanced protection to individuals in conflict situations and clearly applied human rights norms to distinguish civilians from military personnel, who remained more strictly subject to national jurisdiction (Partlett 2011: 222–4). The construction of the single person as rights holder thus emerged, in this case, as a principle that allowed states to adjust to their new immediacy to new global subjects, and to the pressures placed by these subjects on their external structure.

In addition, World War II and its aftermath witnessed an almost global relocation of population groups, which created a need for general mechanisms of legal recognition and organization able to address large flows of refugees, political migrants and displaced persons. Customary international law, with its primary focus on inter-state acts, could not easily produce legal categories for addressing such quantities of stateless persons (Hathaway 1984: 374). To be sure, the League of Nations had initiated attempts to codify customary refugee law in the 1920s. The apparatus of the League of Nations for dealing with

refugees had been mainly created as a response to the collapse of the Russian Empire, and the resultant exodus of regime enemies from the Soviet Union, in and after 1917. Moreover, until 1930 and again after 1938, the League of Nations had a High Commissioner for Refugees (Haddad 2008: 109–10). However, mass population transfers became a far more pressing and in fact almost general phenomenon through the 1930s and 1940s. This began with Hitler's concentration camps, which, alongside their genocidal functions, entailed a vast extraction of different populations from their national legal systems, creating anonymized transnational migrant communities inside the camp walls. This continued, in diverse fashion, through World War II itself, through the resultant expulsion of minorities in some parts of Eastern Europe, and then through the redrawing of national borders after 1945. In 1945, in consequence, there were approximately 30 million refugees and displaced persons in Europe. The fragmentation of European Empires and the formation of new states during decolonization in Africa and Asia quickly exacerbated this problem, as the emergence of new states created new, vulnerable minorities, for some of whom co-existence with dominant groups within newly imposed frontiers was not possible. New nation states thus inevitably led to further mass movement of populations.<sup>12</sup> In many cases, moreover, refugees were transplanted into nation states, which were structurally weak and lacked capacities to deal with large population influxes.

Against this background, the early functions of the UN were integrally linked to the codification of Refugee Law and the promotion of institutions to protect refugees. The UN began to assume obligations for refugee protection right at the end of World War II, and it founded the International Refugee Organization in 1946. Art 15 of the UDHR specifically proclaimed nationality as a core human right, and by 1949 the ILC placed statelessness on its list of objects for urgent codification (see McDougal, Lasswell and Chen 1974: 966). In 1950, then, the United Nations High Commissioner for Refugees (UNHCR) was established, which formed a distinct legal office, able to assume protective powers for refugees in different national societies without national invitation (Hurwitz 2009: 255). International refugee law was formalized in the Convention Relating to the Status of Refugees (1951) (see Malkki 1995: 500–01). This Convention, the basis for

<sup>12</sup> On the deep correlation between rising national statehood and population movements see Haddad (2008: 68). On the relation between the collapse of Empires, nation building and displacement of minorities see Zolberg (1983: 3).

later refugee law, was conceived as part of international human rights law (Hathaway 2005: 4, 24, 53, 75). In fact, refugee law was not always neatly separable from general human rights law (Hathaway 2005: 24); the Preamble to the Refugee Convention referred to both the UN Charter and the UDHR and, in Art 33, it implicitly linked its provisions to more general human rights instruments (Garvey 1985: 483; Clark 1999: 390; Egli 2002: 99). The UN Convention relating to the Status of Stateless Persons was adopted in 1954, and finally, in 1961, a Convention on the Reduction of Statelessness was approved, both of which were strongly influenced by concepts of human rights (Schwelb 1959: 27). One well-positioned observer (Krenz 1966: 115) described UN refugee law as the ‘earliest and most effective attempt towards an application of Human Rights and a recognition of the international status of certain individuals’. The development of refugee law in the UN was also reflected under other human rights instruments. For example, the American Declaration of the Rights and Duties of Man emphatically guaranteed the right to asylum (Art 27).

The rise of human rights as dominant, constitutional principles for international legislation can be partly explained for these reasons. The increasing presumption that single persons should be perceived as rights holders reflected the fact that during and after 1945 states were confronted with masses of dislocated persons, extricated from the legal order of national states: the simple single person became a general external environment for national states. This led both to a generalization and to an individualization of the basic categories of international law, and it fostered the use of legal categories which could be used across diverse territories to address communities and subjects, which had been released from national systems of collectively acknowledged rights (see Slaughter and White 2002: 13). Indeed, the fact that the individual person was constructed as a holder of rights made it possible for states to react to population movements, and the figure of the refugee was translated into a legal category that could be approached in similar fashion, by different states, across jurisdictional boundaries. In this respect, too, human rights law softened pressures on the external structure of states, and they allowed states to adapt to the emergence of new subjects along their borders.

In close relation to this, World War II and its aftermath also gave rise to legal questions regarding the status of minority populations, and the constitutional consolidation of international human rights norms provided a diction in which this could be addressed. The question

of legal protection for minorities had repeatedly attracted attention under the League of Nations. After 1945, this question assumed renewed importance, both because of the violent oppression and attempted liquidation of minorities in interwar Europe, and because of the emergence of new nation states through decolonization, many of which contained multi-original populations. Here, it needs to be noted that the UN was much more reticent in addressing minority rights as free-standing collective rights than in sanctioning rights of refugees. Tellingly, the UDHR did not provide for protection of minority rights, distinct from general human rights; even lawyers critical of the UDHR because of its insufficient obligatory force were only willing to ascribe subsidiary standing to minority rights (Lauterpacht 1945: 145). Effective protection for minorities was not established until the 1980s, and recognition of minorities as distinct collectives, with determinant patterns of affiliation separate from the national systems of rights, in which they were located, was not even partially secured until the early twenty-first century.<sup>13</sup> In some respects, in fact, the promotion of universal rights after 1945 can easily be viewed as a device for securing general basic rights for minorities without encouraging separate community identities or secessionism. Manifestly, many emergent post-colonial states risked fragmentation through recognition of minorities as claimants to distinct group rights, and for many decades after 1945 rights of self-determination offered to distinct national populations were not extended to sub-national groups (Errico 2007: 742). Despite this, however, protection of individual members of minority populations remained an important area of concern for the UN. The UN established a Sub-Commission on the Prevention of Discrimination and the Protection of Minorities (1947), which developed a legal framework for minority protection. Basic minority rights were then protected, rudimentarily, in the ICCPR, which imposed obligations of tolerance for minorities, and, in Art 27, offered limited rights of cultural integrity for minority groups. ECOSOC Resolution 1503 (1970) made provisions enabling the UN to hear complaints about abuse of minorities. The most powerful instrument addressing anti-minority violence and imposing tolerance for non-dominant groups was of course the Genocide Convention, which, like the Refugee Convention, was effectively a human rights instrument.

<sup>13</sup> See pp. 293–4 below.



Overall, in sum, the individualization of international law after 1945 was closely correlated with the dislocation of persons from state jurisdictions, which resulted partly from World War II, partly from advances in military technology, and partly from the end of imperial administration. The rise of the individual person as a focus of rights and duties reflected both the porosity of state borders to international problems and new global subjects and the need for uniform inclusionary categories, which could be adopted by many states at the same time, in addressing such problems and subjects. In the last respect, the concept of the single person as international rights holder established a constitutional structure in which national states could absorb their increasing exposure to global phenomena, and in which transnational phenomena could be addressed in roughly like fashion in different national settings.

#### THE GLOBAL INCLUSIONARY STRUCTURE: THE PROLIFERATION OF STATES

In the above respects, the rise of international human rights law was integrally linked to pressures on national states caused by processes partly resulting, directly or indirectly, from global military conflict. In such contexts, international human rights produced a normative system above states, but they also produced a structure on which states increasingly relied to control their own legislative actions, and that supplemented and reinforced their external organizational order. The role of international human rights in reinforcing the inclusionary structure of the state, however, became most visible in the waves of post-colonial state formation that began after the World War II and gathered pace through the 1950s and 1960s. In this setting, the growth of international rights protection, centred around the increasingly constitutional emphasis placed on the single legal person, accompanied the proliferation of states as dominant centres of national political administration, and international human rights law helped to stabilize national states as statehood became a common model of political organization. In general terms, decolonization and the resultant multiplication of national states had a deep impact on the growth of international law. Indeed, the rapid and unforeseen decline of imperial regimes caused by World War II exposed nation states, both new and established, to distinctive inclusionary crises, and it created a need for radically new legal/constitutional frameworks to regulate phenomena previously addressed within domestic jurisdictions. The growth of international

law, and especially international human rights law, acquired particular normative and organizational significance in this context.

The impact of decolonization on international human rights law can be observed in many ways. Some observers have claimed that anti-colonial movements played a vital role in consolidating human rights as elements of global law (Kay 1967: 804; Burke 2010: 35–58; Reus-Smit 2013: 12, 153). By contrast, other researchers query the connection between human rights and movements promoting decolonization (Shivji 1989: 23; Simpson 2001: 300, 305; Moyn 2010: 96). Some historians have argued that early UN norms served a mainly ideological function for European powers reacting to challenges caused by decolonization (Mazower 2009: 9). Some analysts have argued that decolonization slowed down the promotion of human rights, as ailing Empires were reluctant to implement human rights law as this threatened to expose them to censure during the last years of imperial rule (Madsen 2010: 203). Other observers, further, have argued that post-colonial states ultimately weakened human rights, as they placed primary emphasis, not on personal rights, but on rights of national-territorial independence, which were not open to all ethnicities in multi-original societies (Okere 1984: 158). These reservations notwithstanding, however, from the sociological perspective advanced here, the constitutional rise of international human rights law can be seen as deeply connected with the formation of post-colonial societies: in fact, the end of formal imperialism created deep structural pressures for national states, and international human rights law evolved partly in response to such pressures.

To illustrate this, three points warrant particular note.

Most evidently, first, the sudden demise of imperialism as a dominant system of political administration after World War II had the quite simple result that the number of states in the world grew very quickly. In fact, it was only through the fragmentation of the great European empires that national statehood became the uniformly preferred mode of socio-political organization across the globe. At the beginning of the twentieth century there were roughly fifty-five states, but by the early twenty-first century there were 192 states (Herbst 2004: 304). In 1945, almost 35 per cent of the global population lived under imperial rule. By 1970, this was the case for less than 1 per cent of the world's population (Jacobson 1984: 375). The period 1950–1970, in short, was a period defined at once both by accelerated imperial collapse and by hyperactive national state building. At this time, in short, states became global subjects.

This simultaneous expansion of national statehood and reduction in the influence of traditional hegemonic powers had obvious implications for the legal structure of the emergent global domain, and it meant that states, both new and established, soon required new legal constructions for organizing inter-state relations. Most obviously, the global spread of statehood created – simply – a requirement for *more law* in the inter-state arena, as states (new and old) were required to organize their relations with an expanding number of similar entities. In particular, the rapidly increasing number of states, all of which, under UN norms, were notionally placed on equal sovereign footing, meant that traditional forms of inter-state agreement, bilateral treaty making and dispute settlement through negotiated consent became unwieldy and unmanageably time-consuming. In many cases, questions that had previously been regulated either by imperial administrations enforcing metropolitan law or by simple treaties between powerful imperial states were placed in a new legal context, demanding laws that could be created and acknowledged relatively quickly and positively, on reliable multi-lateral foundations, and which could be applied without constant elaboration of specific agreements between all parties (Falk 1966: 785; Charney 1993: 551; Weiler 2004: 557). As their number grew, states necessarily encountered a need for legal norms that could be acknowledged as legitimate by a broad range of political subjects, and that could be positively applied across the borders between nominally separate political systems, often in contexts in which jurisdictional boundaries were being rapidly redrawn (Szasz 1995: 40). This was particularly important because, owing to the growing number of states, laws were required to regulate relations between states of very unequal authority and stability, and often between existing states and potential states or states which did not yet fully exist. A free-standing legal order was thus required so that emerging states could be located within an already existing normative order, the rights and expectations of nascent states could be pre-defined, and interactions between already existing states and emergent states could be formally pre-structured (see D’Amato 1982: 1113).

The fact, after 1945, that international law showed an emphatic focus on human rights norms becomes explicable, in part, against this background. The growing importance of human rights as the basic underpinning for international law had the result that laws could be created *more quickly*, and they could be authorized quite simply, by autonomous iterable principles (Delbrück 2001: 30), able to gain

recognition in reasonably generalized manner across the borders of different states. As discussed, the construction of the single person as rights holders first played an important role immediately after 1945 in supporting legislation addressing transjurisdictional legal problems, such as refugees, displaced populations and minorities. Eventually, the UN covenants of the 1960s established human rights as principles for controlling other transnational phenomena, such as education (ICE-SCR Art 13), and scientific exchanges (ICESCR Art 15). Later, in the Vienna Convention on the Law of Treaties, all treaties between states were made subordinate to peremptory norms, and the UN Charter was defined as a founding set of norms to shape all inter-state agreements, so that rights dictated a basic grammar for all legitimate state actions. The use of single rights in such laws meant that exchanges between states could be regulated in similar ways, and that all inter-state acts had similar foundations. Gradually, it meant that legal processes in different national domains could establish points of congruence, so that laws with relevance for the inter-state domain, addressing objects and persons moving across jurisdictions, could be similarly constructed and legitimated in many different contexts (McDougal and Bebr 1964: 606). Ultimately, this created a basis for a complex constitutional system of inter-state recognition and interaction, in which states could enter common legal arrangements with other states regarding many internal and external functions: i.e. joint use of scientific and educational resources, economic cooperation, crime prevention, protection of intellectual property.

In these respects, the rise of international law, and especially international human rights law, filled a regulatory gap that emerged, primarily, because of the erosion of imperial power. Arguably, as soon as national statehood replaced imperialism as the most prevalent model of socio-political organization across the globe, national law *on its own* was not able adequately to fulfil the inclusionary requirements of states, and it was not able to support the legislative functions of states in the complex domain that arose between them and other states. The rise of international law, in consequence, was inextricably linked to the dismantling of European Empires: it is no coincidence that the two periods of the most accelerated growth of international human rights law were the years after 1945, which saw the collapse of West European Empires, and the 1990s, which saw the collapse of the Soviet Empire. It was only after 1945 that states confronted other states, with similar legal personalities, as their basic general environment. Prior to that point, political entities

had confronted each other in multiple, typically highly asymmetrical relations – for example, as Empires, colonies, dependencies, mandate territories, protectorates, dominions. In each of these relations, quite separate legal orders had been produced for political administration, usually reflecting the basic asymmetry of the given power relation. However, the general increase in the number of sovereign states after 1945 created a global legal domain, in which states acted as globally constructed subjects, and states required global legal forms to structure their actions, and, above all, to co-ordinate their actions with other, notionally equal, sovereign states. At this time, states became reliant on the existence of an independent legal order, possessing a certain constitutional autonomy against national state institutions, which they were not required separately and singularly to construct and to legitimize, and through which they could conduct international interactions and establish legal principles for the inter-state domain. The emergence of a legal order whose authority was sustained outside national jurisdictions allowed states to adapt to their new environments, reducing the exposure of states and their legitimational processes to highly uncertain external realities, and ensuring that states could orient their actions towards other states around abstracted norms. The consolidation of independent sovereign statehood as the basic pillar of the global political order, in short, generated the need for a constitutional structure in which states could insulate themselves against demands for legislation posed by other states, and in which law could be produced and authorized across state boundaries without the constant engagement of single governments or the constant need to elaborate new principles for all treaties. The accelerated growth of a system of international human rights law can be explained, in part, as a reaction to this process.

Of great importance in this regard, second, is the fact that, owing to the rapid collapse of inter-continental Empires and the hurried re-drawing of national boundaries after 1945, the simple concept of a state became a contested term. Indeed, no fixed or legally binding definition of statehood, or of its exact institutional determinants, existed. In many territories, self-proclaimed governing bodies claimed powers of statehood in circumstances which deviated from intuitively accepted categories of political sovereignty; this was especially the case in post-colonial societies, where newly emerging political institutions often lacked infrastructural support. As a result, the UN began to operate as a body that established internationally accepted norms to

determine whether new political entities could obtain recognition as states. The basic categorical determinants of statehood after 1945 were carried over from the interwar era, notably from the Montevideo Convention (1933). However, entities seeking to present themselves as states after 1945 usually applied for membership in the UN, and membership in the UN rapidly became an indicator of the demonstrable presence of statehood under international law. The role of UN recognition in constituting statehood was often disputed, but it undoubtedly played an important role in providing evidence of statehood (van der Vyver 1991b: 23–4). Importantly, only states could be members of the UN, so UN membership, together with the legal obligations implied in this, became externally constitutive of statehood (see Lauterpacht 1947: 6; Claude 1966: 376; Crawford 1979: 129; Grant 1998: 456). Indeed, recognition through UN membership was actively welcomed by many parties in the process of decolonization, and it simplified the administration of this process for all implicated actors. For former imperial powers, UN recognition brought the benefit that governments of new states could be expected to recognize basic principles of international law, which appeased ex-colonial minorities in newly independent territories. This facilitated the relatively ordered transfer of power from imperial to post-colonial governments, often protecting existing interests of minority elites.<sup>14</sup> In some cases, imperial governments used international norms as guidelines for their policies in recognizing the independence of former colonies; Harold Wilson's policies regarding Rhodesia reflected this (see McDougal and Reisman 1968: 2). For countries in the process of gaining independence, however, membership in the UN meant that governments could follow a path to recognition that was separate from the interests and authority of former colonial rulers. As a result, normative principles proposed by the UN played a central role in the end of European imperialism and in the legitimization of successor states and interim governmental forces (Shaw 1986: 87, 179), and the UN was able to project a series of legal/moral qualities, defined by the UN Charter, which states were expected to demonstrate in order to be considered states. Notably, Art 93 of the UN Charter stated that all members of the UN were ipso facto parties to the statute of the ICJ, which meant that the acquisition of statehood necessarily implied recognition of rights-based conventions and international jurisdiction (see Higgins 1963: 42, 48).

<sup>14</sup> For examples of this in some African states, see Parkinson (2007: 273) and Dudziak (2008: 75).

Statehood became a quality that depended – literally – on acceptance of normative rights-based terms and conditions (Dinčić 1970: 254).

Both factually and normatively, therefore, the UN assumed great importance both in assisting post-colonial areas in the acquisition of statehood and in assisting established states to recognize other states as such. The authority of the UN was substantially increased by the fragmentation of imperial rule, and many important early functions of the UN related to the legal ordering of decolonization. At a very early stage, for example, the UN used human rights norms, under Art 73 of the Charter, to define trusteeship arrangements for non-sovereign post-imperial territories, to protect citizens of societies under trusteeship, and to supervise mandatory powers (Schwelb 1959: 34–5, 38).<sup>15</sup> Trusteeship arrangements placed large populations directly under international law, and they clearly promoted the recognition of individual personalities, outside recognized states, as points of direct international legal attribution. Ultimately, the insistence that all territories possessed a right to self-determination, stated by the General Assembly first in 1952 and then declared formally in 1960, provided the basic constitutional foundation for decolonization (El-Ayouty 1971: 173, 234).

As a result, the UN General Assembly assumed a central role in identifying those groups in colonial societies able to claim rights of self-determination, and in stabilizing the position of national liberation movements in an ordered legal system. Throughout its early years, the UN operated committees to monitor the institutional conditions of territories under external control (Non-self-governing Territories), and to assist in consolidating independent government in these areas. As the competence of the UN expanded over time, it began to intervene more directly in state-building processes, in some cases using arguments based in international human rights law to assess the validity

<sup>15</sup> See the ICJ's *Advisory Opinion concerning the International Status of South West Africa*, claiming that the 'rights of the peoples' under trusteeship arrangements needed to be 'effectively safeguarded' through 'international supervision': [1950] ICJ Reports 136–7. Unfortunately, this sentiment was badly undermined by the ICJ's eventual ruling in the *South West Africa* case in 1966. However, the Court soon reversed the 1966 decision, stating of South Africa's position in Namibia: 'Under the Charter of the United Nations, the former Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race': *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep 57. Ultimately, the Court came to the view that 'the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character': *East Timor (Portugal v Australia)*, Judgment, [1995] ICJ Reports 102.



of claims to statehood and to urge independence (Duxbury 2011: 98–9). For example, in 1965 the UN passed a resolution that the people of Southern Rhodesia had an inalienable right to be free. In this, it ruled the apartheid system in Rhodesia illegal under international human rights law, and withheld recognition for the white-supremacist state declared independent of Britain by Ian Smith, the Duke of Monrovia, and others. Similar principles underpinned the UN's declaration of 1970, following the ICJ's fluffed lines in 1966, that South Africa's occupation of Namibia was illegal (see van der Vyver 1991b: 39, 62). Later, UN norms and powers were even used to establish territorial administrations to prescribe the ground rules for constitution writing in emergent states (see Chesterman 2004: 140; Feldman 2005: 858; Dann and Al-Ali 2006). Many constitutions of new states, consequently, were strongly influenced by UN provisions, and they incorporated extensive catalogues of rights. Even where the UN did not intervene immediately, norms and expectations dictated by the UN widely figured as lines of direction for democratic state building and political transition, and the progressive consolidation of post-colonial states was deeply shaped by international norms embodied in the UN and the ICJ.<sup>16</sup>

In these respects, international human rights norms again provided a legal structure for capturing and managing the rise of statehood. Internationally defined rights facilitated the emergence of new states, but they also made it possible for consolidated states to impute reliable and consistent features to new states, and so to project consistent legal personalities on other states. In each respect, rights created a normative fiction in which states, new and established, were able to proportion their external acts to the global reality of generalized statehood.

In this relation, third, one consequence of the decline of imperialism was that in many newly independent territories a political realm emerged in which acts of high public administration could not draw legitimacy from classical processes of collective or democratic volition, or even from an existing tradition of formal sovereign statehood. In many cases, societies emerging through decolonization did not possess clear institutional mechanisms for generating visible authority either to support external recognition of their state institutions or to legitimate primary domestic laws.<sup>17</sup> The states located in these societies usually had to be constructed in hastily improvised fashion. Often, the foundations for new states were simply created through expedited negotiations

<sup>16</sup> See below p. 124.

<sup>17</sup> For commentary see Jackson and Rosberg (1982: 14).

between metropolitan powers and new, uncertainly authorized national elites, and constitutions were imposed by former colonial elites before either states or nations had been fully consolidated (see Rooney 1988: 182; Branch and Cheeseman 2006: 19; Branch 2009: 179). Paradoxically, therefore, the increasingly universal acceptance of the sovereign national state as a fulcrum of social organization meant that, in many societies, the actual locus of legitimate political sovereignty could only appear in fractured and loosely co-ordinated form, and many new post-colonial states did not initially meet conventionally endorsed standards of normative legitimacy or sovereign societal control. Moreover, as sovereign national statehood became a general norm, many countries proclaimed sovereign power without the means to motivate or demonstrate extensive national support for their political institutions, and even without populations organized as nations.<sup>18</sup> In such societies, political institutions were often forced to rely on, and outwardly to explain their authority through reference to, artificially constructed sources of legitimacy, which were not embedded in factually manifest societal endorsement. In consequence, many states strategically used compliance with international norms to signal their legitimacy, both externally and domestically. In this respect, accession to the UN and acknowledgment of international law became a common international vocabulary of legitimacy (see Koskenniemi 2002: 206; 2007: 19). The institutionalization of human rights norms often allowed new states to symbolize legitimacy towards their own populations, and it allowed other states to recognize new or emergent states as having qualities of legal personality and statehood. Acceptance of human rights norms provided a general standard, albeit often counterfactual, in which states could observe both themselves and each other, legally, as national states, and, in so doing, simplify inter-state relations.

In this respect, in particular, international law offered to newly independent states the distinctive benefit that it allowed them to construct their legitimacy slowly and incrementally, in a form adapted to precarious processes of institutional transition. The fact that international law could be absorbed and enunciated in domestic law in composite fashion, without reliance on single constituent acts, and that it could be assimilated domestically through formal, sometimes quasi-symbolic inter-judicial procedures, meant that, in many societies, new institutions

<sup>18</sup> See pp. 325, 338 below.

could acquire legitimacy in gradual, simplified, internally adaptive fashion (Claude 1966: 370). This was particularly discernible in newly recognized national societies which, owing to inner inter-group divisions, weak centration, limited history of institutional autonomy and prevalence of local structure, could not easily be made to converge around single legitimating acts of a classical constituent or national-democratic power (Strebel 1976: 336). In such settings, actors within the state were able to extract norms from international law, usually through the constitutional recognition of international human rights, and this often allowed them to claim legitimacy and sovereignty for the state without demonstrating unified resources of national sovereign power. Assimilation of international law in fact often provided a shortcut to national statehood, and it allowed states outwardly to project themselves as legal personalities, without passing through a conclusive process of national formation or state construction.<sup>19</sup> In some cases, norms imported from international law helped to create, and gain recognition for, national states where they did not exist, and compliance with externally defined norms replaced single acts of constituent power as the essential source of national political legitimacy and acceptance: international law often assumed a force close to that of a constituent power in societies where such power could not easily be activated.<sup>20</sup> In many cases, it was only

<sup>19</sup> For example, the drafting of the Indian constitution, which defined the state's legitimacy through reference to international human rights law, occurred in a context in which unified nationhood was not easy to find, and society as a whole was partitioned by deep sectoral, regional, stratificatory and religious divisions (see Chandavarkar 1998: 321). One historian argues that before independence the 'plural and deeply regionalized society' of India was beset by a 'crisis of nationhood' (Brown 1985: 282). Ultimately, therefore, international human rights law helped to galvanize Indian nationhood.

<sup>20</sup> For example, late colonial Kenya was marked by extreme ethnic diversity, inter-group discrimination, and the allocation of group rights in accordance with population affiliation (Singh 1965: 940). The making of the constitutions that progressively separated Kenya from the UK was, therefore, hardly driven by a unified nation, able to supply legitimacy for state institutions. The first meeting of Kenyan delegates in Lancaster House, London, to deliberate the form of the independence constitution (1960) reflected this ethnic polarization of interests. The second Lancaster House Conference in 1962, however, included a Bill of Rights in the constitutional draft. This imposed a system of uniform rights on the different factions involved in constitution making, and it created a legally uniform national society in which the constitution could take effect (Singh 1965: 914). The first post-colonial constitution (1963) then designed the new state on a federal model, in which regions were separated partly on ethnic lines: it endorsed *majimboism* as a compromise pattern of nation building. During decolonization, moreover, the British government was unwilling to recognize Kenya as a sovereign nation state because of the large settler community that lived there, which feared expropriation. From this perspective, too, a Bill of Rights, with strong protection for property rights, was a precondition of independence. In both respects, constitutional recognition of basic rights was a path to sovereignty and international recognition. The Bill of Rights in the Kenyan constitution did not imply the existence of a monist legal system; on the contrary,

on the foundation of a normative mix of national and international law that national states could actually be formed, and international law created a system of recognition in which new states could compensate for their basic structural weaknesses, and other states could observe these states in accepted legal categories, despite their structural weaknesses.

On each count, the initial growth of international law after 1945 was not simply the outcome of processes occurring outside national states, imposing external limits upon the sovereign powers of already existing state forms. On the contrary, if seen from a more sociological perspective, the expanding, semi-constitutional force of international law after 1945 was intrinsically linked to the basic functions of statehood: it resulted from the fact that statehood became a generalized phenomenon, and states, as global subjects, formed a generalized environment for each other. Before 1945, the organization of societies in the form of states was not a dominant pattern of social order, and most societies had experience only of either local or imperial governance. After World War II, however, statehood increasingly became a global political phenomenon. The increasing *globalization of statehood*, however, brought two closely linked challenges: first, it undermined the power of established states to absorb inclusionary pressures channelled towards them from the international domain; second, it led to the emergence of weak and uncertainly authorized states in former Empires, which struggled to generate external or internal acceptance. The globalization of statehood thus created a demand for an inclusionary structure, or a *basic constitution*, reaching across and cutting through national boundaries, able to simplify state reactions both to new phenomena and to new states.

As a result, the growth of a constitution of international law was shaped – quite simply and immediately – by the fact that the international arena was populated by national states, and that states alone lacked the capacity to respond to this reality. The rise of international law was shaped by a complex crisis of inclusion in the basic external structure of statehood, which in many cases penetrated deep into the domestic functions of national institutions, and which was caused by

Kenyan courts were quite hostile to international law until the early 2000s, and, under President Moi, they even abandoned responsibility for rights-based review of statutes. However, the original Bill of Rights involved direct incorporation of international human rights instruments. See analysis in Ghai (1967: 192) and Munene (2002: 142–3).

the fact that states were surrounded by other states. Far from placing limits on the efficacy of national sovereignty, international law, and especially international human rights law, was cemented after 1945 precisely as, because, and to the extent that sovereign national statehood became the preferred mode of socio-political organization. As they began to operate in a world of states, national political organizations immediately encountered complex demands for legislation and regulation, which they, acting as sovereign national states, were not able to satisfy. To resolve this, states either constructed or accepted norms that extended vertically, with constitutional force, above national jurisdictions, and most states consolidated their existence as states by, at least in part, locking their basic inclusionary structure into an extra-national legal order. As discussed earlier, this does not even remotely imply that, after 1945, international legal norms immediately acquired conclusive or sustained effect. However, the emergence of a formal grammar of rights, stabilized above national states, progressively became a precondition, both factually and symbolically, for the globalization of national sovereign statehood.

Against more standard views, therefore, the constitutional expansion of international law after 1945 can be viewed as a direct outgrowth, or in fact as a precondition, of state power. The broadening impact of international law facilitated the construction of statehood, and it accelerated the emergence of sovereign states. It also provided a legal framework in which both new and old states were able to secure principles for addressing a world society marked by rapidly escalating complexity, and by rapidly proliferating claims to statehood. The basic fact underlying the rise of international law was simply that after 1945 the national sovereign state became an increasingly dominant centre of authority. This necessarily meant that national sovereign states, acting alone, were incapable of constructing an effective inclusionary structure for their societies. As soon as the sovereign state became a global phenomenon, in fact, states presupposed a constitutional system of international law, strongly marked by international human rights norms, to sustain their external inclusionary functions. National states first stabilized their position in society around constitutional principles of national sovereignty. As soon as national sovereignty became a common reality, however, states necessitated a constitutional order that abandoned the strict norm of national sovereignty. The proliferation of national sovereignty provoked a crisis in the inclusionary functions

of national states, and states positioned themselves, externally, within a transnational constitution in order to compensate for this crisis. National sovereignty proved impossible to secure, internationally, on the basis of purely national constitutions.

## RIGHTS AND THE AUTONOMY OF THE GLOBAL LEGAL STRUCTURE

In the aftermath of 1945, the impact of international human rights norms on the legal structure of global society might not have been easy to detect. In some settings, this was a period of national-democratic re-orientation, and attention was widely focused on everyday realities of political foundation. Moreover, the significance of human rights law was often obscured amidst the geopolitical conflicts of the Cold War and the domestic struggles surrounding decolonization, none of which was conducive to recognition of border-crossing legal norms. As a result, the growth of an international inclusionary structure only became visible very slowly, and its ability to create new legal and political forms did not become fully evident until more recent decades. Nonetheless, in the decades following 1945, the principle that there existed a legal structure standing independently of national laws was slowly consolidated, at least in skeletal form. This structure then slowly formed a basic two-tier global constitution for an emergent global political system. On one hand, it formed a constitution for inter-state actions. On the other hand, it formed a constitution that gave effect to international human rights law within national polities and tied national institutions to the global legal domain.

At the core of the global political system which began to evolve after 1945 was a paradoxical process. The rise of a constitutional structure traversing national societies was driven by the fact that single states could not easily produce sufficient quantities of law to stabilize the complex legal environments of global society, increasingly defined by states, as global subjects. As a consequence, national states began to bind their legal structures into a legal or constitutional system located, relatively autonomously, above national jurisdictions. In this system, states transferred some responsibility for producing and legitimizing laws to actors and organizations working in a global normative order, and, to some degree, they proportioned their inner legislative functions to norms prescribed by this order. Global society thus engendered a relatively differentiated constitutional system, standing above national

states.<sup>21</sup> Central to this constitutional system was the fact that the *single person* located within national societies was constructed as a holder of rights, and the single person, replicable across national jurisdictional boundaries, became a defining source of authority for the law, both nationally and globally. In consequence, law increasingly obtained authority as it was applied to persons as rights holders, and as it accounted for the person *qua* rights holders as its essential normative origin. At this time, national sovereignty slowly lost its standing as the sole basis for society's inclusionary structure, and the global political system, both in its national and extra-national dimensions, was re-centred, however gradually and imperceptibly, around rights held by singular persons. Once established on this foundation, then, the constitutional system formed by international human rights law began to assume an increasingly autonomous position towards national law and assertions of national sovereignty. The fact that, in the global legal order, legislation was explained through single human rights meant that national states gradually became secondary components of a wider, global legal/political system, whose reliance on classical sources of legitimacy was limited, and which was able to authorize laws across societal boundaries, and to reproduce its own structure at a high level of abstraction. As discussed, however, the rise of a relatively autonomous global legal order was not propelled by a weakening of state sovereignty. On the contrary, the factual consolidation of sovereign statehood as a uniform legal phenomenon was only possible because states were able to position themselves, as secondary components, within a transnational legal system, which enabled them to shield themselves against the implications of their own sovereignty. As states were formed as dominant sovereign actors in world society, paradoxically, they presupposed reinforcement in their external dimensions from an international legal structure, which became increasingly autonomous against national states themselves. In essential terms, the global growth of national statehood and national sovereignty both produced and presupposed an autonomous structure of global legal inclusion: a global constitution.

<sup>21</sup> For a similar claim see Albert (2002: 321).



## CHAPTER FOUR

# THE CRISIS OF SOCIAL INCLUSION AND THE PARADOX OF THE NATION STATE

### STATE FRACTURE AND INCLUSIONARY PRESSURES

The re-orientation of constitutional law after 1945 was caused, to a large extent, by the fact that national states based in national sovereignty were not equal to the *external* demands for legislation which they encountered through the multiplication of sovereign states across the globe. As discussed, the growth of a global constitution outside national societies protected states from the external implications of national sovereignty. Equally importantly, however, this transformation of constitutional law also resulted from *internal* inclusionary pressures in different national societies, which domestic political systems faced as they were condensed into the form of national states. Over a longer period of time, the original formulae of classical constitutionalism projected a model of political-systemic inclusion, which placed great inclusionary burdens on national political institutions. In particular, the presumption expressed through the concepts of constituent power and national sovereignty that the political system was internally founded in *the sovereign nation*, and that this nation formed the core source of legitimacy for the political system, exposed the political systems of national societies to great duress, and to repeated inclusionary crisis. The rise of an overarching constitution based in international human rights law can be observed, sociologically, against this background. Most states eventually integrated elements of international law in their constitutional systems, in the form of transnational law, because this helped them to absorb unmanageable pressures for inner-societal inclusion, which, under the legitimational formula of national sovereignty, they had themselves produced. The intensification of

international law, and its increasing constitutional impact, can in fact be interpreted, from a sociological view-point, as the result of pressures within national societies, which originally accompanied the formation of national states, yet which national states, without external constitutional support, were not able to resolve.

National constitutionalism, particularly in its European form, was centred, from the outset, around a deep paradox, and this paradox remained fateful for national states throughout their formative history. As discussed, the first foundation of the constitutional state in the late Enlightenment helped, projectively, to create inclusionary societies: *nations*. The classical constitutional state, namely, defined its legitimacy in highly inclusive fashion, as derived from the sovereign nation, and it imagined its authority as extracted from, and applied to, all persons in a national society, without regard for their status or location. This constitutional self-construction of the state separated the modern political system from its historical precursors, and it expressed an inclusionary norm to sustain political authority across nascent expansive modern societies. In most concrete historical situations, however, this constitutional projection of the nation as a foundation of legitimacy was, initially, scarcely more than a fiction. In fact, beneath the letter of classical constitutional doctrine, the emergence of homogenously nationalized societies after the constitutional revolutions of the eighteenth century remained a deeply conflictual process. National societies were only gradually consolidated after 1789, and, in most of Europe, it took a long time for states to penetrate deeply into society, and for society to evolve as truly *national*. As discussed, most early constitutional states only performed their functions in a very narrow social domain, defined by a thin set of private, subjective, and – above all – economic rights: such rights became the medium by which the political system included the nation from which it extracted its legitimacy. Well into the nineteenth century, no European state acquired deep social foundations, and no state supplemented the basic private rights which allowed it to perform its inclusionary functions with a system of *political* rights extending beyond a thin elite stratum of society. To be sure, after the revolutionary interim in America and France, most states slightly widened access to governmental office, and they tightened procedures for ensuring political accountability. Nonetheless, most European states founded in and after the revolutionary era almost immediately abandoned the national political form through which they had proclaimed legitimacy, and few states enduringly guaranteed even the most basic of the

political rights declared in the revolutionary era. After the constitutional revolutions, in consequence, few societies were formed as political nations, supported by politically integrated constituencies, and, beneath a thin layer of monetary inclusion, they remained determined by a privatistic, often localistic, structure. Through the course of the nineteenth century, and in many cases in fact far beyond, few national states established themselves as a generally inclusive focus of political power in society, and few states eradicated local authority as the primary source of obligation. Through the nineteenth century, most national states persistently coalesced with existing social elites, typically purchasing support by accepting and promoting the power of historically privileged groups in different localities and sectors across society, thus ensuring, to a large degree, that traditional elites retained far-reaching authority in their conventional domains. Throughout the nineteenth century, political realities fell far short of the norm of national inclusivity first promoted in national constitutions, very few societies approached uniform inclusion in anything but their basic economic functions, and, outside major urban centres, the inclusionary extension of state power remained low.<sup>1</sup>

Despite this persistent localism of national society, nonetheless, in the course of the nineteenth century, the implications of national sovereignty slowly acquired palpable impact in many European regions. If private economic rights formed the primary medium of national political inclusion in the wake of 1789, by the later nineteenth century many states had broadened the scope of the political rights which they offered, and political rights had begun to form a *second stratum* of inclusion for the political system of many societies. The growing allocation of political rights increasingly meant that the national people, to a limited degree, began to enter the political system, not solely in its economic dimensions, but as a real active presence, able to demand objective inclusion and to shape the content of laws. This process of deepening inclusion was in fact directly stimulated by the initial use of private, economic rights as inclusionary instruments. As, after 1789, national societies expanded their internal inclusivity through the increasingly even distribution of private economic rights, this led to a basic geographical widening of society. In societies that consolidated a distinct sphere of economic rights, social agents, depending on their

<sup>1</sup> On the persistent localism of nineteenth-century society, see, generally, Weber (1976: 50–51) and, for specific analysis, Domingo and Piqueras (1987: 13).

economic position, availed themselves of freedoms secured under these rights in ways that rapidly changed and extended the form of society as a whole. For example, social agents exercised these rights to migrate from region to region in search of work and personal improvement, to engage in enterprises reaching across large regions, or even to circulate commodities across broader regional spaces. The broad purchase of economic rights, thus, of necessity, meant that labour and commodity markets became more closely interlinked and integrated, and specific economic practices were uniformly replicated across the inner regional boundaries within society: rights of contractual autonomy in particular clearly acted to extend the form of modern society.<sup>2</sup> This became visible in the fact that, in the early capitalist economies of the earlier nineteenth century, old customs borders were removed, economic interactions were subject to increasingly uniform laws, and judiciaries, increasingly professionalized, were expected to apply the law at an increasing level of uniformity, beyond narrow local structures.<sup>3</sup> By virtue of their promotion of private economic rights, in consequence, national political systems soon transformed the geographical shape of society, and, accordingly, they were confronted with rapidly expanded societal environments. One immediate result of this was that national societies became increasingly reliant on general legal norms that could be applied widely across different regions, independently of local customs and legal or commercial conventions. After 1789, most European societies began to develop organized bodies of civil law to bring order to economic interactions. In addition, however, as national political systems were required to provide general rules for society in its economic dimensions, they were also obliged to construct more extensive, generalized political support across local boundaries, and they were progressively expected to legitimate laws, decisions and policies amongst an increasingly large number of social groups.<sup>4</sup>

<sup>2</sup> In some cases, of course, the introduction of uniform monetary rights quite literally created a national economy. Prussia first acquired a national economy in 1818, with the removal of domestic customs. Shortly after, in 1833, the separate German states began to form a single customs union. In the USA, one interpreter argues that the formation of a national economy was driven by a 'silent juridical revolution' (Sellers 1991: 54). As discussed above, the contract clause in the constitution was widely used to impose national economic laws across the states. See the enactment of this in *Sturges v Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819). See also Currie (1985: 203).

<sup>3</sup> On this process in England and France see Atiyah (1979: 399–400).

<sup>4</sup> In many European societies the progressive organization of civil law coincided with reforms to the system of political representation. Examples are France, different German states and, later, Italy and Germany.

In societies of the earlier nineteenth century, where rights-based expansion in the private or economic domain was most advanced, consequently, political rights, established as elements of a growing body of public law, began to play a vital role in the inclusionary structure of society, and in inclusive national formation more generally. The extension of society caused by economic rights typically led, by delayed consequence, to a strengthening of political rights, and national states generally reacted to the economic widening of society by allocating some rights of political representation, participation and self-organization to different groups.<sup>5</sup> In cases where large sectors of society were accorded political rights, the political system was able to extend its inclusionary basis across society, and it could extract broader reserves of legitimacy and more generalized support for laws from the sectors permitted to exercise such rights. In the course of the nineteenth century, therefore, political systems clearly began to use political rights to solidify their position above the local, status-determined divisions within society, which had been partly erased through the circulation of private and economic rights, and political rights enabled states to construct socially encompassing foundations to support their legislative acts, in different functional domains. Through this process of intensifying societal inclusion, by necessity, states applied political rights as institutions that bound larger sectors of society into the political system, gradually supplanting the localized organization of society with a social structure defined by the proximity of social actors to the state, by collective recognition of legal and political decisions and by the centralized exercise of state authority.

As discussed, early national constitutions had originally established a system of rights as institutions that obstructed full inclusion of the nation in the political system. However, in the longer trajectory of national formation, rights were gradually applied as vital elements in a process of thickened social integration. As soon as the power of states began meaningfully to penetrate into society, states augmented the scope of the political rights which they guaranteed, and they allocated rights of political participation to a growing number of social agents, diffusely positioned across society. The broad distribution of political rights was uncommon before 1850. In the longer wake of the failed national revolutions of 1848, however, many states slowly intensified

<sup>5</sup> For brilliant analysis of ways in which, in nineteenth-century Europe, the extension of capitalist civil society promoted the growth of public law, see Wienfort (2001: 361).

their commitment to political rights. By the later nineteenth century, political rights became a *second tier* in the basic inclusionary structure of many national political systems, and political rights were used to sustain the application of laws across the deep social and geographical divides that national societies now contained. This stratum of rights evolved as political systems required support for their laws: political rights formed an inclusionary structure to address the increasing volume of legal demands produced by early national societies. This tier of rights, moreover, formed an inclusionary medium in which the national sovereign will, from which national states originally extracted legitimacy, gradually became an inner component of the political system, and the allocation of political rights meant that the people, or the nation, progressively entered the political system as a factual agent, and as a material source of political legitimacy.

Notable in the growth of political rights as instruments of inclusion in the nineteenth century is the fact that these rights immediately exposed national states to a deep paradox in their internal structure, and they subject states to profound *pressures of inclusion*. As they evolved into fully national states, distributing rights of political enfranchisement to a diverse array of social groups, the capacities of most states for legal/political inclusion were quickly overtaxed, often in many dimensions at the same time. In most cases, as states began to integrate national populations in their political dimensions, the intensification of rights meant that a mass of social conflicts, originating in different parts of society, began to converge around the state, and most states struggled to balance the divergent social prerogatives which they were forced to address and to internalize. Ultimately, in most cases, the inclusionary distribution of political rights produced a deep crisis in the political system, the consequences of which few national states were able to withstand. Typically, once they had established an inclusionary structure based in separate tiers of private/economic and political rights, states were rapidly required to allocate further, additional strata of rights, in order to absorb the pressures of inclusion which they, of necessity, induced through the circulation of political rights. In most societies, however, the distribution of additional strata of rights engendered demands for legislative inclusion, which states, in their national form, could not absorb, and for which they lacked a sufficiently robust inclusionary structure.

In this respect, the modern nation state appears as an entity founded in a deep internal paradox. On one hand, national statehood evolved

as a system of inclusion through rights, in which states were gradually forced to integrate the national sovereign people, from which they purported to obtain legitimacy, as an aggregate of rights holders, claiming first private economic and, then, political rights. On the other hand, few nation states were actually able to sustain the factual inclusion of the sovereign nations from which they claimed to derive legitimacy, and few national states preserved institutional solidity and inclusionary autonomy as they allocated secondary and tertiary strata of rights to cement the structure through which they included the national people.

If contemporary states promoted the formation of international law for *external* reasons, they also did so for *internal* reasons. Indeed, if contemporary states promoted constitutions based partly in elements of international law because this allowed them to deal with the external consequences of their sovereignty, they also did so because this allowed them to deal with the internal consequences of their sovereignty. Historically, most states were overwhelmed by the expectations of inclusion which they stimulated as centres of national societies, constructing multi-level systems of rights to include their populations. The more national states sought to construct their societies on a national inclusionary pattern, the more they were exposed to intense inclusionary pressures, and the more they experienced inner inclusionary crisis, relinquishing autonomy and stability within their own societies. Overall, few states developed as fully inclusionary political systems as long as they retained their foundations in national sovereignty, and as long as they built their inclusionary structure through purely national strata of rights. In most societies, paradoxically, the attempt to extract legitimacy from the political inclusion of the nation directly obstructed the reliable formation of solid national states. In many cases, it was only by connecting their legitimacy to rights defined under international law that national states established a sustainable inclusionary structure in their national societies, and that they actually learned to function as national states. The integration of states into a global or transnational constitution was thus also driven, historically, by deep-lying domestic pressures caused by national sovereignty.

## THE CRISIS OF CLASS INCLUSION

The primary reason why early national states were unsettled by the growth of political rights is linked to the fact that processes of social inclusion mediated through the allocation of political rights contained



clear implications for the politics of *class conflict*. That is to say, wherever states expanded the range and scope of political rights which they offered, they were also expected to resolve pressures caused by class conflict, and to assuage antagonisms in the economic dimension of society. In turn, this meant that once they had allocated *political* rights, states were almost invariably obliged to enlarge these rights to include *social and material* rights, and rights of material inclusion. Self-evidently, when early states began to distribute extensive political rights to their constituencies, integrating broad sectors of their national populations, they were forced, almost immediately, to broaden these political rights to endorse *social and material* rights: claims to material rights flowed inevitably from political inclusion, as holders of political rights inevitably used rights of political participation to demand improvement in their material circumstances. For this reason, for much of the nineteenth century, most states avoided offering extensive political rights, and they tried to ensure that class conflict was not intensely politicized; as mentioned, none of the major European states had enduringly established large electorates until the 1870s. As societies were widened beyond their local structure, however, states became inexorably dependent on broad political franchises, and, as a result, they were exposed to increasingly intense pressures resulting from the inclusion and politicization of class conflict. As examined further, the inclusionary pressures resulting from the politicization of class proved to be a general challenge to all emergent national states, and it unsettled polities across all lines of state construction – not only in Europe, but, most especially, in later state-building processes in South America and Africa. However, the destabilization of state institutions through the inclusion of class conflict first became evident in the European heartlands of modern statehood. From the nineteenth century onwards, the construction of national states in Europe was defined, paradigmatically, by the conflict over social and material rights as elements of societal inclusion, and the problem of class integration ultimately became the structurally defining problem for European constitutional states. The essential proclamation of states as legitimated by nations inevitably meant that, ultimately, states would be exposed to intense pressures of class inclusion. However, few national states were structurally equal to this primary inclusionary challenge, which they stimulated.

Class conflict can be observed as a source of inclusionary pressure that is inherent in, and even co-genetic with, the national constitutional state. Before the rise of the modern state, economic conflicts,

later articulated as class conflicts, necessarily assumed a sectoral, functionally isolated form. In the European *ancien régime*, crucially, society as a whole had a very pluralistic shape, and most areas of social exchange were regulated by local institutions, falling under the jurisdiction of regional estates, professional corporations, or guilds. This was primarily the case in questions relating to economic activities – notably, employment, professional duties, monetary exchange and labour-market policy (legislation for professional qualifications, education, wage levels and so on). Significantly, guilds and corporations possessed extensive judicial systems, and their judicial functions, usually conferred by monarchs or larger corporations such as cities, played an important role in constructing and perpetuating the economic order of early modern societies (Neuburg 1880: 205, 209). To be sure, in most of Europe, the powers of guilds and other corporations had been curtailed in the eighteenth century, as increasingly centralized political systems had progressively unified the legal patchwork of pre-national societies.<sup>6</sup> Yet, with variations across different regions, in the eighteenth century corporations retained arbitrational responsibilities for many parts of the economy, still essentially acting as organs of public authority.<sup>7</sup> The social landscape of early modern Europe was mainly defined, accordingly, by *status*, and social agents widely defined their position around rights of personal standing or privilege attached to their membership in corporate bodies, each of which had a particular hierarchy (see Lousse 1943: 42, 168; Sewell 1980: 119; Fitzsimmons 1987: 270). In this setting, corporations exercised judicial power over their members in many dimensions of life, and they prevented the even convergence of society around the state; intermediary bodies located between the state and the single person obstructed the extension of society into an encompassing national system of inclusion. As a result, corporate organizations also prevented a direct transmission of social antagonisms towards the state, and they ensured that society preserved a segmented functional order, in which state authority, barely generalized across different social domains, only acquired limited relevance for conflicts in the economy.

After the constitutional revolutions, and especially after the dissemination of Napoleonic civil law, the pluralistic corporate fabric of

<sup>6</sup> In the Holy Roman Empire, for example, the judicial functions of guilds had been restricted in the *Reichszunftordnung* 1731. In France, the eighteenth century saw concerted pressure on guilds, culminating in their temporary prohibition in 1776.

<sup>7</sup> See analysis of the public-legal quality of guilds in Schmoller (1875: 8) and Najemy (1979: 59).

European society was progressively erased. This was not a uniform process. In less centralized societies, guilds, and to some degree, estates, re-appeared after 1815, albeit with diminished authority (Brand 2002: 24–8, 64–6).<sup>8</sup> In many societies, some aspects of pre-national corporate structure persisted throughout the nineteenth century. As discussed, nonetheless, the initial rise of the sovereign nation after 1789 meant that the powers exercised by corporations were increasingly assigned to the state, and societies were increasingly inclined to converge, as nations, around their political systems. The revolutionary principle that states were based in public authority, allocating rights to *single persons*, necessarily flattened out the corporate landscape of pre-modern societies, and it transformed societies into relatively uniform environments for political systems (see Garaud 1953: 116). Although states originated through the eradication of corporate social order, however, this process presented a series of acute challenges for emergent modern states, and the formation of national statehood was indelibly shaped by pressures of inclusion resulting from the weakening of societal corporatism and the decline of estates. This was particularly the case because national states, presiding over increasingly uniform national societies, began to stand at the centre of regulatory conflicts previously resolved, in different societal sectors, by private or communal corporations. The rise of national societies, thus, inevitably directed economic conflicts immediately to the state, and, as soon as the national state genuinely took form, it was confronted with pressures caused by economic antagonisms, which placed great pressure on its inclusionary structure.

Initially, as mentioned, before societies reached a stage of advanced industrialization, many European states were able either to ignore economic conflicts resulting from the transformation of corporate life, or to address these conflicts through residual late-feudal conventions. In much of Europe, in consequence, different societies retained their basic localized structure for a long time after 1789. In parts of Europe where local power was weaker and economic development was more advanced, moreover, the rise of the national state occurred within a legal conjuncture, which, for a short period, insulated state institutions against economic exchanges in society, so that the full centration of national society around the state was delayed. Normally, the abolition of corporations in the revolutionary era was not only intended to

<sup>8</sup> Under Art 57 of the concluding agreements of the Congress of Vienna (1820), German states returned to governance by sovereign princes and regional estates.

augment the power of state institutions; it was also designed to separate market interactions from the realm of state authority, and to cement economic exchanges in a legal sphere, increasingly defined under private law, which was relatively free from state encroachment (Martin Saint-Léon 1922: 581). In many societies, corporate regulation of economic interactions was initially supplanted by a legal system in which public authority over the economy was comprehensively reduced, and the economy was consolidated, in counter-position to the state, as a free-standing *private-legal* domain. Indicatively, in the anti-corporate laws of the French Revolution, it was declared that professional conditions were to be regulated, not by corporations, but solely 'by free conventions' with lateral effect 'between individuals' (Buche and Roux-Lavergne 1834: 194–5). In societies in which feudal structures began to disappear, therefore, the corporate form of society was often supplanted, after the constitutional revolutions, by a social structure in which the abstract rules of *private law*, guaranteeing free circulation of goods and autonomous freedom of contractual obligation, became the dominant medium of legal organization (see Atiyah 1979: 400; Haupt 2002: 9). In such settings, the decreasing importance of corporate activities led to a formal division between the public domain and the realm of private activity, and private law was applied to consolidate the sphere of economic activity in a relatively autonomous legal dimension.

This phenomenon should not be exaggerated; it is surely not wise to follow Marx (1958–68 [1844]: 364–5) in arguing that the early nineteenth century, almost in its entirety, was defined by a strict separation between private law and public law. In most regions, Marx's description of an early capitalist civil society based in relatively uniform monetary and contractual freedoms was only realized, if at all, in the later nineteenth century, by which time most states had begun to subject their economies to extensive regulation (see Keiser 2013: 211). In most European societies, the promulgation of a distinct corpus of private law occurred only selectively, and the skeletal remnants of medieval corporations persisted well after 1850.<sup>9</sup> Typically, principles of private law were established only tentatively; in some societies, Napoleonic civil law was strategically enacted in order simply to delineate a very limited sphere of proprietary exchange, which posed little threat of unsettling the existing legal/political hierarchy (Fehrenbach 1979: 29).<sup>10</sup>

<sup>9</sup> In Germany, the power of the guilds was finally removed by the *Reichsgewerbeordnung* of 1869.

<sup>10</sup> This is exemplified by Brauer (1809: 68–9), responsible for applying Napoleonic law in the Southern Rhineland.

Nonetheless, it remains the case that the legal conception of a property-based economy, incrementally circumscribed by private law, became increasingly pervasive through early nineteenth-century Europe.<sup>11</sup> As a result of this, during the early development of capitalism, some states were able, in part, to exclude economic conflicts from the domain of direct political regulation, and they stabilized their limited political functions in relative indifference to economic exchanges.

In the first instance, the persistence of localism and the strict separation of a private-legal sphere in society softened the exposure of European states to the economic antagonisms released by the decline of corporations. As discussed, however, through the course of the nineteenth century, most European states began to integrate society more fully in a general system of inclusion, and, by the later nineteenth century, most political systems had accorded vital political rights, alongside existing private and monetary rights, to different social groups. Through these processes, national societies were progressively integrated in the political system, and the political system assumed greater immediacy towards different parts of society. This political inclusion of national societies placed great burdens on national states. The fact that society lost its corporate structure meant that, once it had been established as a system of rights-based political inclusion, national societies transmitted all conflicts, political and economic, directly to the state, and all parts of society produced politically relevant and unsettling antagonisms. In particular, in those societies that possessed extensive national economies, the social interactions notionally defined by private law began to generate conflicts which private law alone could not regulate, and which spilled immediately into the political arena.<sup>12</sup> At the moment where states began to distribute political rights and to activate processes of deep-reaching political inclusion, therefore, they were usually confronted with acute conflicts over economic goods, formally originating in the system of private law. These economic conflicts acquired direct political resonance, and states, deprived of the buffers formed by intermediary corporate organizations, were forced to translate them, undilutedly, into political conflicts.

This problem was exacerbated by the fact that, owing to the decline of corporate life, most nineteenth-century European societies began to evolve new structures for representing economic interests, which

<sup>11</sup> For the most advanced cases of this, Britain and the USA, see Steinfeld (1991: 187).

<sup>12</sup> Hegel of course had begun to intuit this possibility as early as 1821 (1969 [1821]: 360). But Hegel's intuition only became common reality about five decades later.

also intensified the concentration of economic conflicts around the state. Owing to the acceleration of industrialization in the nineteenth century, notably, most European societies soon began to re-develop, in altered form, corporate features, which played an important role in expressing conflicts generated, originally, in the system of private law. By roughly 1850, most European societies had witnessed the growth of new semi-corporatist associations, such as combinations, early trade unions and syndicates, which articulated the primary economic conflicts in nascent national economies. In most modern European societies, early unions and syndicates had originally been prohibited, in some cases under revolutionary laws used to abolish corporations. In fact, laws introduced during the revolution in France and in its wake in other countries had formed a particularly potent armory for the suppression of early professional associations (Roscher 1917: 144). By the later nineteenth century, however, many national governments had either softened or repealed these laws, and the legal position of trade unions had generally been strengthened. In the UK, for example, this occurred, first in 1871, and more fully in 1906. It occurred in 1884 in France. Once legalized, early trade unions assumed many functions previously performed by guilds and corporations, insulating different professions against unmitigated exposure to economic pressures. In contrast to earlier corporations, however, the trade associations characteristic of early capitalism had less comprehensive regulatory authority for the economic sectors in which they were located, and their ability to resolve inner-sectoral crises depended on the intervention of national legislators. As a result, unlike earlier corporations, the basic function of trade unions was, not independently to regulate economic problems, but to channel conflicts over production directly towards the state. Moreover, with the demise of corporations, economic agents had tended (albeit slowly) to organize themselves in the form, not of corporations or local communities, but depending on economic position, either of single unitary professions, or of unified, trans-sectoral groups, bound by general socio-economic identities.<sup>13</sup> In consequence, trade unions eventually evolved as mechanisms for the assertion of interests attached to increasingly consolidated and socially generalized *economic classes*, and the disputes that they transmitted towards state

<sup>13</sup> On the closely linked rise of professions, trade unions and classes through the nineteenth century see Larson (1977: 118).

institutions were clearly determined by wider class conflicts. The rise of national society was inextricably linked to the rise of socio-economic classes: owing to their anti-corporate origins, *nations inevitably produced social classes*, and the organization of social classes was a primary social consequence of the constitution of society on an extended national model.

By the late nineteenth century, in consequence, the national state was usually surrounded in its domestic environment by increasingly organized political-economic classes and increasingly disciplined social organizations, conflicts between which it was supposed to resolve. As a result, the state was placed under increasingly intense obligation to satisfy the demands of different corporations, and to placate the collective interests of distinct classes.<sup>14</sup> The growing power of new corporations was in fact part of a more general process of renewed corporatist organization, or even partial re-collectivization, of national economies in the later nineteenth century, and it was mirrored on the opposing side of the industrial divide. In some economies, notably those that were less successful in international economic competition, associations of leading industrialists joined their adversaries in the production process in promoting new modes of collectivism, and in many European states monetary resources and sectoral power were increasingly concentrated in monopolies and cartels. In Germany, for example, guilds remained influential through much of the nineteenth century, and collective economic interests were also reflected in the power of cartels; notably, cartels were legalized by the Imperial court in 1897. Moreover, in Germany, observers who saw benefits in the collective power of trade unions were often not unsympathetic to cartels, which they accepted as important actors in a new semi-controlled economy (Schröder 1988: 480–84). Quite generally, the formation of national states and national societies in the revolutionary period eventually led, by about 1900, to the reconstitution of an informally collectivized public economy. In this setting, classical private-legal principles of free property holding and free exchange of contracts were, if not abrogated, then at least subject to factual collective constraint, on both sides of the industrial production process (Pirou 1909: 360).

Taken together, these processes had the result that, once states had begun to reach deeply into national society, they confronted, and were

<sup>14</sup> See the classical, but still valid, analysis in Brentano (1871: 81). See also Garaud (1953: 257).



forced to include, societies that had little in common with the simple nations proclaimed as the source of the state's inclusionary power around 1789. By the late nineteenth century, most states had begun to include their constituents as holders of certain participatory rights. As a result, states ultimately confronted and integrated their nations as societies marked by advanced sectoral organization, in which different groups, based in increasingly solid economic classes, were highly mobilized around economic conflicts, and different spheres of production had acquired a rigid associational structure. The nation entered the political system, therefore, not as a simple aggregate of persons, but as a nation ordered in class-based collective organizations. This meant, in turn, that most states could only obtain societal support if they pacified the different political factions which they integrated, and they were forced to devise inclusionary procedures for mollifying conflicts between new corporate organizations. Typically, states reacted to these pressures by further widening the scope of political rights, and by allotting *social and material rights* to the organized economic groups (classes) that had assumed political relevance. Once they had established a corpus of political rights, states began, almost immediately, to distribute material rights as a *third tier* in their inclusionary structure, and they began to incorporate the national people in the political system as a mass of agents laying claim to material benefits, and demanding resolution for deep-lying antagonisms between the nation's constituent classes. The national people thus entered the political system, finally, through a *third stratum* of social and material rights, which were produced and solidified as national states absorbed pressures resulting directly from the earlier unification of their societies through the media of private economic and political rights.

In the later nineteenth century, the third tier of social and material rights which emerged in most national societies was reflected, in particular, in the sphere of *labour law*. Initially, as mentioned, guilds had performed functions of labour-market regulation for much of European society, and they had supervised labour and production both through corporate legislation and free-standing judicial institutions. However, the disappearance of guilds and classical corporations meant that national states acquired greater responsibility for labour-market regulation, and they were required to fill the vacuum left by the erosion of corporations. Tellingly, in fact, Napoleon himself introduced councils [*conseils de prud'hommes*] in 1806 to resolve professional and early industrial disputes, and these were emulated in other territories under

Napoleonic influence (Weiß 1994: 5–8). Indeed, Napoleon introduced such petty labour courts because a substitute jurisdiction was required for cases that had been heard by corporations before 1791 (Mollot 1846: 21). By the 1840s, there were over sixty such courts in France. Later, factory courts and trade courts were introduced in other European countries for similar purposes, and most states provided, in patchwork fashion, for some degree of formal arbitration in labour conflicts, replacing conciliatory functions previously performed by guilds. This began slowly and tentatively. For example, Prussia had established a number of communal labour courts by 1845 (Graf 1996: 10). In the UK, provisions for arbitration in the cotton industry were made as early as 1800, and a (largely ineffective) Arbitration Act was passed in 1824. By 1840, a basic system for industrial arbitration was in place in the UK (Jaffe 2000: 557). Councils of Conciliation were established by parliamentary statute in 1867, and mechanisms for arbitration were greatly expanded in the Conciliation Act of 1896 (Chang 1936: 45). From the late nineteenth century onward, however, labour law became an increasingly significant legal field, and national governments assumed widening arbitrational duties in the industrial economy. By the end of the nineteenth century, most states had begun to construct a corpus of labour law, in which the state was required, to some degree, to thicken the political rights which it distributed. In part, states were required to convert these rights into basic *social and material rights* relating to contractual and general employment conditions, and to apply such rights, however selectively, to stabilize relations between rival organizations in the production process. In the UK, arbitrational powers in labour disputes were augmented in the Conciliation Act of 1896 (see Amulree 1929: 101). In Imperial Germany, the law on *Gewerbegerichte* (1890) expanded provisions for judicial regulation of labour (Sinzheimer 1932: 11), providing reinforced guarantees for labour rights. In France, a law on conciliation and arbitration was passed in 1892.

In most of Europe, consequently, labour law gradually became a key dimension in the inclusionary structure of national societies, and pressures of inclusion triggered by earlier strata of rights were refracted and absorbed in social and material rights secured in a growing body of labour law. It is notable in this process, however, that few states succeeded in establishing a stable system of labour law, capable of moderating the class adversity that surrounded them. Almost invariably, national states struggled to distribute labour rights in legally secure

form. Typically, labour law did not provide a solid inclusionary structure for the political system, and it did provide an autonomous legal structure for society as a whole. Usually, the conflict over social and material rights formalized through labour law ultimately created a legal domain, which placed the state in an immediate relation to intense social conflicts, and in which potent rival organizations gained proximity to the state and attempted to impose their interests on departments of the state. By the later nineteenth century, societies were increasingly polarized around rival conceptions of labour rights, and few states were able to resolve this polarization or to integrate actors in the field of labour law into a system of public inclusion. Generally, the arbitral power of state institutions had limited effect; often, powerful class-based organizations used labour law to circumvent the state, and they established legal norms to regulate labour and production outside immediate state jurisdiction. In fact, by the early part of the twentieth century, in many European states economic organizations had begun, in classical corporatistic fashion, to create laws for their own professions, separately to negotiate conditions of employment with semi-binding force, and even to form labour contracts on a collectivist basis.<sup>15</sup> As a result, economic actors came to sit alongside the state, and organized groups on both sides of the industrial production process instrumentalized labour law to assume potent, semi-autonomous positions in the margins of the political system. Accordingly, the gradual creation of a *third tier* of rights in the inclusionary structure of national societies proved deeply unsettling for most national political systems. Few states were able to sustain an authoritative public form above the conflictual organizations which they internalized by allocating placatory social rights to rival economic bodies and rival economic classes.

By the late nineteenth century, in short, it had become apparent, in Europe, that the national constitutional state, resulting from the revolutionary interlude after 1789, was afflicted by an inherent, and essentially insoluble, problem. The national state had not been able to consolidate its position as the inclusionary legislative centre of nationalized societies. The idea of a state expressing the will of a single sovereign people was originally a fiction. By the late nineteenth century, it had become clear that this fiction had not, and in fact *could*

<sup>15</sup> See the classical analysis of the rise of the collective labour contract in Duguit (1912: 134–5) and Lotmar (2001 [1902–1908]: 818). By 1914, leaders of German trade unions saw the establishment of collective contracts as a primary objective of trade-union activity. See the outstanding, but rather forgotten, research on this question in Fritz (1931: 72).

not, become a factual reality. This idea was only upheld as long as the state hardened itself against real, material inclusion of the people. Where states began to integrate their populations as real political and material agents, states encountered societies marked by deeply entrenched class fissures: indeed, national states invariably generated class antagonisms as they presided over the transition from corporate/localistic to nationally inclusive societal structures. Class organizations became the form in which the national people presented itself, as sovereign, to the national state. Moreover, the inclusionary instruments provided by national constitutional law did not establish a sufficiently robust structure for states to integrate the complex, materially divided societies, and classical constitutional laws did not provide a basis for the abstraction of the political system as a primary centre of legislation in such environments. As national states penetrated more deeply into society, they allocated different sets of rights to stabilize their position and to cement their inclusionary structures. Paradoxically, however, the use of rights to integrate national society inevitably obstructed the rise of uniform and cohesive societies. The formation of the national constitutional state was commonly accompanied, not by the state's pervasive inclusion of society in the political system, but by a *re-corporation* of civil society. In this process, the state was required to sustain its power through negotiation with powerful private organizations, many of which utilized state resources for quite distinct sectoral functions and for quite distinct class interests. Paradoxically, as the state reached further into society, distributing rights to more social groups, and as, accordingly, society became more and more nationalized, the formal dominance of the national state in society appeared more and more illusory. As society became more nationally extensive, the national political system lost its inclusionary capacities in face of the divergent class-related pressures that it produced, and society as a whole tended to lapse back into a pluralistic corporatist structure, defined now not by professional status but by class antagonism. The increasing nationalization of society led, in seemingly inexorable fashion, to its class-based re-corporation, and, in consequence, to the relativization of the power of the state in society.<sup>16</sup>

<sup>16</sup> Indicatively, much of the most important political and sociological literature of the nineteenth century was focused on proposing solutions to the inclusionary demands placed upon the national constitutional state by the complex form of the sovereign nation, which it had summoned into life. Marx, of course, concluded that radical simplification of the social order was the only solution for these problems. However, the more refined sociologists of early national

This deep inherent problem in the rise of national statehood culminated, most acutely, in World War I.

Throughout World War I, on one hand, European societies underwent an accelerated process of nationalization. During the war, most obviously, national populations, which had been rapidly mobilized for combat, were integrated wholesale in the military machine, and so placed under direct control of their national states. As a result, the factual reach of states into their societies extended exponentially, and under pressures of mobilization, states assumed positions of unprecedented centrality and coordinating authority in their national territories. In belligerent nations, further, groups from different regions and different classes confronted each other, through military conscription, at a level of new immediacy, nationalized by the common threat of violent death. In both respects, national statehood became an intensified phenomenon. As a result of this, in much of Europe, World War I gave dramatic impetus to the concept of national sovereignty. As discussed, in the first emergence of modern national states, the exercise of constituent power by the sovereign nation had little factual importance for the political system, and the most enduring early constitutional states made little reference to national sovereignty as a source of authority.<sup>17</sup> Despite this, however, the principle that the political system derives its legitimacy from the nation as an integrated constituent actor did not wholly disappear from the political imagination. This principle was briefly reinvigorated around 1848, and it began to regain momentum in the later nineteenth

capitalism were intent on showing how dynamics propelled by uniform nationalization of society could be contained within new inclusionary structures. For example, Durkheim (1926 [1902]: 31) accentuated the continuing importance of independent corporations in absorbing economic antagonisms, and he described corporations as one of the 'essential bases' of 'political organization'. In Germany, Lujo Brentano and Adolf Wagner, with other economic sociologists around the *Verein für Sozialpolitik*, drew the conclusion that these problems could only be resolved if the state expanded its classical perimeters and assumed immediate responsibility for the legal-regulatory inclusion of conflicts relating to the labour market (Brentano 1871: 127; 1877: 335; Wagner 1892: 744–5, 851). These views later fed into Weber's (1921: 863) account of the modern state as a centre of integration reliant on leadership elites. Analogously, much of the leading legal inquiry of the nineteenth century, at least outside the positivist field, was dedicated to re-conceiving the state, not as a formal edifice, but as an organic aggregate of institutions, providing complex structures of inclusion for increasingly polarized nations. This conception was surprisingly general across national boundaries. It appears in the works of Gierke (1873: 886) in Germany, and in those of Duguit in France (1901: 77). Overall, both factually and reflexively, the later nineteenth century was dominated by sociological questions resulting from the rather paradoxical link between state consolidation, societal nationalization and privatistic re-corporation.

<sup>17</sup> See pp. 64–8 above.

century. After 1914, however, the belief that the state owes its legitimacy to the expressly incorporated will of the sovereign national people became, albeit briefly, dominant. World War I stimulated widespread demands for mass inclusion in national political systems, and it led to a new period of constitution writing in Europe, which, reflecting the experience of national populations forced together, and uniformly mobilized, by war, revitalized the concepts of constituent power and national sovereignty as ineliminable sources of political legitimacy. In international politics, on one hand, the assumption became commonplace at this time that national sovereignty was the sole appropriate form of existence for different peoples. This principle had already been progressively asserted through the fragmentation of continental European Empires, especially the Austro-Hungarian Empire, through the unification of national states in Germany and Italy, and through the resultant rise of irredentist movements, all of which characterized the later nineteenth century. But this principle culminated, most obviously, in the international policies of Woodrow Wilson in 1918. In domestic politics, on the other hand, popular mobilization for the war effort promoted the conviction that the nation as a whole needed to be fully and comprehensively integrated into the political system, and that a political system could only obtain legitimacy and authority through its close homology with a given national population. Consequently, most European societies entered a condition close to full national democracy either in, or as an immediate consequence of, the war. Between 1914 and 1918, both national sovereignty as an *external* concept of legitimate statehood and national sovereignty as an *internal* construction of legitimate statehood were dramatically inflated by the mass experience of inter-state hostility and popular mobilization.<sup>18</sup>

At the same time, however, World War I did not only lead to an intensified nationalization of European societies. It also led to an intensified re-corporation of these societies. During the war, belligerent states and their military executives relied heavily on the support of industrial associations and trade unions to produce armaments and to maintain discipline in the workforce. As a result, governments were forced to purchase support for military and industrial mobilization by granting growing powers to economic organizations, especially trade unions, and by overseeing relations between trade unions and industrial management. This led to a sudden reconfiguration of the political

<sup>18</sup> On this connection see Manela (2007: 217).

economies of national societies, and it offered important opportunities for the organizational representatives of different economic classes. Typically, above all, this meant that in most of Europe between 1914 and 1918, trade unions acquired significantly increased status for the political system: unions widely received formal recognition, they obtained some measure of judicial protection through arbitration courts, they were co-opted in economic planning activities and collective labour contracts between unions and business leaders were accepted and even expressly promoted by national governments.<sup>19</sup> However, this also meant that co-operation between unions and business was primarily directed, often coercively, by the state, and labour conflicts were regulated through formal, often mandatory, systems of industrial arbitration.<sup>20</sup> In the war-time public economy, therefore, organizations representing diverse class interests moved close to the nervous centre of the government, and they began to form, and define their functions within, an extended *corporate periphery* to the political system, surrounding, and interacting with, the core institutions of the state. As a result, the state was expected to oversee the allocation of social and material rights and legal protections to increasingly integrated economic organizations, and it assumed far-reaching responsibility for securing an equilibrium between collectively ordered class interests as the basis for military mobilization and public policy more generally. After 1914, in consequence, most European societies developed a deeply materialized inclusionary structure, locking citizens into the state through a thick stratum of social and material rights, and through extensive provisions for industrial arbitration, collective bargaining and co-option of sectoral and professional corporations. Trade unions in fact became a core expression of the national sovereign people.

<sup>19</sup> During World War I, most European trade unions established a deal with national governments: the basis of this deal was that unions would support the war effort (i.e. forgo strikes and regiment the workforce) if governments guaranteed their legal recognition and enabled collective bargaining or at least established fora for representing union interests. This was cemented in important pieces of legislation in the different belligerent states – notably, the Auxiliary Service Law in Germany (1916), the establishment of a formal system of mediation in France (1917), and Lloyd George's Munitions Acts in the UK. See on Germany Fritz (1931: 106). On labour law in war-time France see Raynaud (1921: 31). In France, collective bargaining was established in 1919. On the bilateral advantages drawn from these arrangements, see Rubin (1987: 17, 29).

<sup>20</sup> France established arbitration courts in 1917. In the UK, tribunals for arbitration were set up in munitions factories under the Munitions Act of 1915 (see Amulree 1929: 128; Rubin 1977: 152–3). A permanent court of voluntary arbitration was established in 1919.



The paradoxical nature of the national state thus became most apparent during World War I. At this time, both the trajectory towards national inclusion and the trajectory towards economic re-corporation were, simultaneously, greatly accentuated and intensified. The moment in which the state approached fully realized national form was also the moment in which it was forced to recognize, legally, the segmentation of society around it along lines of class affiliation. This overlapping process then continued into the interwar era. In most societies, the longer-term effect of World War I was that labour law acquired an increasingly vital role as a legal form for establishing compromises between the different corporations which had entered the state periphery during the war (see Wieacker 1952: 321). Either during the war or in its aftermath, in fact, most states, as they converted to mass democracy, established constitutions with a pronounced corporatist dimension, placing labour law, mandatory industrial arbitration and social and material rights at the centre of constitutional law, and using labour law to soften social conflict by incorporating organized interest groups more closely in the state. Different examples of this are discussed below. Through this process, however, labour law remained a dimension of public-legal order marked by extreme volatility, which exposed the political system to conflict of constantly rising intensity. States invariably struggled to stabilize labour law, based in the mediation of class conflicts, as an autonomous inclusionary structure for their functions. In the wake of World War I, few political systems solidified their position above the rival associations drawn into the margins of the state by the use of labour law as an inclusionary medium.<sup>21</sup> As discussed below, the new democratic states of interwar Europe endeavoured to give expression to the sovereign will of their nations, which became materially manifest during World War I, and to integrate this will through a three-tiered system of rights, comprising private rights, political rights and social and material rights. However, in virtually all cases, these states were incapable of mediating the divergent prerogatives implied in this sovereign will. Instead of forming a strong inclusionary structure, the allocation of deep strata of political and socio-material rights usually triggered a corrosive fragmentation of the political system, in which different social groups used their proximity to the political system to secure protection for quite distinct private and associational interests across society, rooted outside

<sup>21</sup> States that retained some stability after 1918 usually had the characteristic that they had reached a reasonably advanced pacification of labour conflicts before 1914 (see Luebbert 1987).

the political system. Although national sovereignty had first appeared as a concept to segregate the state from private corporations, therefore, when it finally became a material reality for the political system around World War I, this concept had the converse, *bitterly paradoxical* effect – it locked the state into a cycle of endemic *reprivatization*.

These paradoxes of national statehood first assumed prominence in Europe. However, they were not exclusive to Europe. The inability of states to establish an inclusionary structure for class conflicts in national societies was a salient aspect of state building across the globe. For example, most Latin American states, formed through the collapse of the Spanish and Portuguese empires in the Napoleonic age, had possessed limited constitutions through the nineteenth century. As in Europe, these constitutions usually only provided for a very small franchise, and their main function was to stabilize elite bureaucracies above the conflictual dimensions of society. As they penetrated more deeply into society during the twentieth century, however, most Latin American states were formed, or at least consolidated, on a corporatist model of constitutional class integration and conflict mediation; Latin American societies, shaped by their Hispanic origins, were particularly receptive for corporatistic governance models. To an even greater degree than in Europe, attempts at corporatist class inclusion in Latin America were not only designed for the inner organization of democracy. They were also inseparable from a wider policy of sovereign state formation and objective nation building. In Latin America, the intensification of sectoral inclusion through the promotion of corporatist labour law was widely promoted to bind different sectors of society together, and effectively to *create nations*, in settings where national institutions had traditionally enjoyed only very shallow social purchase, and different regions and subgroups were only loosely integrated (Erickson 1977: 59, 63). Corporatist labour law, in other words, was accorded an express nation-building function, and it was expected to stabilize the inclusionary position of the political system within previously only haphazardly connected national societies. As in interwar Europe, however, in Latin America, corporatist constitutional experiments usually led to acute inclusionary crises, and they typically gave rise to regimes that were marked by the deep reliance of the executive on private or patrimonial support (Remmer 1989a: 150; Ranis 1992: 38–9): i.e. by the co-option of powerful societal elites through privatization of public goods. Indeed, in most Latin American societies, political corporatism led to a condition of effective *state re-privatization*.

In the post-independence states of Sub-Saharan Africa, corporatist constitutionalism was also widespread, and, here too, attempts at inclusionary resolution of class antagonism often had results very similar to those described earlier. Indeed, in Sub-Saharan Africa, extreme tendencies towards inflated socio-economic inclusivity and weakly articulated statehood were almost invariably linked attributes of the post-colonial political system. In most Southern African societies, national statehood was only constructed through decolonization, and it was initially defined by constitutions, which proclaimed uniform nationhood as the bedrock of newly emergent polities. In most cases, however, uniform nationhood was merely an illusion. Typically, decolonization led, not to the establishment of political institutions reflecting strong national support, but to the proliferation of institutions whose roots in society were shallow and uneven, which lacked deep structural legitimacy and which were destabilized by ethnic fissures in society. In consequence, these institutions relied to a large degree on patrimonialism, clientelism and distribution of spoils to construct a bedrock of societal support.<sup>22</sup> At the same time, most post-colonial states in Africa proclaimed legitimacy through far-reaching economic interventionism, conflict management and socio-material rights allocation. In particular, these states attempted to downplay the role of class fissures in national society, to reduce the divisive power of lateral affiliations, and so to bind together a clearly national society through acts of corporate integration and material redistribution (de Walle 1994: 133). To this end, most post-colonial states sought to sustain adequate levels of support in society through the selective allocation of economic goods, through artificially high public employment and publicly regulated production and through the (often coerced) corporatist integration of organized labour.<sup>23</sup> In most cases, however, this placed unmanageable burdens on states, whose regulatory capacities were already precarious, and it usually led to a profound crisis of state autonomy and a far-reaching *privatization* of the foundations of the state (de Walle 2001: 52–4).

Quite generally, in sum, the national constitutional state contains the deep paradox that, typically, it claims to obtain legitimacy from the will of a particular nation: the will of the nation is the essential inclusionary structure of the modern state. This nation, however, does

<sup>22</sup> On the link between low legitimacy and patrimonialism, see Englebort (2000a: 29).

<sup>23</sup> For expert analysis of the relation in Africa between patrimonial state privatization and corporatist integration of society in the state see Lemarchand (1988: 155–6). See also Callaghy (1988: 82) and de Walle (1994: 133).

not exist. Once constructed, the national state is forced to create a nation, and it does so by applying rights to penetrate more and more deeply into society. Across a range of very different trajectories, most national states were built through a *three-tier system of private, political and socio-material rights*, in which the sovereign national people, from which states extracted legitimacy, was included, layer upon layer, in the political order. In attempting to create the nation as the basis of its legitimacy, however, the national state was inevitably forced to internalize an increasing volume of social conflicts, and it almost invariably lost its stability and legitimacy, as it failed to mediate these conflicts into a publicly inclusionary structure. The great paradox of national sovereignty, therefore, is that it distilled the basic formula for the emergence of the modern differentiated political system. Yet, it also proved a structural obstacle to the evolution of this same system, and it exposed this system to recurrent inclusionary crisis. In most cases, societies which based their politics around the norm of national sovereignty were unable to escape destabilization through intense pressures of inclusion, and their ability to support a strictly political domain, capable of generalized functions of inclusion, remained precarious. On these grounds, the concept of national sovereignty appears as an *impossible political formula*. It first emerged as a fictitious construction of the political system. Ultimately, political systems defined by the principle of national sovereignty proved incapable of applying their power to fully nationalized societies. The more states presided over societal nationalization, the more internally fragmented they became, and they usually lacked the basic inclusionary structure required to sustain their position in a national society. The constitutional formula which separated the political system from the pluralistic reality of corporations and estates in the *ancien régime* did not, in its long-term consequences, create a basis for sustainable political institutions, capable of even acts of societal inclusion.

## THE CRISIS OF LEGAL INCLUSION

In most cases, albeit most paradigmatically in interwar Europe, the inclusionary crisis of national statehood expressed itself, objectively, in the capacity of national political systems for *law production* and in their primary functions of legislation and legal construction. Generally, the fact that they developed an inclusionary structure built around expansive strata of rights meant that national states assumed responsibility for

satisfying multiple demands for law, and they were required to generate a rapidly growing volume of law for society as a whole. Most specifically, states were required to make good on pledges for material inclusion and distribution, to produce law to stabilize spheres of social conflict, and to apply palliative norms to the most volatile and conflictual areas of society – especially through labour law. This led to a dramatic increase in societal consumption of law. Most national states, however, were not able adequately to meet the rising demands for law which they engendered. In a number of different ways, the instruments that states evolved for producing law proved unequal to their inclusionary obligations, and the inability of states to produce sufficient quantities of law for society exacerbated the structural crises and fragmentational tendencies to which they were exposed.

First, as they reached more deeply into society and were expected to produce law to mediate deep-set structural conflicts, most states reacted to these expectations by cementing the power of *democratic legislatures*. After 1918, most European states attempted to accelerate and intensify the production of law by expanding the legislative power of parliamentary chambers. Clearly, the concept of national sovereignty through which most modern states declared their legitimacy eventually dictated that the state was required to integrate the people as a direct source of legislation. In most European societies, therefore, the initial transition to mass democracy, around or after 1918, coincided with a short-lived expansion of parliamentary competence, as parliaments symbolically assumed a central position as the epicentre of the political system. In most cases, however, as states moved towards full popular enfranchisement, it became clear that parliamentary legislatures were unable to establish inter-party consensus on key points of public policy, and they normally proved ineffective in generating the required volume of legislation for the societies in which they were located. In most early mass-democracies, consequently, parliaments quickly ceded legislative power to other branches of government, usually executives, which were soon transformed into leading organs of state.

In some cases, this shift in institutional emphasis occurred in authoritarian fashion, as executive actors violently arrogated the powers formally allotted to deadlocked legislatures. The classic examples of this are Italy in the early 1920s and Germany between 1929 and 1933. In both cases, leading theorists argued that legislatures were incapable of producing the necessary quantity of legislation for society, and

powerful executives were more effective organs for law making (Schmitt 1931: 88; Rocco 2005: 222, 218). In some cases, this shift took place by more consensual means, as executive agencies assumed responsibility for the resolution of problems of national reconstruction which existing mechanisms of legislative delegation could not accomplish. This can be seen in the USA under Roosevelt (see Kersch 2004: 61). In some cases, this shift occurred in slightly less visible fashion, as executive committees, often interacting freely with private associations, assumed a primary role in legislation behind the facade of classical parliamentarism. This can be seen in the UK, through a process beginning in the franchise reforms of the later nineteenth century and running through to the 1920s, in which the Westminster parliament progressively surrendered power to the executive branch (see Low 1904: 58–9; Flinders 2001: 45). Indeed, the displacement of effective legislative competence in the UK was a source of repeated polemic in the 1920s and 1930 (see Hewart 1929: 59), and in the early 1930s the government even established a public committee to investigate this transfer of power. In most cases, tellingly, this shift of emphasis from legislature to government was effected through an extension of wartime emergency powers into peacetime regulations: emergency provisions used to mobilize society in World War I provided the basis for the later reinforcement of the executive (see Boldt 1972; Fox and Blackwell 2014: 45). In each case, the basic design of the national democratic state underwent a profound transformation as a result of its inclusionary expansion and its exposure to increasing demands for legislation. In each case, this was reflected in an either partial or comprehensive *personalization*, or even, in more extreme cases, in a *de facto privatization*, of national legislative authority.

As discussed, second, as they approached a condition of mass-democratic inclusion, normally after 1918, most states addressed increasing demands for legislative inclusion by developing corporatist chambers and corporatist organs for economic interest aggregation. Sitting alongside formal legislatures, these chambers were assigned responsibility for interacting with economic organizations (i.e. trade unions, lobbies, industrial associations) and for producing legislation and constructing legitimacy for legislation through consultation with representatives of organized professional interest groups. The creation of corporatist institutions usually formed a second key outcome of the escalating need for law in the inclusive political systems, positioned

in acutely divided societies, which emerged from World War I. As with elected parliaments, however, in most states marked by the growth of corporatist delegation, corporatist institutions were quickly transformed into executive bodies, typically with repressive functions. As discussed below, most political systems that evolved democratic corporatist patterns of representation were eventually reconstructed as institutional blocs to protect select material interests in society, and they were annexed by potent private actors, whose primary motives were external to the political system. In this respect, too, pressures of inclusion meant that national political systems lost the capacity for the autonomous creation of law, and this resulted in the solidification of strong private interests within the state.

Third, in most settings in which national political systems encountered pressures for accelerated law production, they began to malfunction, not only in the concrete *production* of legislation but also in the societal *application* of law – that is, in their judicial departments. The weakening of judicial organs was a common feature of interwar European polities, and it was especially notable in political systems confronted with intense demands for laws to palliate class hostilities. As mentioned, corporatist democracies usually institutionalized judicial bodies for reconciling inter-organizational disputes over production conditions, and they used courts as fora for allocating social and material rights and preserving a balance between social classes. As corporatist democracies were replaced by authoritarian regimes, however, judicial bodies were widely converted into highly coercive institutions, with the function of suppressing class antagonisms at the place of work and preventing such antagonisms from pervading more deeply into the economic and the political system. Labour courts, in other words, were deployed as instruments to cement the coercive interests of one class throughout society.<sup>24</sup> Loss of judicial capacity is not peculiar to European authoritarianism. One quite general result of the exposure of the political system to intense inclusionary pressures is in fact that societal application of law is personalized, and judicial institutions lose capacity to generate reliable and consistent rulings.<sup>25</sup> As in other dimensions of the political system, therefore, pressures of inclusion on the state

<sup>24</sup> In the official doctrine of fascist Italy, for example, courts had responsibility for resolving ‘collective conflicts’ in the economy, and in doing this they were expected to tie the rulings they handed down to national economic interests (Sforza 1934: 275–6).

<sup>25</sup> See examples on pp. 267, 326, 357 below.



have typically led to fragmentation in the judicial domain, and this has normally been accompanied by a pervasive privatization of judicial functions, and a haemorrhaging of public authority in the judicial domain.

Across different lines of political-systemic construction, the attempt to incorporate the nation as a sovereign author of laws has often triggered an intense *politicization* within the political system: that is, it has confronted states with rapidly escalating demands for legislation. Naturally, this has been registered in different systemic dimensions in different states. However, it has typically engendered pathological tendencies towards *reprivatization*, enabling extra-political actors directly to infiltrate the state and to dictate key aspects of public policy. As a result of which the political system – in many cases – has renounced its public-constitutional form, and at least partly re-converged with private sources of power and coercion. Very few states, operating solely or primarily within nationally delineated societies, have been effective in responding to the primary inclusionary pressures stimulated by these societies. Only in very few societies did the dissolution of traditional, corporate society see the emergence of reliable structures of inclusion, able enduringly to support a national political system. Most states, be this on one single occasion, repeatedly or cyclically, have been brought to a condition of structural debility by pressures of mediation and inclusion directed towards them from societies which they constructed, and integrated, as reservoirs of *national sovereignty*. In order to preserve some degree of structural inclusivity, states have usually resorted to relying on patrimonial, clientelistic or privately embedded supports, through which, ultimately, lateral emphases and interests of different social groups have fractured the independent structure of the state. The focusing of state authority around the presence of a real, living sovereign nation has tended to provoke a *loss of differentiation* of the political system *vis-à-vis* powerful private organizations, in which the basic distinction of the political system in relation to other centres of agency and motivations becomes blurred. In most societies, national states were formed through a process, first, of mass inclusion and, later, of mass mobilization, which detached them from their origins in private/local power. Yet, they proved incapable of performing inclusionary functions as socially abstracted political systems, and they rapidly – often cyclically – collapsed back into a condition of deep privatism, close to the corporate estate-based order, in contradistinction from which the modern nation state first defined itself.

## THE NATIONAL FOUNDATIONS OF TRANSNATIONAL CONSTITUTIONAL LAW

As indicated in [Chapters 2 and 3](#), the recent development of national statehood since 1945 has been marked, albeit in regionally staggered and variable fashion, by one dominant trajectory. *Externally*, the character of contemporary statehood is shaped by the increasing constitutional impact of international legal instruments and international organizations. As a result of this, national legislation is now typically, to varying degrees, constitutionally *co-determined* by internationally justiciable norms, usually informed by human rights legislation. *Internally*, contemporary statehood is defined by the directly linked rise of national courts, especially Constitutional Courts, exercising powers of judicial review, which also constitutionally constrain the freedom of legislative institutions. National courts typically act in close consort or comity with supranational judiciaries, and they derive from international human rights law the constitutional power to check national legislation, often using this to increase their authority and influence vis-à-vis other branches of government. As a result of this, national laws are widely pre-defined – however variably – by transnational constitutional principles. Both externally and internally, national states increasingly operate within a *transnational judicial constitution*.

There are many different explanations for this new constitutional system. On one hand, as discussed, the rise of this constitutional pattern has often been understood as an *external* attempt by international norm setters to reduce the authority of national states following the traumas of interwar authoritarianism. Viewed at a deeper sociological level, however, transnational judicial constitutionalism began to evolve after 1945 as a reaction to less visible social factors. In particular, it evolved as a reflexive legal form in which national states were able to overcome their disastrous centration on national sovereignty and constituent power as the primary norms of political inclusion, and in which they could avoid processes of institutional collapse caused by these concepts. *Externally*, as discussed, the rise of international human rights law created a legal structure, in which states could manage and soften the implications of national sovereignty in the international domain. *Internally*, however, the rise of international human rights also created a constitution in which the domestic, inner-societal implications of national sovereignty could be more effectively absorbed and sustained. As discussed in [Chapter 1](#), the first classical formula of

constitutionalism created a legal order in which a political system based in national sovereignty could evolve. Structurally, however, the political system defined under classical constitutionalism presupposed only minimal inclusion of the sovereign people as a factual entity. Political systems only became able factually to integrate their sovereign populations as they renounced their centration on national sovereignty, and as they attached their inclusionary foundations to international law. The inclusionary reality imagined by national constitutions only became reality under constitutions giving high standing to international law. In fact, international law often became a paradoxical precondition for the realization of the inclusionary structure envisioned by national constitutions, and transnational constitutions often recreated, in sustainable form, the system of inclusion projected by national constitutions.

One particularly important result of the constitutional impact of international human rights law was that, in reaching into domestic constitutions, it modified the three-tier system of societal inclusion, to which states had been obligated as centres of national sovereign authority. After 1945, international human rights began to form a *fourth stratum of inclusion* in this system, and national political systems began to conduct their processes of inclusion, in part, by applying international human rights norms as a supplementary tier of rights, alongside, or overlying, the strata of rights generated through the evolution of national constitutions. Through this process, the growing prevalence of transnational judicial constitutionalism after 1945 began to cement a relatively stable form for mass-democratic governance, which had been elusive in states defined by a constant obligation to active national sovereignty, and it led to the gradual emergence of constitutional democracy as a widespread model of political organization. The partial integration of national states and their constitutions within an international normative system provided structural reinforcement for domestic institutions that had previously collapsed in face of the inclusionary expectations induced by earlier experiments in national mass-inclusion and national mass-democracy. Clearly, it cannot be disputed that wider international forces, for example economic directives, played a vital role in the post-1945 stabilization of democratic statehood.<sup>26</sup> However, the fact that state institutions were able to integrate internationally defined norms

<sup>26</sup> See, for example, Ruggie's (1982) account of 'embedded liberalism' as a foundation of stable statehood after 1945.

in domestic law obviated their exposure to destabilizing societal pressures, and it contributed greatly to the reinforcement national systems of political inclusion. Above all, international human rights entered national societies as normative institutions that strengthened the inclusionary structure of their political systems, and which allowed these political systems to act at a level of unprecedented autonomy, producing laws, reliably and inclusively, without constantly unsettling risk of annexation by private groups. Political democracy, with its attendant expectations of expansionary societal inclusion, only became a manageable socio-political reality as national political systems were, in select normative domains and through select institutional hinges, locked into an inter- or transnational legal/political system, and as they projected an inclusionary structure based in transnational legal premises. In many cases, in fact, international law was not only the key to the stabilization of democratic institutions. In most societies, it provided a basis for the stabilization of both national states and national political systems *tout court*. Often, it was only by internalizing international law within their own national constitutions that states were able to define their societies as reasonably inclusive entities, evenly subject to legislative resources stored within the state.

Crucial in this respect is the fact that, if national states originally promoted national integration through rights, states only acquired the capacity consistently and robustly to secure the primary strata of rights through which they had historically integrated their own populations by adding to these a *fourth stratum of rights*: international human rights. Typically, this fourth stratum of rights provided the foundation on which states were able effectively to activate other, national sets of rights without being re-absorbed into society, or structurally *re-privatized*. Usually, the national people only entered the political system in enduring institutionalized form through the medium of international human rights, which both overlaid and secured earlier strata of rights. In key respects, therefore, the international human rights which incrementally assumed global constitutional force after 1945 were constructed through processes of inclusion that were deeply embedded in domestic societies. Just as, after 1945, states gradually developed and presupposed an autonomous rights-based constitutional structure to support their external functions, they also developed and presupposed an autonomous rights-based constitutional structure to support their internal functions. Both internally and externally, this constitution was propelled by the fact that it allowed

states to construct an inclusionary structure not destabilized by highly contested expectations of inclusion attached to national sovereignty.

Illustrations of this relation between the expansion of national structures of inclusion and the growth of transnational constitutional law are given in the following chapters.

## CHAPTER FIVE

# CONSTITUTIONAL RIGHTS AND THE INCLUSION OF THE NATION: SYSTEMIC TRANSFORMATIONS I

### INTERNATIONAL HUMAN RIGHTS AND POLITICAL STRUCTURE BUILDING

After 1945, international law had a deep effect on most national political systems, both in new and more consolidated democracies, and international law often profoundly transformed domestic constitutional law. There are of course some exceptions to this pattern. In some societies in North West Europe, for example, national constitutional formation was not immediately shaped by a very deep influence of international law. In most societies, however, international human rights law solidified an inclusionary structure for national political systems, and it played an important role in consolidating national political institutions as relatively autonomous actors, able to produce legislation across all parts of domestic society.

In the extended wake of 1945, as mentioned earlier, international human rights norms assumed structurally formative significance in new, still precariously consolidated post-colonial polities. Indeed, such polities often showed distinctive reliance on international human rights norms as sources of legitimacy and structural integrity. One particularly important case of this is the Indian polity after independence, whose constitution (in force from early 1950) was partly inspired by the rights enthusiasm of the post-1945 era. The Indian constitution accepted a basic dualist notion of international law, and it permitted parliamentary amendment of basic laws. However, it established powerful protection for human rights (Art 13), derived in part from early UN treaties (Sripati 1997: 101–2), and it made provisions for judicial

review by a Supreme Court (Arts 32, 131, 143 and others). Indian courts were generally very open to the assimilation of international norms. By the 1970s, the Indian Supreme Court had established a body of case law to extract certain rights from parliamentary encroachment, fleshing out the principle that there existed a *basic structure* in the constitution, including fundamental rights norms, which were exempt from parliamentary revision.<sup>1</sup> In key respects, the Supreme Court acted as a primary custodian of the constitution, despite periodic complicity with more authoritarian executives, notably during Indira Gandhi's emergency rule. Indeed, in developing the basic structure doctrine, the Supreme Court expounded a particular theory of constituent power, incorporating a doctrine of divided sovereignty, which located legal sovereignty partly in the judiciary.<sup>2</sup> Particularly significant in India is the fact that international human rights law helped to consolidate a legal order after the withdrawal of imperial authority, such that human rights were applied to mark a founding caesura between the new democracy and its colonial past (Austin 1966: 58–9), acting to distil legitimacy, *ex nihilo*, for the political system. Also significant is the fact that, in India, constitutional law was constructed in a society marked by extreme regionalism, low national integrity and formalized social gradations. As a result, the courts eventually assumed vital nation-building functions, expanding a fabric of human rights through society, and even encouraging litigation to promote the transfusion of constitutional values into society,<sup>3</sup> and to bring social agents, in very different locations, into a direct relation to national political institutions (see Craig and Deshpande 1989: 368). In both respects, human rights played an important role in a slowly deepening process of political structure building and national construction.

<sup>1</sup> See the progressive development of this doctrine in the Supreme Court rulings in *I.C. Golaknath & Ors v State of Punjab & Anr* (1967); *Kesavananda Bharati v. State of Kerala* (1973). For comment, see Austin (1999: 196–277), Sen (2007: 197) and Dalal (2008). The basic structure doctrine was widely supported by reference to international human rights law. In *Kesavananda Bharati v. State of Kerala*, for example, it was stated: 'while our fundamental rights and directive principles were being fashioned and approved of by the Constituent Assembly, on December 10, 1948 the General Assembly of the United Nations adopted a Universal Declaration of Human Rights. The Declaration may not be a legally binding instrument but it shows how India understood the nature of Human Rights'.

<sup>2</sup> See the arguments in *Indira Nehru Gandhi v Shri Raj Narain & Anr* (1975). See comment in Krishnaswamy (2009: 271).

<sup>3</sup> See in this respect the classic Indian cases of public interest litigation, which had profound implications for rights-based nation building in India and beyond, *Bandhua Mukti Morcha v Union of India* [(1984) 3 SCC 161]; *S.P. Gupta v. Union of India*, AIR (1982) SC 149.



In addition, after 1945, international human rights norms acquired vital structural importance in established democratic polities. One most significant example of this is the USA.<sup>4</sup> In the USA, the ability of federal government to exercise control of all society was greatly increased through the 1950s and early 1960s, and the formation of the USA as a fully nationalized polity, merely foreseen, not accomplished, in the Federal Constitution of 1789, approached completion in this period. This process was directly tied to the increasing willingness of the federal government to guarantee uniform civil rights to all American citizens, across the colour line, and, in order to give effect to these rights, to override state legislatures.<sup>5</sup> Moreover, this process was informed, to a significant degree, by the pervasive influence of international legal norms. International human rights instruments have only rarely been directly applied in national jurisprudence in the USA. However, in the 1950s and 1960s, legal pressures resulting from the international normative domain often led national courts in America to reinforce the standing, scope and reach of rights in domestic law, and the growing authority of international human rights was one factor that gave rise to the allocation of more uniform civil rights across the entire federal polity. On one hand, the importance of human rights was evident at this time in the fact that federal tribunals were more prepared to give relief for persons violated in their rights in the states (see Tucker 1965: 342).<sup>6</sup> On the other hand, this was visible in the rights jurisprudence of the Supreme Court, which was open and sensitive to international legal debate, and which played a vital catalytic role in broadening the impact of human rights (Casper 1972: 39). In both respects, the

<sup>4</sup> For the classic case regarding direct enforcement of international law in the USA, see *Sei Fujii v State* (1950), in which a California state appellate court relied on the UN Charter and the UDHR to strike down the state's Alien Land Law, prohibiting Japanese immigrants from owning lands. Note, though, that the state Supreme Court later denied the direct applicability of the UN Charter.

<sup>5</sup> One recent account defines the struggle for civil rights as the 'crux' of American state building and governmental expansion (Francis 2014: 8).

<sup>6</sup> See broader comment in Dudziak (1988: 94) and Eschen (2012: 179). Note – vitally – the rise in influence of international treaties and conventions as background to the legal success of the Civil Rights movement and the weakening of the power of the states, which this implied (Power 2000: 12; James 2010: 189). Famously, the National Negro Congress, the NAACP and the Civil Rights Congress (under the Genocide Convention) all protested before the UN (respectively in 1946, 1947 and 1951, each time without success) against Jim Crow laws. Prominent Civil Rights cases before *Brown v Board of Education* also referred to the power of UN treaties as a normative source of American law. On both these points, see the excellent inquiry in Layton (2000: 27, 49). For conceptual background see Primus (1999: 194–5). Tellingly, opponents of Civil Rights legislation in the 1950s also opposed the influence of UN treaties on American legislation (consider The Bricker Amendment, 1953), and they invoked states' rights to counter the rise in presidential authority caused by implementation of treaties (Anderson 2003: 227).

influence of international norms triggered a general domestic expansion of national authority, across all parts of society. Indeed, the *osmotic* impact of international law has been a constant feature of the American legal system since 1945, and international law, although rarely guaranteed direct effect, has widely been used to instil cohesion in the national legal system as a whole. In certain cases, for example, the Supreme Court has invoked international law to overrule state courts.<sup>7</sup> In numerous cases, state courts have cited international law as an interpretive guide in order both to consolidate domestic rights at state level, and, most strategically, to avoid seeing their verdicts overturned by higher courts.<sup>8</sup> In both respects, international law has commonly been used to link together different tiers of the national legal system.

The role of human rights in consolidating national political structures after 1945 became most evident, however, in the formation of new national polities, following post-authoritarian transitions. In such settings, international human rights norms, transformed into domestic law, often proved crucial to the stabilization of relatively autonomous political institutions, and, during processes of rapid political re-orientation, the domestic assimilation of human rights enabled political institutions to overcome embedded, often recurrent sources of inclusionary crisis.

Research focused on democratic transitions has usually identified *external* factors, be these particular socio-economic conjunctures, or particular, often economically determined, societal challenges to political institutions, as causes of political transition towards democracy (see Remmer 1990: 328; Gasiorowski 1995: 892; Haggard and Kaufmann 1997: 167–8; Acemoglu and Robinson 2001: 940). Naturally, this chapter, and subsequent chapters, do not deny the validity of such explanations. Nonetheless, it is argued here that constitutional transitions have typically been induced by *inner-systemic* causes, or by pathologies within national political systems, acting alongside other factors. In particular, it is argued that most democratic transitions were caused by *inclusionary*

<sup>7</sup> See *Roper v Simmons*, 543 U.S. 551 (2005), prohibiting the juvenile death penalty. See impact of this in *Ex parte Adams*, 955 So. 2d 1106 (Ala. 2005). My thanks are due to Gianluca Gentili for these points.

<sup>8</sup> In this respect, there are extreme variations from state to state. In some states, there is intense hostility to the use of international law, and courts have expressly rejected principles based in international instruments. See for the Kansas Appeal Court ruling in *State v Amaya-Ticas* (2008). In other states, courts have cited international law to establish strong precedents for domestic rights and to harden rights provisions in state law. See the Connecticut Supreme Court verdict in *Moore v Ganim* (1995). I again thank Gianluca Gentili for these references.

crises within national legal/political systems: that is, they were caused by the fact that national political systems had not evolved a robust inclusionary structure, and the political system had failed to perform functions of effective legal inclusion for society. In many cases, these inclusionary crises were the result, in part, of the constitutional diction in which political systems defined their legitimacy, and they resulted from the excessive inclusionary expectations which national constitutions had generated. Notably, societies often encountered inclusionary crises because their political systems, following the classical constitutional formula, had defined their legitimacy as extracted directly from the will of the sovereign nation, and they had been enduringly unsettled by inflated inclusionary pressures resulting from this. Ultimately, however, many states devised an alternative formulation of legitimacy through the course of democratic-constitutional transitions, and they developed a constitutional formula, defined in part by international human rights law, which reduced their susceptibility to inclusionary crisis. In many cases, international human rights became a medium which, once constitutionally incorporated in national states, softened the exposure of states to inherent strains caused by other strata of rights, and it helped to consolidate national political structures on that basis. Consequently, as mentioned in [Chapter 4](#), it was often only through the rise of a powerful system of international law, and especially human rights law, that national states learned to correct structural problems in their formative trajectories, to soften their exposure to inclusionary pressures that had traditionally brought them to crisis, and, as a result, to construct evenly inclusive sovereign political structures across national societies. This process is most clearly exemplified through democratic transitions; most democratic transitions usually involved, not only the establishment of national democracy, but the formation, more basically, of generally stable inclusionary structures for national societies as a whole. In most democratic transitions, the fact that hard norms could be borrowed from the international arena meant that political institutions were able to evolve relatively autonomous inclusionary structures in settings in which this had classically proved very precarious, risk-filled and inconclusive. To this degree, the rise of international human rights norms made it possible for national states to perform *compensatory structure building*. In both their internal and external dimensions, most states only acquired the ability to discharge their inclusionary functions *as sovereign states* to the extent that they were constitutionally locked into a transnational legal/political system, ordered

around rights. This usually coincided with processes of democratic consolidation.

### TRANSITION 1: GERMANY, ITALY AND JAPAN

This structure-building impact of international human rights became visible, first, in post-authoritarian or post-fascist societies, which, after 1945, were subject to military occupation by the Western allied powers, in particular by the USA: that is, in the Federal Republic of Germany (FRG), Italy and Japan. After 1945, each of these societies developed a constitutional order defined by increasing judicial power and by deep penetration of international law into domestic society. Each society developed a constitution with a transnational judicial emphasis. In each case, this clearly reinforced the basic inclusionary structure of the political system, and it heightened the general sovereign authority of the state.

To approach this phenomenon, it is necessary first of all to address a common historical misconception. To varying degrees, in the interwar era, Germany, Italy and Japan all established systems of authoritarianism designed to promote *developmentalist* policies,<sup>9</sup> and they used coercive techniques to steer the domestic economy and to elevate industrial productivity, with the goal of re-positioning national economies within the global economic system.<sup>10</sup> On this foundation, these authoritarian states regularly assumed programmatic objectives that exceeded the dimensions of classical liberal states. Typically, they intervened in private relations at work and in the family, they sought to mobilize all society through co-ordination of leisure activities and ideological indoctrination, and they ordinarily demanded high levels of obligation and obedience in different spheres of social practice. Most significantly, insofar as they assumed responsibility for the forcible management of economic growth, these states, of necessity, were required to address deep-lying societal conflicts, and to assume regulatory

<sup>9</sup> The developmentalist aspect of fascism was clearest in Italy under Mussolini. This is distilled in Panunzio's (1937: 21) characterization of fascism as a form of *state-nation*, based in the economic mobilization of society through a 'historical synthesis of syndicalism and nationalism'. But the developmentalist aspect was a feature of all fascist government. For an account of European fascism as a system generally oriented towards developmentalism, see Gregor (1979). For discussion of developmentalism in Japan, see Tabb (1995: 78).

<sup>10</sup> In Italy, Gentile (1982 [1927]: 275) argued in paradigmatic fashion that, in fascist corporatism, individual persons acquired a relation to the state 'as a specialized productive force', and the integral linkage between state and society was mediated through the construction of the person as producer.

authority for economic disputes over labour, employment and production. To perform these functions, all interwar authoritarian states developed corporatist mechanisms for the forcible regimentation of organized labour; all evolved corporatist methods for steering the economy, for managing relations between different sectors in the employment market and for linking industrial production to strategic macro-economic goals, usually related to planned development.<sup>11</sup> For this reason, the interwar states in Germany, Italy and Japan were defined by their ideological spokespeople as strong, 'total', or even 'totalitarian' regimes, and this construction was accepted by external observers.<sup>12</sup> The perception of interwar authoritarian polities as strong states was then widely replicated after World War II. As discussed, in fact, the growing promotion of international law after 1945 was partly conceived, at least rhetorically, as a means of limiting the reach of national states and of obviating the recurrence of neo-fascist authoritarianism.<sup>13</sup>

Despite the totalist rhetoric of interwar authoritarianism, however, the developmentalist regimes in Germany, Japan and Italy which dissolved before and at the end of World War II cannot reliably be classified as strong states or strong political systems. In fact, these regimes were deficient in certain quite basic hallmarks of statehood. In many respects, these regimes were afflicted by endemic structural instability, and their inner-societal capacities for legislation, even legal inclusion, and independent policy making were low: they possessed very insecurely unified political institutions, and they were only able to exercise limited control of society. The weakness of these states had similar underlying causes in each case, and, as discussed further, they reflected structural features that were common to each of these societies. In consequence, it is against a background, not of total statehood, but of endemically debilitated statehood and low inclusionary structure, that the democratic transitions in Germany, Italy and Japan after 1945 can be most adequately examined. This background, moreover, illuminates the role of international law in the constitutional dimensions of these transitions. In each case, interaction between international and domestic law played a vital role in consolidating political institutions and expanding the inclusionary structure of historically unstable national states.

<sup>11</sup> See pp. 179–80 below.

<sup>12</sup> On the theory of the 'total state' at this time see Gentile (1929: 46) and Forsthoff (1933: 24).

<sup>13</sup> See p. 103 above.

Notable in this respect, primarily, is the fact that the main authoritarian, or *fascist*, states of the interwar era – Germany, Italy and Japan – had been formed on a broadly congruent *three-stage evolutionary pattern*.<sup>14</sup> In each case, this pattern meant that the basic inclusionary structure of the state and the essential convergence of society around the state both remained low. Consequently, the eventual structure-building force of international human rights compensated for problems that were very deeply inscribed in the evolutionary history of these societies.

In the *first stage* of their formation, all these states had their origins in a societal environment that was marked by very limited social and regional unity, by deeply embedded private authority and by the persistence of pronounced residues of feudal social order.<sup>15</sup> In particular, each of these states was first created as part of a strategic process of institutional centralization, in which elite actors implanted a set of political institutions in society in order selectively to eradicate typical features of late feudalism from the political order: that is, strong conventions of patronage,<sup>16</sup> low levels of legal control, deficient fiscal capacities and generally reduced centralization and institutional density (Witt 1970: 55; Tabb 1995: 66).<sup>17</sup> As a result, initially, the political institutions of modern Germany, Italy and Japan were rapidly imposed, often by elite decree, upon national societies that were still deeply pervaded by localism and feudal customs, and in which some remnants of inherited feudal structures of authority still needed to be accommodated.

This state-building pattern was exemplified in the unification of Italy in the 1860s. In Italy, the national state was imposed by a liberal elite on territories whose localized structure was residually unresponsive to political centralization, and in which local power monopolies then persisted in many parts of the new (notionally) national society (see

<sup>14</sup> There has been much controversy regarding the question whether military Japan should be classified as a 'fascist' state. See the famous rejection of this description in Dzus and Okimoto (1979). For its qualified rehabilitation, to which I subscribe, see Gordon (1991: 335).

<sup>15</sup> On the persistence of some aspects of feudalism into the Meiji era, see Beasley (1972: 73, 348) and Johnson (1982: 36). On the survival of aspects of feudal law in nineteenth-century Germany, see Heß (1990: 16). On local opposition to centralization in Italy, see Romeo (1978: 38).

<sup>16</sup> For a description of the historical background to national state building in Japan see the brilliant exposition in Ravina (1999: 17, 25). Ravina (1999: 27) tellingly describes Tokugawa Japan as a 'compound state' and he examines the function of patrimonialism in Japan at this time (p. 34). See, further, Beasley (1972: 20) and Ramseyer and Rosenbluth (1995: 39). Yet, for excellent revision of standard views of the weakness of the Tokugawa polity, see White (1988: 6). The account proposed by White overlaps with my own in that he stresses the weakness of European states well into the nineteenth century.

<sup>17</sup> For example, Germany had no federal income tax until 1913, and direct taxes only amounted to 2 per cent of imperial revenue (Daunton 1996: 177).

Romanelli 1979: 17).<sup>18</sup> This pattern was also manifest in the unification of Germany under Bismarck. In Germany, in somewhat more authoritarian fashion than in Italy, a national political system was established that reflected a delicate balance between modern elites, who favoured national consolidation, and groups committed to the preservation of local and aristocratic privilege.<sup>19</sup> National order was eventually imposed on German society, which remained enduringly resistant to national convergence, through a mixture of military conquest, executive decree and inter-elite accommodation. This pattern was also manifest in early Meiji Japan, where a Western state model was imported as a technical instrument to supplant the feudally dispersed socio-political structure of the Tokugawa era.<sup>20</sup> In Meiji Japan, moreover, although the high aristocracy initially lost status through the state-building process, the aristocracy soon became the backbone of the political elite (see Silberman 1964: 111).

One common background to interwar right-wing authoritarianism, in consequence, was that it eventually emerged in societies in which state institutions had first been created in very artificial manner, effectively by fiat. In each case, state institutions sat uneasily alongside the surviving elements of feudal governance, and state authority was often sustained by private compromises between elites, which scarcely reflected deep-reaching patterns of social integration. In each case, states were not confronted with societies formed as nations; instead, they were surrounded by societies defined by deep regional and sectoral affiliations. Typically, in consequence, these states were, in their socio-historical foundations, very weak states, whose societal legitimacy was fragile, whose congruence with a discernibly organized nation was limited and which struggled to exercise immediate control of everyday social life across their national environments.

<sup>18</sup> It is widely reported, both in historical and eye-witness accounts, that in many areas Italian unification was partly driven by the liberal aristocracy, who abandoned their historical localism because they saw advantages in unification for their own social and political authority. On these points, see Kroll (1999: 339, 386).

<sup>19</sup> Local privilege was clearly preserved in the constituent states of the German *Reich*. This was most notable in Prussia, which, until 1918, preserved a franchise weighted towards the aristocracy. The main bastion of aristocratic privilege was the Prussian First Chamber, or *Herrenhaus*, which did much to guarantee the interests of the Prussian nobility. On the position of the *Herrenhaus* as a centre of vested aristocratic interests, see Spenkuch (1998: 227). The Prussian aristocracy is typically viewed as the 'leading political and social class' in unified Germany (Carsten 1990: 112).

<sup>20</sup> One excellent commentary argues that the Meiji Restoration was experienced as a military invasion in some Japanese provinces (Lewis 2000: 1).



In the *second stage* of state building, after their initial formation, the main authoritarian states of the interwar era all passed rapidly – sometimes within just a few years – from a hastily improvised process of post-feudal state building to a condition of limited constitutional organization. In Germany, Italy and Japan, in fact, constitution writing was promoted as one step in a longer-term state-building design, and a constitutional order was imposed on the political system because prominent elite actors viewed national constitution making as a technique for solidifying state power and for consolidating a national economy.<sup>21</sup> In each case, constitutions were established as a means to draw together diffuse elements within society to stabilize a post-feudal,<sup>22</sup> relatively centralized and fiscally efficient state above the conflictual relations of civil society.<sup>23</sup> In each case, constitutional laws were also used to create a national-economic environment conducive to industrial growth and to the promotion of national economic competitiveness. In each case, however, the mobilization of societal support for the political system in society was not a precondition, or even a formulated objective, of constitutional formation. Unsurprisingly, the first constitutions in Germany, Italy and Japan defined the conditions of constitutional rule in very technical, positivistic categories, eschewing expansive constructions of state legitimacy.

This technical pattern of state expansion through limited constitutional organization was evident in Italy under the *Statuto Albertino*, the Savoyard constitution of 1848 which became the constitution of all Italy after unification in the 1860s. Under this constitution, there developed a semi-democratic system of governance, defined as *trasformismo*, which culminated in the policies of Giolitti around 1900. *Trasformismo* was a strategy for mustering broad-based support for the

<sup>21</sup> On constitutionalism as a strategic path to national consolidation and national-economic reconstruction in Japan, see Beckmann (1957: 23), Ike (1969: 74) and Ramseyer and Rosenbluth (1995: 2). In Germany, constitution drafting was inextricably bound up with nation building. The 1848/49 constitution had been designed to create a German nation state based on broad popular support; Bismarck's constitution of 1871 promoted a less integrally unified pattern of nation making but still reflected the same objectives.

<sup>22</sup> The anti-feudal nature of Meiji state building is very often noted (see, for example, Norman 1973 [1940]: 8, 70, 72). However, Bismarckian Germany and unified Italy were also designed as states that were expected to eradicate the patchwork and privatistic remnants of feudalism in these states. All three states, to varying degrees, were intended to iron out the societal particularism of late feudal society, and to create a national state and a national economy without, however, accepting democracy as a dominant political form.

<sup>23</sup> See Maki (1947: 395). The Imperial constitutions of Germany and Japan in particular can be viewed as examples of constitutions designed to conduct a process of semi-authoritarian state and nation building. See on Japan Beckmann (1954: 260, 268) and Ravina (1999: 15). The Japanese language did not have words for 'rights' until the 1860s (Tsuzuki 2000: 77).

national government, which underpinned the consolidation of Italy as a national constitutional state. This strategy involved the gradual elaboration of a formal constitutional regime through personal, often semi-clientelistic, bargains between the governing executive and powerful societal elites, so that the new national political order was gradually extended across society through a web of ever-widening personal negotiations and accommodations (Ghisalberti 2000: 189, 203). Notably, the process of political unification in Italy coincided with the establishment of a civil code (1865), which, in parallel to political unification, slowly unified economic exchanges. This technical pattern of state expansion was also evident in Germany in the early to mid-Imperial era (1871–1900). Under the Bismarckian constitution (1871), the legal obligations of the state (easily circumnavigated by the executive) were defined in highly positivistic manner, and the elected parliament (Reichstag) played only a limited role in forming government.<sup>24</sup> In fact, the exercise of law-making initiative by the Reichstag was constitutionally restricted, and, under Art 21 of the constitution, members of parliament could not assume governmental office; parliamentary activity was mainly concerned with budgetary control. Notably, this same period also saw the creation of a German civil code (assuming effect in 1900), to impose legal unity on economic relations. This technical pattern of constitutionalism was also visible in Japan in the Meiji era. Indeed, the constitutional policies of the Meiji oligarchs were deeply influenced by the principles of limited constitutionalism pioneered in Germany (Ando 2000; Tsuzuki 2000: 108, 110), and the Meiji Constitution (1889) was specifically designed to create the basis for a strong national state, resistant to external military depredation. In Imperial Japan, the elected Diet was, until after 1900, only conceived as a secondary, essentially deliberative institution, and it did not possess complete legislative initiative or full control of the national budget (Wilson 1957: 39, 79; Beckmann 1957: 29; Akita 1967: 59, 80; Gordon 1991: 2).<sup>25</sup> As in Germany, the formation of governmental executives was not a function of the Diet (see Akita 1967: 73). In Japan, too, early constitutionalism was tied closely to the codification of economic law,

<sup>24</sup> This is exemplified in Laband's (1901: 195–6) positivistic view of the constitution as a formal legal personality.

<sup>25</sup> One commentator (Duus 1976: 113–15) states: '[T]he oligarchs had wished to assure the firm existence of a bureaucratic state structure before venturing into the uncertain waters of constitutional politics. [...] The main new element introduced by the constitution was the establishment of an elective national assembly, the Diet. The last of the new state organs to be created, the Diet was regarded as the most peripheral by the oligarchs'.

and a civil code was introduced in 1898, based largely on a German template (see Flaherty 2013: 24).

In the period of early constitutionalism, therefore, the political systems of Germany, Italy and Japan still only possessed very shallow societal foundations. In these states, most notably, public office was commonly transacted through informal procedures, and it was still partly concentrated in private hands. In each case, constitutional norms did not penetrate very deeply into society, and the scope of political rights was clearly curtailed. In many regions, further, public functions were performed by private elites, and core organs of state (i.e. judicial institutions, fiscal institutions) were only very uncertainly centralized.<sup>26</sup>

In the *third stage* of state building, after the initial process of constitutional organization, the major states which ultimately converted to authoritarianism in the 1920s and 1930s all witnessed a short period of either full or at least extensive constitutional democratization, in which political rights were more widely distributed through society. In this period, the range of social sectors that were drawn into the state expanded exponentially, and, to differing degrees, the exercise of popular sovereign power became an important source of systemic legitimacy. This period is exemplified by Italy in the period after 1912, which saw the stepwise introduction of a mass franchise and a rapid widening of the authority of parliament, prior to Mussolini's assumption of power in 1922. In Germany, this period lasted from the foundation of the Weimar Republic in 1918/19 to the onset of presidential rule in 1930. In Japan, this period can be identified in the longer timeframe 1900–1932, but it coincided, in particular, with the era, so-called, of Taishō democracy (1912–26) (Gordon 1991: 127).<sup>27</sup> In each of these interludes, the states in question experienced a dramatic rise in the volume of inclusionary expectations directed to them from different parts of society. In each setting, moreover, these states underwent a significant increase in their basic structural integrity, and they began to perform their functions at a heightened degree of centralized inclusivity. In each case, arguably, the state only became a fully national state through democratic reform, and the creation of a democratic or semi-democratic constitution intensified, not only the

<sup>26</sup> As mentioned, Imperial Germany had no fully unified taxation system. On the weakness of national institutions in Meiji Japan, see Flaherty (2013: 97).

<sup>27</sup> Japan was not actually a democracy during this period; Japan had full manhood suffrage in 1925. However, the move towards democratization in Japan was accelerated at this time. Germany had full male and female suffrage in 1919. Italy had full manhood suffrage in 1918.

structural integrity but also both the inclusionary reach and authority of state institutions.<sup>28</sup>

Notably, however, in these short interludes, the accelerated process of democratization in Italy, Germany and Japan was complicated by the fact that these states were required not only to conduct increasingly extensive processes of *political* inclusion but also to act as focal points in intensely contested and highly volatile material/economic conflicts – normally running broadly along class boundaries. In Germany and Italy, in particular, the beginning of full democratization coincided with the comprehensive mobilization of the national population in World War I, in which, as discussed, industrial production was subject to a high level of co-ordination by state departments, and governments experienced deep reliance on trade unions to regiment the labour force. After 1918, therefore, these states were expected to demonstrate their legitimacy not only through political representation but also by assimilating their populations as a source of *material sovereignty* or even *material constituent power*: by placating antagonisms between organizations at different locations in the industrial production process, and by incorporating civilian populations which were both highly militarized (and dangerous for the state) and increasingly accustomed to state intervention in economic disputes.<sup>29</sup> In consequence, these states experienced full political democratization at a point where, from an original position of low institutional integrity, they were also required rapidly to design legal/constitutional mechanisms to regulate economic production, to manage industrial relations and to arbitrate between rival organizations in labour conflicts. This conjuncture assumed different forms in each of these societies. However, in each case, the construction of a constitutional system of political-democratic inclusion coincided with the transformation of the political system into a central actor (and, in fact, often the final arbiter) in conflicts relating to conditions of labour

<sup>28</sup> Tellingly, for example, the autonomy of the German state in relation to embedded elites increased exponentially after 1918. This was reflected in a number of factors, especially in the growing extractive capacities of state, enlarged through Matthias Erzberger's fiscal reform of 1919–1920, and resultant expansion of the Imperial state against the regions and conservative elites. In Italy, after 1918, the traditional countervailing pull of local elites was diminished, governmental power, although very temporarily, was rotated between different parties, and the circulation of power through society became less reliant on private agreements. In Japan, the state's ability to legislate positively, against prominent elite and local interests, was also intensified (Garon 1987: 186).

<sup>29</sup> In Germany, in particular, World War I gave rise to the passage of legislation, notably the Auxiliary Service Law of 1916, which both forcibly co-opted the civilian population in the war effort and assigned far-reaching industrial rights to organized labour.

and production. In each case, at a decisive point in its formation, the political system was confronted with acute pressures resulting from the internalization of class conflict, and it was obliged to distil its legitimacy from the resolution of economic conflicts, lying deep in the structure of society as a whole. In Germany and Italy, in particular, this meant, at an early stage in their democratic construction, national states were obliged to sustain their inclusionary functions by generating expansive rights of socio-material inclusion for their constituencies, and by ensuring that such material rights mollified the potentially volatile political conflicts which they internalized as they assumed the form of political democracy.

This last point has particular importance for the development of authoritarian states in the interwar period. In all major states which subsequently converted to fascism or to similar patterns of authoritarianism, societal inclusion through political rights and societal inclusion through socio-material rights occurred, broadly, at the same time. As a result, in Germany, Italy and Japan, democratization led to the creation of political systems that possessed a pronounced *corporatist emphasis*, and that adapted their inclusionary structures to demands for the integration and legal reconciliation of industrial conflicts by using social and material rights to solidify their foundations through society. In some cases, these states established democratic constitutions with strong provisions for collective rights or group rights, enabling originally private collective actors (that is, trade unions, lobbies, business associations) to negotiate conditions regarding production and distribution, and to participate in public decision making.

This confluence of political democracy and economic democracy was most obvious in the early years of the Weimar Republic, which saw a wave of legislation to promote a corporatist system of economic management. Semi-corporatist arrangements between big labour and big business had in fact already been established in Germany in 1916. After armistice in late 1918, then, laws (*Tarifvertragsordnung*) were introduced to sanction collective labour contracts, and to create a quasi-corporatist Central Community of Labour, designed to create a forum for consensual negotiations between unions and industrialists regarding relations of production. The corporatist emphasis in German industrial legislation was intensified in the Weimar Constitution itself (1919), which, albeit uncertainly, contained plans for the establishment of a system of economic democracy. In particular, Art 165 of the Weimar Constitution made provision for collective regulation of

the conditions of production, and Art 157 foresaw a separate system of labour law. This corporatist tendency resulted in the introduction (tellingly, by emergency decree) of provisions in 1923, which subject some industrial disputes to mandatory state arbitration (*Zwangsschlichtung*) (Englberger 1995: 153–4; Steiger 1998: 132–5).<sup>30</sup> It also resulted in the establishment of a system of labour courts, in 1926, which was conceived as the ‘first main part’ of a comprehensive legal order to regulate industrial production and industrial labour (Bohle 1990: 85). In the Weimar Republic, the free-standing corpus of labour law projected in the constitution and attendant agreements never fully materialized. In fact, conceptions of economic democracy, conceived as a ‘supplement to political democracy’, were advocated consistently by trade unions through the 1920s (see Naphthali 1929: 14), but had only marginal impact on political reality. Nonetheless, the legal ordering of labour in the Weimar Republic marked a very advanced position in European employment legislation, and it incorporated substantial parts of labour law under public law. Significantly, moreover, in interwar Germany labour law was utilized quite expressly as a mechanism for national inclusion and nation building (see Preuß 1924: 141; 1926: 491).<sup>31</sup> Under the labour-law provisions of the Weimar Constitution (Art 7(9)), organized labour was placed in an immediate relation to the Empire, and provisions for industrial mediation were clearly designed to bind different classes together in a unified order of material citizenship.<sup>32</sup> Similar – albeit somewhat less systematic – tendencies were evident in Italy. The aftermath of World War I witnessed the rise of corporatist models of political-economic governance in Italy, and plans for a corporatist parliament were openly debated, across the political spectrum, between 1918 and 1922 (Lanciotti 1993: 301–6). In Japan, organized labour was significantly weaker than in Europe. Legal rights of Japanese unions were not fully covered by protective legislation; in 1931, notably, even a diluted bill to acknowledge union rights did not clear both houses of parliament (Large 1981: 148). Nonetheless, the era

<sup>30</sup> This was more weakly realized in more liberal societies. In the UK, for example, the Industrial Courts Act (1919) created labour courts, but they rested on a voluntary basis (Mackenzie 1921: 48).

<sup>31</sup> In the debates around the Weimar Constitution, for examples, the allocation of socio-material rights was expressly conceived as a technique for rectifying the weak correlation between state and nation in the Imperial period. This was declared programmatically by Friedrich Naumann, who wrote the catalogue of rights in the constitution, in the Constituent Assembly of 1919.

<sup>32</sup> See the conception of material citizenship in the works of Preuß (1889: 7), who was the main drafter of the constitution.

of semi-democratic experiment in Japan saw a rapid expansion of union activity and membership, notably in the years after 1918 and then again after 1930 (Gordon 1985: 107, 240). Many firms also established semi-corporatist mechanisms for interest articulation at this time, especially through the promotion of factory councils (Gordon 1991: 130). To some degree, moreover, the Japanese government sanctioned the principle that the state obtained legitimacy through the internalization of labour conflicts. This was clearly expressed in the (rarely used) Labour Disputes Conciliation Act (1926), which provided mechanisms for the politically controlled pacification of industrial conflict (Garon 1987: 112). Related legislation was also introduced in the agricultural sector.

Overall, at an early point in their public formation, all the main authoritarian states of the interwar period were required to balance deep contradictions between rival economic prerogatives and rival models of democracy. In Germany, in particular, the democratic state was soon obligated, under a system of collective social and material rights, to tie its legitimacy to the effective incorporation of, and mediation between, powerful social organizations, which were backed by increasingly unified and politicized social classes. Arguably, in fact, post-1918 governments in both Germany and Italy were required to promote a corporatist, half-privatistic societalization of the governmental order (based in socio-material rights) before their political institutions had been fully consolidated and before they had been able to stabilize their constitutions as a formal system of public law (based in political rights). This corporatist dimension was less pronounced in Japan, but Japanese governments also confronted class conflicts before the state had obtained even public control of society.

The states of interwar Germany, Japan and Italy, manifestly, were soon deeply unsettled by antagonisms between the rival social groups whose interests they were called upon to equilibrate. None of these states proved capable of reliably containing conflicts between class-determined interests within the rule-based structure of a democratic constitution. In important respects, in fact, these states retained an inner core of privatistic pluralism. They often relied, in their policy-making processes, on lateral links to powerful economic organizations and business elites, whose own commitment to democracy was weak. Moreover, they were vulnerable to private influence as they sought to respond to and accommodate dictates of different social groups, and they were highly sensitive to sporadic fluctuations in the relative



power of different economic classes.<sup>33</sup> In each society, consequently, the period of democratic-constitutional class balancing was short-lived. In each of these societies, state institutions quickly became deadlocked through inter-class adversity, coalitions between parties with rival economic constituencies became difficult to engineer, and powerful economic actors, installed in the peripheries of government, actively promoted the abandonment of the democratic order.<sup>34</sup> As a result, these societies proved a fertile breeding ground for highly authoritarian political parties and factions, which soon overthrew the democratic political order. In each case, moreover, the ultimate suspension of democratic rule led to the creation not only of an authoritarian legal/political order, but to a more authoritarian system for the administration of industrial relations and economic conflict, which abandoned the more consensual dimensions of earlier corporatist constitutional laws. In each major fascist state, a system of authoritarian or *exclusionary* corporatism was devised, in which original inter-class corporatist arrangements were selectively re-designed to favour dominant economic groups, and in which the particular prerogatives of economic elites acquired direct coercive force.

Italy led the way in this regard. Beginning in 1926, Mussolini gradually established a system of corporatism, whose centrepiece was the National Council of Corporations (instituted in 1930), which was intended to organize the economy in specialized unitary corporate organizations. In 1926, Mussolini introduced the *Legge Rocco*, designed to discipline trade unions, which created a judicial apparatus for regulating collective bargaining (the *Magistratura del lavoro*, which in fact only heard a small number of cases). The primary foundation for this system, however, was created in 1927, when Mussolini introduced a general blueprint for fascist economic administration, the *Carta del lavoro*. This document, at least in its declared intentions, established a

<sup>33</sup> For literature on business-executive interlinkage in interwar Germany, see Grübler (1982: 189, 199) and Zimmermann and Saalfeld (1988: 328). On the 'close governmental ties to the zaibatsu' in interwar Japan, see Johnson (1982: 23). Johnson (1982: 98) also gives evidence of direct *zaibatsu* involvement in economic legislation.

<sup>34</sup> In Italy, the democratic system had failed by 1922, and leading industrialists were keen to transfer power to the fascist party. On links between Mussolini and big business, see Adler (1995: 155). In Germany, the democratic system had ground to a halt by 1930, primarily due to disputes between coalition parties in 1929 over adequate fiscal responses to the Wall Street Crash. The support of big-business associations for the executive-led system of government by economic decree that emerged after early 1930 is well documented. For studies on the retreat of German business from democratic corporatism, see Blaich (1979: 64), Turner (1985: 296) and Meister (1991: 248). Business support for political clampdown during the crisis of the Japanese experiment in progressive politics is also widely acknowledged (Gordon 1985: 156; 1991: 252).

consensual structure for resolving labour conflicts, giving entrepreneurs and unions equilibrated positions in industrial bargaining. In so doing, purportedly, it created legal preconditions for a corporatist system of industrial organization, labour integration and conflict settlement, designed to promote cross-class negotiations in economic legislation. In particular, the *Carta* defined collective labour contracts, mediated or coercively imposed by the state, as acts of binding legislation, which were subject to the jurisdiction of the labour courts. In this respect, the *Carta* accorded constitutional standing to collective labour law and to the collective material rights that it contained, and it imputed a distinct public-legal personality to organized professional corporations: the act of forming a collective bargain became an ‘act of public law’ (Guidotti 1935: 86).<sup>35</sup> Some of the most eminent theorists of Italian fascism even viewed the corporatist ordering of economic law under the *Carta* as a solution for fateful separation of state (public law) and civil society (private law) caused by the French revolution and its anti-corporate laws (Costamagna 1927: 3, 16; Sforza 1942: 255). However, the consensual-corporatist projections of the *Carta* remained illusory. Tellingly, the *Carta* was introduced after the prohibition of free trade unions in 1926. Moreover, it tied industrial settlements to quasi-developmental macro-economic policies, and it expressly stated that, in wage disputes, labour tribunals should give precedence to directives of entrepreneurs over the demands of organized labour. In consequence, the *Carta* acted mainly as an instrument for the ‘discipline of labour’, forcibly binding productive groups together in a drive to maximize industrial production.<sup>36</sup> One commentator described Mussolini’s labour courts as instruments in a ‘perfect interpenetration’ of juridical and political-economic prerogatives (Costamagna 1927: 239). In these respects, Mussolini’s labour laws provided a legal substructure for a system of authoritarian corporatist capitalism, through which the state gave coercive backing to business, and which, in its foundations, was deeply hostile to the interests of labour (Mayer-Tasch 1971: 34, 138). Despite the cross-class corporatist rhetoric of Mussolini’s regime, its leading theorists openly claimed that, far from negating class division, fascism was committed to preserving ‘the differences between classes in all senses’ (Panunzio 1937: 291).

<sup>35</sup> This point was central to fascist legal theory. See, for examples, Guidi (1930: 97) and Panunzio (1933: 368).

<sup>36</sup> This is spelled out in Fanno (1935: 110). See also Areva (1929: 18).

After his assumption of power in Germany in 1933, similarly, Hitler emulated some aspects of Mussolini's corporate legislation, notably in founding the corporatist labour federation (*Deutsche Arbeitsfront*, DAF) and in passing the *Arbeitsordnungsgesetz* (Law for the Organization of Labour, 1934). This legislation provided for the state-led settlement of industrial conflicts, and it placed supervision of industrial conflicts in the hands of labour trustees, appointed by the National Socialist Party (NSDAP). This legislation clearly favoured the entrepreneurial side in the industrial process, and, as in Italy, it was instituted after the abolition of free unions, so that independent delegates of labour could not participate in industrial arbitration or negotiation. These laws were immediately followed by a law providing for compulsory cartellization in some industrial sectors, which concentrated economic authority in a small number of key units. In Japan, similar authoritarian corporatist tendencies, linked to aggressive anti-labour policies, were also in evidence. Legislation of the mid-1920s had already encouraged the formation of large cartels, and laws were introduced in 1931 both to facilitate cartelization and to ensure reporting of large enterprises to government (Johnson 1982: 98). By the mid-1930s, unions were subject to suppression and prohibition. In the late 1930s, many unions were replaced by patriotic associations, known as *sanpo*. Eventually, the *sanpo* movement was transformed into a corporatist labour front, modelled on the DAF in Germany, which those few free unions that still existed were encouraged to join, and it subordinated factory councils to state control, ensuring that business interests were protected and preserved in industrial settlements.<sup>37</sup> In 1940, all unions were forcibly incorporated in the *Sanpo* Association. In Japan, as in Germany, cartels were expressly promoted through this legislation, and they were utilized as organs for the co-ordination of the national economy. This greatly intensified the authority of large-scale capitalist enterprises (*zaibatsu*), which controlled almost one quarter of total capital in Japan (Shoda 1996: 245).

National statehood in Germany, Italy and Japan, in sum, was, with significant variations, shaped by an evolutionary trajectory in which state institutions did not originally possess deep inclusionary foundations. These states were originally formed as political systems which, in the first instance, possessed low institutional integrity and limited

<sup>37</sup> On the reception of European fascist ideas regarding union organization in Japan, see Garon (1987: 213) and Gordon (1991: 322). On the functions of *Sanpo*, see Large (1981: 211) and Gordon (1985: 263).

inclusionary autonomy, and they lacked a comprehensive monopoly of power in society. Then, at an early stage in their formation, these states were expected to secure their legitimacy via the simultaneous political mobilization and material pacification of rival parties in the process of industrial production. However, these states did not possess sufficient inclusionary force to conduct such highly politicized processes of inter-class mediation, and they were unable to translate rival economic interests into an obviously integrated, public/political will. After the failure of the more inclusionary/democratic experiments in the 1920s, the underlying privatism of political institutions in Germany, Italy and Japan meant that they adopted a systemic design shaped by dominant private prerogatives and organizations, which shifted rapidly towards policies focused on the authoritarian suppression of one class (labour) by the another class (business). Indeed, the main fascist or quasi-fascist states that developed in the later 1920s and 1930s re-deployed the mechanisms originally used consensually to integrate organized labour as instruments for the forcible subordination of the labour movement to dominant private, monetary interests, which were then directly mediated and enforced through the coercive apparatus of the state. The authoritarian states of the interwar era were products of a societal conjuncture afflicted by a recurrent *crisis of inclusionary structure*, and this was reflected in unsuccessful inter-class co-operation, low state autonomy, privatistic porosity of institutions and general structural depletion.

The authoritarian states that evolved in the 1920s and 1930s in Italy, Germany and Japan did not put an end to these structural problems. On the contrary, once established, interwar authoritarian states retained many of their historical weaknesses, and problems of depleted structure were in some respects exacerbated in all the main states possessing fascist characteristics. This was visible, first, in the *internal* organization of these states. Interwar authoritarian regimes were typically marked by low inner organic consistency and weak differentiation of public functions. In Italy, for example, the structure of the state under Mussolini was defined by an uncertain partition of authority between members of the fascist party and offices attached to the pre-existing state apparatus. One endemic feature of fascist Italy was the existence of a parallel administration, in which public offices were discharged by para-state agencies with partly private character, created by the fascist party, which often challenged or duplicated more formally established offices of state (Melis 1988: 262–3; Bonini 2004: 98). Such agencies had originally been instituted to generalize state power across society, and

to increase the presence of the state in remote localities. But the proliferation of such offices meant that Mussolini's state lacked cohesion, offices were divided, in a blurred institutional pluralism, between private and public actors, and political institutions were weakly defined and regulated. In Germany, problems of inner state cohesion were still more acute. Even NSDAP insiders repeatedly observed that the apparatus of Hitler's regime was marked by extreme centrifugalism, so that, behind the veneer of totalitarian social control, many offices were transacted as private goods, regional actors established local domains of semi-autonomy, and rival administrative sectors and office holders divided responsibility for similar functions, thus creating a highly pluralistic and internally dispersed administrative order.<sup>38</sup> Even the utility of the term 'state' to describe Hitler's regime remains a matter of dispute. Hitler's regime could be equally well defined as a fluid conglomerate of coercive functions, held together through a mixture of private interests, personal associations and systemic violence.<sup>39</sup> In military Japan of the 1930s, in partial analogy, the administrative system was horizontally divided into distinct, weakly co-ordinated, often rival units (Berger 1977: 80; Gao 1997: 111–12). Indeed, in Japan, the models of authoritarian statehood promulgated from the late 1930s onward were based in the idea that a new governmental structure should be created, standing in parallel to constituted state institutions, and integrating society through mechanisms not attached to formal organs of state.<sup>40</sup> During the war, then, the Japanese state was forced to rely on support from cartels and private organizations, and state functions were routinely beset by 'chronic weakness' (Haley 1991: 145).

In their *external* engagement with other parts of society, the structural debility of interwar authoritarian states was still more palpable. In Italy, the central organs of the regime were barely in a position to exercise control over different regions and different functional sectors in society, and the societal implementation of legislation, if successful at all, usually relied on incentivized co-opting of powerful local actors.

<sup>38</sup> The lack of statehood under Hitler was admitted by Alfred Rosenberg, a leading ideologue of the NSDAP, who stated: 'The National Socialist state developed into a *legal centralism* and into a *practical particularism*' (quoted in Ruck 1996: 99). Similarly, Hans Frank, the chief jurist of the Hitler regime, claimed that National Socialism was based in a 'clear attack on the state' (Rebentisch 1989: 2). See related analysis in Diehl-Thiele (1969: 21), Schulz (1974: 294) and Costa Pinto (2011: 206–7). See the classical version of this argument in Neumann (1944: 467).

<sup>39</sup> Note the telling comment on the 'essential difference between state and totalitarian rule' in Buchheim (1962: 117).

<sup>40</sup> I refer here to the Association for Promoting a New Order. For an account, see Berger (1977: 278–80).

In many ways, the corporatist state under Mussolini, like the liberal state under Giolitti, was designed to support a process of uniform nation building. The basic ordering of the economy in unitary corporations was in fact intended to separate economic agents from their regional locations and integrate them directly in the national political system (Palopoli 1931: 55, 117). Moreover, interactions between public offices, corporations and private elites were promoted in order to cement a deep-reaching societal substructure for the political system. However, the penetration of the political system into society was always partial and regionally limited. In particular, the partial privatization of public offices promoted by the party encouraged the local/personal arrogation of public authority, and local resistance to the political centre, often based around pre-existing patronage networks, was normally extensive: under Mussolini, the idea of the unified political nation remained illusory (see Salvati 2006: 233). Similarly, Germany under the NSDAP remained a political regime, in which private actors assumed far-reaching public authority in different social sectors and different geographical locations, and the reach of the political system across society, even when it was sustained by extreme levels of violence, remained dependent on personal co-option, it was regionally variable, and it was confused by erratic duplication of public offices (Hachtmann 2007: 60). The creation of a 'unitary state' revolving around 'strongly centralized power' may have been a declared objective of the Nazi leadership (Rebentisch 1989: 97). This, however, never became a reality. Analogies to this can be discerned in Japan. In the Japanese military regime, parochial authority and patronage remained very strong, and the penetration of the central state both into rural localities and into some economic sectors was very curtailed (Berger 1977: 233–4). In particular, in authoritarian Japan, powerful corporate actors (firms, cartels, monopolies) were only uncertainly subject to state jurisdiction, and their autonomous authority was expressly protected under state law.<sup>41</sup> Corporate bodies and large enterprises were typically at liberty to pursue interests outside the state, thus clearly limiting the efficacy of official policy making (Duus and Okimoto 1979: 72).

Both internally and externally, therefore, the main authoritarian states of the 1930s projected a definition of themselves as alternatives to classical liberal states. Accordingly, their policies and ideologies were focused on imposing strong statehood and deep national

<sup>41</sup> Note the functions in this respect of the Important Industries Control Law (1931), which allowed autonomy for firms in the formation of cartels (Johnson 1982: 109).

uniformity on societies that had only recently been constructed as nations, and which, historically, had often proved unresponsive to consolidated state institutions. However, these states fell far short of their rhetorical self-construction as *total states*, and these societies bore little resemblance to the descriptions of cohesively integrated nations which their governments used to characterize them. By any reasonable measure, Germany under Hitler and Italy under Mussolini had weaker levels of institutional hardness or *stateness* than their ill-fated democratic precursors in the periods 1919–1930/33 and 1912–1922 respectively. Each of the main interwar authoritarian regimes, most notably, was marked by regressive, quasi-feudalistic tendencies towards inner and outer particularism.<sup>42</sup> The main cause of the structural debility of these regimes was the fact that, during previous democratic interludes, these states had been confronted with acutely polarized class conflicts, for the consensual internal resolution of which, typically pursued through the distribution of collective or socio-material rights, they had lacked adequate institutional capacities. In consequence, democratic constitutions had been replaced by authoritarian corporatist systems, in which the attempt at constructing a cross-class balance was abandoned, economic interaction was coercively stabilized, and industrial production and conflict were subject to highly prerogative, often violent, regimentation. Overall, the incorporation of class-based economic conflicts overtaxed the inclusionary structure of these political systems, and the fact that the state could not withstand class conflicts led to a privatistic, semi-patrimonial dismemberment of state institutions, in which state organs were aligned to dominant private interests, both in different economic sectors and in different localities. Throughout the authoritarian period in Germany, Italy and Japan, state weakness remained the defining problem, and the inability of the state to support its power with a deep-lying inclusionary structure lay at the centre of the authoritarian pathology.

This historical analysis provides a distinctive sociological perspective for observing the rise of transnational judicial constitutionalism after 1945. As mentioned, after 1945, the states that replaced fascist Italy, National Socialist Germany and military Japan all obtained a public-legal order marked by express obligation to international human rights law, in which international law was used to dictate firm normative constraints for the exercise of state power. The rights-based

<sup>42</sup> On the regime of the NSDAP as an example of neo-feudalism see Rebutisch (1989: 535). On Japan, see notes 43 and 51.



constitutional model was, in part, imposed by external actors, notably by representatives of the government of the USA (see Shoici 1998: 98–110; Hellegers 2001: 189, 500, 503; Heun 2012: 13). This has led to a broad perception that international law ultimately curtailed the power of these states, after its inflationary growth in the 1920s and 1930s. Against the background outlined above, however, not expansive public power, but *chronically reduced* state sovereignty, formed the factual context for post-1945 patterns of constitutional re-orientation, influenced by the increasing domestic recognition of international law. Observed sociologically, in fact, the consolidation of the rights-based constitutional model was determined by social forces prevalent in Germany, Italy and Japan, and it enabled these states to address sociological pressures, above all their propensity for *crisis of inclusionary structure*, that were deeply embedded in their national societies, and which had historically obstructed the formation of strong political institutions. The growth of transnational judicial constitutionalism allowed these societies to compensate for, and – to some degree, and with clear case-to-case variations – to overcome their weakness in the face of obdurate *pressures of inclusion*, which had traditionally proved destabilizing. This applies in particular to inner-societal pressures relating to the participation of class conflict and to the distribution of material rights, which, in these societies, had repeatedly disturbed the autonomy of the legal/political system. The rise of the transnational rights-based constitutional model produced a social conjuncture in which these political systems were able to control their reactions to external demands, to elevate their differentiation in relation to other social actors, and to avoid fragmentation in face of intense inclusionary pressures. On this basis, in fact, the constitutional models that were established after 1945 can be observed as a pattern of *compensatory state and structure building*. In these constitutions, international human rights norms were assimilated domestically, usually through courts, as principles that hardened the inclusionary structure of the political system against virulent inclusionary crises. International rights law began to form a new tier of rights in society, actively stabilizing the political system against the unsettling implications of the strata of rights through which its inclusionary processes had previously been conducted.

This structure-building impact of international human rights can be observed in different ways in different post-fascist polities. However, one general reason why states obtained more sustainable legal structures after 1945 was that they gave primacy to singular civil and

political rights over collective rights, and states defined their legitimacy by applying rights, not to incorporate persons (and the associations to which they belonged) within their own structure, but to recognize and reinforce the single liberties of persons, positioned outside the state. Accordingly, the post-1945 constitutions of the Federal Republic of Germany (FRG), Italy and Japan all reflected reservations about collective/corporate material rights, they showed increased sympathy for singular rights as the primary grounds for the authority of law, and, in consequence, they weakened the link between political legitimacy and corporatist integration.

To be sure, there were variations in the degree to which these constitutions entrenched rights, and in the emphasis that they placed on different categories of rights. For example, the Italian Constitution (1948) gave greater importance to labour rights and social rights than other post-1945 constitutions, even according ‘centrality’ to such rights (Stolzi 2014: 168). Art 1 of the Italian Constitution defined Italy as a ‘Republic founded on labour’ and, although sanctioning the freedom of property, it stipulated that the pursuit of property needed to be constrained by principles of human dignity (Art 41), and (in Arts 42–43) it provided for expropriation of property if required for the common good. By contrast, other post-authoritarian constitutions engaged in relatively cursory fashion with second-generation rights. The Japanese Constitution (1947) enshrined rights to minimal welfare and living conditions (Art 25), and it guaranteed the right to work. However, these rights were not enacted through corporatist arrangements, and formal collective rights were not included in the constitution. The *Grundgesetz* of the FRG (1949) merely declared (Art 28) that constitutional order was required to comply with the principles of a social-legal state, thus making only minimal commitment to state incorporation of labour. Alongside this, however, all these constitutions gave obligatory force both to common civil and political rights and to classical personal-subjective rights of ownership, contract, movement and labour. In this respect, these constitutions reflected a construction of single persons as rights holders increasingly promoted under international law. Of course, post-1945 international human rights declarations and instruments proclaimed certain social rights; this was most emphatic in Arts 22–26 of the UDHR. In the early application of international human rights law, however, social rights did not assume substantial purchase. In most national constitutions created after 1945, similarly, emphasis was placed firmly on the attribution of single rights

to single persons. Social rights were not absent in these documents, but they were clearly subordinate to primary subjective rights, and, where they did recognize social rights, these constitutions did not tie the state into deep programmatic obligations regarding fulfilment of these rights.

The use of singular rights to define the legitimacy of the state impacted on Italy, Japan and the FRG in very different ways. In each case, however, the domestic assimilation of international rights tended to raise the stability and inclusionary power of the political system, and, above all, these rights reduced the traditional propensity of these states for fragmentation in the face of deep social conflicts.

On one hand, for example, the standing which these constitutions gave to singular rights meant that the state institutions of post-1945 Japan, Italy and the FRG were less susceptible to influence by powerful industrial enterprises. Reflecting the impact of US-American anti-trust law, these constitutions promoted classical rights of economic liberty, freedom of contract etc., in order to enforce stricter lines of differentiation between political institutions and organizations exercising economic power. In fact, in some cases, the process of post-1945 constitution writing was flanked by additional legislation, applying anti-monopoly laws to curb the influence of large-scale industrial units, to reduce the traditionally extensive power of cartels, and to limit the intersection between private economic actors and the state. In the FRG, for example, de-concentration measures were imposed by the Western allies, and the debate about anti-cartel legislation remained a matter of pressing concern throughout the post-war era, culminating in Ludwig Erhard's anti-cartel law of 1957/58 (see Robert 1976 245, 344). Anti-monopoly legislation was also introduced in Japan; a Law for the Dissolution of Excessive Concentration of Economic Power was implemented in 1947 (Shoda 1996: 248). In each case, the growth of singular rights straightened the lines of demarcation between the political system and powerful economic bodies.

On the other hand, the fact that these constitutions gave priority to singular rights meant that the previously tight (often coercive) knot between the state and trade unions was loosened. Responding to the consequences of the diverse corporatist experiments in the 1920s and 1930s, the main constitutions created in the post-1945 transitions gave emphatic recognition to the rights of independent trade unions. In doing this, they clearly rejected corporatist models of union integration; instead, they constructed a legal order, in which unions were defined as organs for autonomous collective bargaining, thus locating

organized labour and industrial conflicts outside the vertical structure of the state administration. As a result, a system of industrial relations emerged in which unions were legally protected, but disputes were not subject to mandatory arbitration and were not fully internalized within the state. Before the founding of the FRG, for example, trade unions attempted to revitalize plans for a system of economic democracy promoted in the Weimar Republic (Schmidt 1975: 69–71), and early post-1945 industrial legislation looked back to legal provisions at the beginning of the Weimar era. However, although the *Grundgesetz* (Art 9) protected union rights, compulsory state arbitration was not established; legislation on collective bargaining in 1949 (*Tarifvertragsgesetz*) insisted on trade-union autonomy, and it placed labour conflicts outside the realm of compulsory state jurisdiction (Reuß 1958: 324; Rütten 1996: 160–62). In Italy, union rights were strongly protected in the 1948 constitution. However, corporatist models of statehood found few influential advocates, and, in Art 39 of the constitution, compulsory arbitration of industrial disputes was abandoned in favour of free collective bargaining. By 1954, it was decided at the National Congress for Labour Law that the social and labour laws contained in the constitution should be interpreted, in essence, as legal principles pertaining not to public law, but to private law. This decision in some ways changed the basic emphasis of the Italian constitution, and it diminished the extent to which state institutions were directly implicated in the enforcement of social legislation (Cazzetta 1999: 627). In Japan, the presumption in favour of singular constitutional rights was weaker than in post-fascist Europe (Beer 1981: 442, 453; Upham 1987: 10). Moreover, labour legislation after 1945 reflected a more paternalistic approach to unionization. In the immediate aftermath of the war, independent rights of unions were increased – notably, in the Labour Union Law (1945) and in the constitution itself (Art 28). However, owing to a wave of protracted and unsettling industrial agitation, trade-union liberties were restrictively revised (Gordon 1985: 331). As a result, Japanese political economy retained a partial corporatist structure, and through the Labour Relations Adjustment Law of 1946 union negotiations again became partly susceptible to state intervention as arbitration commissions were introduced (Gordon 1998: 56). Notably, post-war Japan remained, almost paradigmatically, a *developmentalist* state, in which state agencies assumed maximum responsibility for effective growth management (Johnson 1982: 17–19; Tabb 1995: 100; Gao 1997: 16). However, the position of trade unions as parties to free

collective negotiations was preserved (Hanami 1996: 183), and the coercive system of interwar state corporatism was dissolved.

In the first instance, therefore, patterns of post-1945 constitution making in post-authoritarian societies established a stricter differentiation between political functions and economic functions, and they promoted singular personal rights norms as institutions to *depoliticize* class relations. The corporate rights enshrined in much public law of the interwar era had intensified already incubated class hostility by locating industrial disputes at the centre of the political system. Post-1945 constitutions generally did the opposite. These constitutions applied singular rights to disperse the political intensity of class conflict, and they reduced the extent to which parties in class conflict could directly transmit industrial antagonisms through the political system. Indeed, post-1945 constitutions dictated a grammar of legitimacy, in which single rights acquired greater importance than the mediation of class conflict as the ultimate source of legitimacy for the political system and its acts of legislation. Singular rights constructed a vocabulary in which states could produce basic legitimacy, both of a fundamental character and for single laws, without reference either to class conflicts or to the constituent inclusion of corporate (class-based) social organizations. Central to this process was the fact that rights allowed states to presume legitimacy for legislation as a resource constructed in *systemically internal* fashion: through their centration on relatively static singular rights, states were able to presuppose principles of legitimacy as elements of their inner structure, which they could project, internally, to accompany and authorize single acts of legislation. This reduced the degree to which states were required to negotiate with external bargaining groups, and to manufacture legitimacy through absorptive and precariously balanced processes of inclusion and mediation. In this regard, notably, rights separated single *acts of legislation* from the *production of legitimacy*: legislation and legitimation became quite separate and distinct functions. The application of singular rights as legitimating norms meant that states could utilize reserves of legitimacy that were to some degree independent of the objects and the process of law making, and, to some degree, they were able to make laws on the basis of already existing, internally stabilized, legitimational premises. In each respect, the rights inscribed in post-1945 constitutions began to heighten both the inclusionary force and the basic differentiated autonomy of the national political system. These rights enabled states plagued by histories of weak inclusionary abstraction both to position their functions in relative

distinction *vis-à-vis* other organizations, and they extracted an internal normative order for state functions which was relatively independent of highly charged interests articulated through society at large. The constitutional prioritization of basic rights – notably rights of independent economic interaction, free political and economic association and contractual autonomy – served in part to liberate the state structure from its dense interpenetration with traditionally potent private bodies, and it helped to clarify the legal framework in which social conflicts were to be absorbed by the state.<sup>43</sup> In each respect, singular rights began to distil an inclusionary structure for the political system, which softened the conflicts which the state had encountered through earlier processes of rights-mediated inclusion, and, in so doing, rights also hardened the inclusionary structure and supported the basic functional differentiation of the state.

A more obvious reason for the structure-building impact of rights in some societies after 1945, second, was that post-authoritarian constitutions, albeit more tentatively in the Japanese case, provided for the direct implementation of international law. Moreover, these constitutions created superior courts, which, with variations, they construed as *transformers* of international law, and especially of international human rights law, and which acquired responsibility for transplanting international law into national political systems (see Mosler 1957: 25; Partsch 1964: 53, 80, 115). These features generally proved vital for promoting systemic autonomy and inclusionary structure building in post-authoritarian societies.

In Italy, the FRG and Japan, international law acquired near-constitutional standing in the post-war constitutions, and national legislation was constitutionally bound to reflect principles of international law. For example, the Japanese constitutional apparatus assigned high standing to international law,<sup>44</sup> and, by the 1960s, the UDHR was

<sup>43</sup> In Japan corporatism was not diminished but solidified after 1945. Yet, post-1945 Japanese corporatism was corporatism with a difference. Under the post-1945 corporatist order, the state was not merely a mediator in industrial conflicts but a developmentalist agent of growth (see Johnson 1982: 197). Crucially, constitutional reform in Japan was flanked by extensive land reform (1947–1949), implemented by the American occupying government, which abolished sharecropping and generally both reduced the potency of status-based social structures and reduced the obstructive force of local institutions (Dore 1959: 317, 378–9). This reform was conceived by General MacArthur as a final remedy for ‘centuries of feudal oppression’ (Dore 1959: 23).

<sup>44</sup> In Japan treaties and human rights covenants have self-executing force. The 1947 Constitution incorporated international law in the catalogue of rights, although it did not give express constitutional standing to international law (Port 1991: 141, 152).

recognized as a guide for domestic legal interpretation (Iwasawa 1988: 85). The *Grundgesetz* gave recognition, in Articles 24, 25, 26 and 100(2), to the precedence of international law over national acts of legislation. Over a longer period, the authority of international law was occasionally qualified by the high courts, but it remained an important normative principle. This was also stipulated in Article 10 of the Italian Constitution of 1948, and, although Italy retained a dualist construction of international law, the courts were required to ensure that customary international law was applied as the foundation for domestic law (La Pergola and Del Duca 1985: 603–4). Under the influence of the US-American constitutional model, further, the main post-1945 constitutions made strong provisions for judicial review of primary laws, and they conferred on superior courts the authority to oversee statutory legislation and to adjudicate contested laws and cases through reference both to domestic rights norms and to rights defined under international law. Art 81 of the Japanese Constitution gave authority to the Supreme Court to exercise control of statutes. To be sure, this authority was rarely exercised in the early decades of democratic rule. After the end of US occupation in 1952, the Japanese Supreme Court decided that it could only exercise judicial review in accordance with the diffuse American model, if cases were referred to the Supreme Court from the regular courts.<sup>45</sup> Under Arts 92–3 of the *Grundgesetz*, the FRG obtained a very powerful Constitutional Court, operative from 1951, which was authorized to conduct abstract and concrete review of statutes. By the late 1950s, the court had assumed responsibility for enforcing basic rights both as vertical and horizontal principles of organization for the whole of society, and it declared fundamental rights, derived originally from international law, as normative parameters for all social interaction.<sup>46</sup> In Art 134, the Italian constitution also instituted a Constitutional Court, which began work in 1956. This court had weaker powers of abstract constitutional review than

<sup>45</sup> See the Supreme Court ruling in *Suzuki v Japan* (1952), stating: ‘what is conferred on our courts under the system now in force is the right to exercise the judicial power, and for this power to be invoked a concrete legal dispute is necessary’ (Maki 1964: 363–4).

<sup>46</sup> See the Constitutional Court ruling in *Lüth* (1 BvR 400/51 (1958)), which imprinted a comprehensive rights-based order on West German society as a whole. In this case, rights were not expressly extracted from international law, but the openness of the *Grundgesetz* to international norms was an important influence on the ruling. *Lüth* eventually played an important role in defying the distinctiveness of West German law. However, it was constructed against an international background. Although *Lüth* did not cite any international human rights treaties, it did cite the Declaration of the Rights of Man and Citizen of 1789 and an opinion of Benjamin Cardozo on the freedom of expression.



the West German court, and human rights norms were less integral to its jurisprudence than in the FRG. Notably, in early rulings, the court pursued a restrictive approach to the domestic application of international law. It limited both the matters protected under international law and the range of persons with rights defined under international law.<sup>47</sup> Significantly, however, it applied constitutional rights directly to eliminate remnants of criminal law surviving from the fascist period, and, in so doing, it used human rights as the basis for quasi-legislative functions.<sup>48</sup>

In these respects, the post-1945 constitutions of Japan, Italy and the FRG impacted in highly beneficial fashion on the structure of the political system. Discernibly, the institutions of these states acquired increased cohesion, and the tendencies towards patrimonial centrifugalism which had historically undermined their autonomy lost corrosive effect. Above all, the constitutions created after 1945 tightened the distinction between the political system and other parts of society, and they allowed state institutions to include society more evenly and cohesively in positive acts of legislation. In each respect, the judicial assimilation of international rights norms formed a relatively autonomous legal structure for the state, and, as such, it reduced the state's sensitivity to inclusionary crisis.

This reinforcement of national political systems through international rights law and increasing judicial power became evident – first – in the *internal/organic structure* of the states created by the post-war transitions. Most evidently, of course, the fact that the democratic states of Italy, the FRG and Japan were constitutionally committed to the recognition of international law and international rights norms meant that national high courts, enforcing rights partly constructed under international law, assumed a prominent position in the institutional order of state. From this position, generally, courts instilled a routine procedural order on government, and they dictated clear norms to support legislation and jurisprudence. Notably, new Constitutional Courts were not bound by precedent, and they were able to dictate a new set of norms, at least influenced by international legal presumptions, as a comprehensive foundation for the political system as a whole (see Hönnige 2011: 250). As a result of this, post-1945 states obtained rapidly heightened judicial cohesion, and the assumption that basic rights, applied

<sup>47</sup> Italian Constitutional Court 32/1960.

<sup>48</sup> See Italian Constitutional Court 29/1960, declaring limitations on the right to strike unconstitutional.

by courts, formed simple and non-derogable sources of legitimacy for law and judicial practice did much to raise the uniformity of their legal orders.<sup>49</sup> In particular, judicial control of the legislative process helped to ensure that statutes obtaining force of law had been authorized by open, public procedures, and generally to cement the state as a public order against private actors, which had traditionally enjoyed easy access to powers of public coercion. In each respect, the penetration of international human rights norms into national law heightened the basic differentiation and structural integrity of the political systems of the FRG, Italy and Japan, and it obstructed their historical tendencies towards internal privatism, re-societalization and institutionalization of parallel agencies. Central to this was the fact that, by defining their legitimacy in relation to abstracted rights norms, post-transitional states were less reliant on objective or external sources of legitimacy, and they were less frequently compelled to obtain legitimacy through the satisfaction of very specific group interests or through appeals to singular actors. As a result, these states could authorize laws through inner processes of self-scrutiny, and they were able consistently to explain the legitimacy of laws without internalizing specific groups or actors in their organic functions.

The reinforcement of national political systems through the assimilation of international human rights law and the rise in judicial power was also evident – second – in the *external/societal position* of post-authoritarian states. In the polities that evolved in the FRG, Italy and Japan after 1945, the fact that legislation was overseen by courts and subject to rights-based review established transparently generalized principles to legitimate the societal transmission of law, and it imprinted a more uniform grammar on legislation, as it was applied across all parts of society. Further, this meant that all members of society could, at least in principle, insist on equal inclusion in acts of legislation, so that regional, professional and structural variations played a less vital role in shaping the production and enforcement of law. Moreover, it meant that law could more easily cut through traditional distinctions of status, and it could bring areas of social exchange (family, religious orders, workplace), which had traditionally been

<sup>49</sup> The *Lüth* verdict meant that in the FRG ‘all spheres of the law’ were aligned to a basic value order, founded in fundamental rights. Basic rights became the highest unifying criteria to define the operations of legislature, executive and judiciary. See the brilliant analysis of this in Stolleis (2012: 225–7). On this process in Italy, see Azzariti (1959: 16–17).

partly immune to state jurisdiction, under consistent legal control.<sup>50</sup> The legal consistency derived from rights enabled state institutions to legislate more uniformly across their social environments (nations), and it meant that intermediary local or regional institutions, positioned between the state and individual members of society, lost importance.

This may in itself appear paradoxical. Notably, the constitutions of the three main post-authoritarian states contained clauses reinforcing the autonomy of local government, and, to some degree, they broke with the attempted policies of coerced corporatistic unitarism promoted during the authoritarian era. This is evident in Art 92 of the Japanese Constitution, in Art 115 of the Italian Constitution, and in Art 70(1) of the Constitution of the FRG. However, the fact that each of these constitutions made provision for relatively uniform rights ensured that local power, even where constitutionally protected, was exercised in terms defined by the central state (Rodotà 1999: 57). As a result of this, although promoting some administrative decentralization, these constitutions obviated the uncontrolled particularism that had prevailed behind the mask of political totalism in the fascist period.<sup>51</sup> This was especially pronounced in Art 28(3) of the Constitution of the FRG, which made the federal government responsible for ensuring that state constitutions complied with basic rights norms. Yet it was also apparent in Art 127 of the Italian constitution, which dictated that regional power could only be exercised, not as detached from the central state, but as part of the wider exercise of national power and as subject to international law (Pubusa 1983: 71),<sup>52</sup> thus reinforcing the position of central organs of state within the national legal system (Donnarumma 1983: 46). In establishing an evenly inclusive legal

<sup>50</sup> For example, Art 24 of the Japanese Constitution was designed to cut away the old quasi-feudal system of family law and to undermine the patriarchal 'house system', which still survived in rural areas (see Oppler 1976: 115–17).

<sup>51</sup> In Italy, notably, the Constitutional Court played a most important role in formalizing the legal and political position of the regions. Accepting decentralization in some functions, it also ensured a strictly ordered balance of competence between national and regional government. One commentator argues tellingly that the constitutional formalization of regional power replaced local communes and provinces which had assumed public functions by 'ancient tradition', but it also imposed 'constitutional discipline' on the regions and imposed stricter regulation on regional autonomy (Astuti 2006: 914). See further Sciascia (1957: 17–18), Bartole and Vandelli (1980: 180) and Rodotà (1999: 57). In Japan, the prefectural system provided a link between the state and the municipalities (Michio 1988: 56). Moreover, constitutional emphasis on single rights also led to agrarian reforms, which eroded the powers of late-feudal elites in the provinces (Dore 1959: 317, 378).

<sup>52</sup> For an early decision insisting that all regional laws are subject to international law, see Italian Constitutional Court 32/1960. It was clearly decided in this case that international law 'constitutes a limit to the legislative power of the regions'.

system, therefore, national courts, partly applying norms of international extraction, performed clear nation-building functions. As discussed, in societies marked by extreme authoritarianism before World War II, nation-building functions had often been assigned to corporatist labour law. After 1945, the nation-building functions of labour law migrated into formal human rights norms, applied through domestic courts, which placed a stratum of single rights, partly of international provenance, across national society, forming a structure of inclusion to supplement the strata of rights elaborated through solely national processes of legal formation. Paradoxically, in the main post-authoritarian transitions of the post-1945 era, the penetration of international law into national states was often the precondition, not only for the successful consolidation of the political system and its basic inclusionary structure but also for the successful construction of societies as *nations*.

In sum, the rise of rights-based constitutionalism after 1945 helped to create national political systems whose laws were enforceable in more generalized fashion across society, and which, accordingly, were able to act at an increased level of societal abstraction and autonomy. On one hand, international human rights law, transformatively assimilated into domestic constitutional practice, projected a construction of legal validity that allowed post-authoritarian states partly to re-locate the source of their legitimacy from a *position outside* to a *position inside* the political system. Conversely, however, rights allowed these states to re-locate class conflict from a position inside to a position outside the political system. This greatly augmented the structural autonomy of these states, and it meant that the political system acquired a relatively free-standing inclusionary structure, which was not endlessly challenged by over-politicized inter-organizational conflicts and sectoral demands. On the other hand, as courts applying rights increasingly controlled access to law-making authority, the tendency in authoritarian societies for powerful local and regional actors to arrogate legislative force in particular areas or social domains, and so to disrupt the underlying foundations of the legal system was in part abated. On both counts, the domestic filtration of international law led to a concentration of society's inclusionary powers within the political system itself, it established a relatively robust structure of political inclusion, and it helped to place national society as a whole in a more even relation to state institutions. As mentioned, nation-building strategies attached to corporatist class mediation had usually proved corrosive and unsuccessful. By contrast,

the transmission of international law through national societies normally had a distinctive nation-building effect.

These claims should under no circumstances be taken to imply that the interaction between national and international constitutional norms after 1945 removed all traditional structural features in post-authoritarian societies, or that it created fully autonomous state institutions. After 1945, Italy and Japan both retained a tradition of relatively weak statehood, marked by high convergence between private and local influence and public authority (Haley 2004: 67). Similar claims, albeit rather less plausibly, were often made about the FRG, at least in its early decades.<sup>53</sup> Moreover, this argument should not be taken to mean that the new constitutions in these societies simply eradicated the traditional corporatist structure of society. This was evidently not the case. In Japan, for instance, the anti-monopoly laws introduced after 1945 were never fully applied (Johnson 1982: 226); the anti-monopoly legislation of 1947 was revised in 1953, and the amended law exempted some cartels from proscription and facilitated partial reorganization of the *zaibatsu* (Shoda 1996: 251; Gao 1997: 183). The Japanese polity remained marked by a combination of incomplete de-concentration of industrial monopolies and persistent weak legal structure (i.e. low levels of litigation, distrust of formal legal procedure, reluctance to activate procedures for rights redress) (Johnson 1982: 319; Haley 1987: 347). After 1945, notably, direct state incorporation of trade unions was replaced by firm-based, enterprise unionism (Kawanishi 1992: 127). However, state regulation and promotion of economic activity remained high, and the early post-war years saw a rise in corporatist economic administration (Johnson 1982: 41; Kume 1998: 53, 55). In the FRG and Italy, likewise, industrial production retained a discernible *corporate bias*, and the political system was persistently shaped by complex, often relatively informal, interactions between holders of formal office within the state and organizations representing trade unions and industrial management (Sülow 1982: 25; Abelshauser 1987: 148; Salvati 2006: 243).

Nonetheless, the promotion of human rights jurisprudence in post-1945 constitutions generally meant that, in societies emerging from fascism or similar experiences of authoritarianism, the political system had access to principles of legitimacy that were not derived from acts of

<sup>53</sup> The 1950s and 1960s saw the growth of a voluminous literature on the power of private associations in the FRG. See, for example, Eschenburg (1955: 84) and Forsthooff (1971: 119).

concrete material pacification, and the position of corporatist bodies within the political system was structurally modified. After 1945, in fact, a new system of quasi-corporatist economic management was widely instituted in different post-fascist societies. This system still relied on corporatist consensualism, yet it reduced the importance of corporatist organizations as primary pillars of state legitimacy. In the FRG, notably, the corporatist economic constitution of the Weimar era was replaced by an enforced liberal constitution, in which, despite renewed corporatist tendencies in the 1950s, strict laws of competition ensured that leading industrial bodies were located outside the state (see Böhm 1971 [1949]: 107). In Italy, as mentioned, some corporate agencies from the 1920s persisted into the post-war period, but organizational structures surviving from classical corporatism were adapted to a market economy (Stolzi 2014: 171). In Japan, similarly, enterprise unionism gave rise to a more obviously societalized model of corporatism (Kume 1998: 58). In each society, the ability of the state to manage inter-organizational conflict management, relating to industrial production, was no longer declared the primary source of legitimacy for legislation. Instead, industrial conflict management was simply construed as one function of a state that was already legitimated by an overarching normative system. As Kjaer (2014: 120) has recently explained, this period quite generally saw a break with pure state-led or *politically integrative* corporatism, and it witnessed a transition towards *neo-corporatism*, in which corporatist interactions remained vital for the production of everyday consensus and practical legislation, but these interactions were usually conducted at a societal, sub-executive level.

In some ways, the assimilation of international human rights norms as principles of legitimacy for domestic law was a decisive factor in this transition to neo-corporatism in the FRG, Japan and Italy. As discussed, in the decades after 1945, these states explained their legitimacy, to some degree, by circulating private, civil and political rights through society, which were partly extracted from the international domain, and whose authority was formally secured under international law. One consequence of this was that rights could be applied by states as simple, statically iterated principles of legitimacy, and they did not necessarily generate further layers of rights or engage states in deep cycles of social politicization or class-determined inclusion. After 1945, in fact, these states were able to distribute rights, through courts, to legitimate legislation while in fact, in the act of rights distribution, also separating themselves from the organizations whose conflicts they were required

to regulate and which had traditionally mobilized around rights. This meant that the deep traumatic logic of national strata of rights, which drew the state inexorably into society and its conflictual exchanges, was broken. Tellingly, in fact, some of the most important early rulings of the Italian and West German Constitutional Courts were focused on the social conflicts which had historically proved most disruptive for the state – that is, questions of labour law, especially concerning freedom of labour and the standing of collective contracts. In such cases, the rulings of these courts served both to protect certain formal rights of organized labour, yet also to ensure that, to a large degree, these rights were exercised outside the jurisdictional functions of the state. In 1954, for example, the West German Constitutional Court declared that collective bargaining was defended by the basic rights in the *Grundgesetz*; in so doing, however, it also insisted on the legal position of unions as freely constituted organizations, operating in a relatively autonomous legal sphere.<sup>54</sup> In early cases in Italy, the Constitutional Court strongly protected the right to strike and it defended collective bargains. But it also stated that collective wage agreements should be essentially defined by rules of private law.<sup>55</sup> In these cases, the courts clearly protected the position of trade unions as organizations intended to secure socio-material rights for their members. However, they imposed a restrictive formal grammar on industrial disputes, limiting the politicization of the questions at issue, and stabilizing labour relations under a system of formal rights standing outside the state. Because of this, the courts were able to resolve labour conflicts in relatively neutral fashion. Owing to such judicial depoliticization of labour conflicts, in fact, national states eventually acquired the ability to negotiate more independently with economic organizations, and to reach agreements over production conditions without risking coalescence with external private interests. In most post-authoritarian societies this ultimately made it possible for states to establish a solid corpus of social rights, even rights entitling trade unions, within constraints, to participate in economic decision making.<sup>56</sup> In these societies, in fact, the fact that some elements of its legitimacy were extricated from social controversy ultimately allowed the state to construct a quasi-corporatist system of material distribution, in which substantial material guarantees were allocated to trade-union

<sup>54</sup> West German Constitutional Court, 1 BvR 629/52(1954).

<sup>55</sup> See Italian Constitutional Court 10/1957; 106/1963.

<sup>56</sup> In the FRG, for example, laws were passed in 1951, 1952 and 1976 to sanction union participation in workplace decision making.



constituencies, yet in which economic negotiations were conducted by sub-executive departments, at a reduced degree of social contestation. The rise of a neo-corporatist system of economic administration was partly determined by the fact that states learned to perform basic processes of national inclusion, especially inclusion through political and material rights, without acute politicization of social conflicts. This in turn was determined by the constitutional order of singular rights established after 1945. The emergence of a fourth tier of judicially constructed international human rights norms in Germany, Japan and Italy, in short, did much to facilitate the inclusionary circulation of rights, and in fact to stabilize the older tiers of rights which political systems had struggled to secure on the basis of a purely national inclusionary structure.

In all the main states that developed a fascist structure in the interwar era, the propensity towards authoritarianism had originally been caused, or at least intensified, by the depleted inclusionary autonomy of the state. Arguably, the main states that converted to fascism in the interwar era had been persistently undermined by the structural residues of feudalism, and they had not been conclusively constructed as modern states, able to perform relatively uniform processes of inclusion or even positively to sustain their functions in the face of pervasive private interests. To some degree, in fact, the societies in which these political systems were located were not yet fully formed as nations, and they retained a highly patchwork legal/political structure, which was induced by, and then in turn contributed to, the private and local usurpation of political power. Consequently, as these states had attempted to construct legitimacy around the formula of the sovereign people in the early twentieth century, they had failed, quite catastrophically, to condense this people into a sustainable political will. For these reasons, these political systems had struggled to abstract a stable and autonomous body of public law to organize and legitimate their inclusionary functions, and they had lacked a fully extracted system of higher-order public norms to determine their functions. Vitally, however, the fact that these states were partly incorporated in an international constitutional system after 1945 meant that they could harden the autonomy of their legal structures, and that the processes of state and nation building initiated in the nineteenth century could be more effectively continued. In the first new democracies after 1945, the rise of consolidated national political systems depended on the paradigmatic shift from national or popular sovereignty to

international human rights as the ultimate premise or *formula* of political legitimacy.<sup>57</sup> As the basic source of legal authority migrated from national sovereignty to human rights, national laws could be underpinned by norms derived, in part, from a pre-constituted international legal system, and national legislatures could use these norms to authorize legislation, both at its inception and throughout the course of its application. As a result of this re-orientation, national states were to diminish their factual inclusion of organizations expressing societal interests, and they were able to legislate, under some conditions, without express approval from actors situated outside the political system. In particular, they could presuppose an autonomous normative foundation to justify legislation, even in circumstances, typical of protracted institutional transitions, in which laws were exposed to radical contestation, policies did not meet with manifest endorsement, and institutions lacked hard foundations in society. Eventually, this made it easier for national political systems to disentangle themselves from the social environments in which they operated, to propose their legitimacy as relatively differentiated from specific social prerogatives or exchanges, and, as a result, to maximize the volume of positive law which they were able to generate and apply across a national society. Only through the medium of international human rights law, in sum, did these national states manifestly acquire the capacity to integrate their populations, *as nations*. Ultimately, states learned to apply internationally defined rights, as a fourth tier in their inclusionary structure, across their societies. This fourth tier of rights proved a more enduring source of inclusionary structure than previously instituted strata of rights. By reducing the intense conflicts attracted by political and material rights, it allowed states to perform inclusionary functions for their constituencies, including the distribution of material rights, without exposure to extreme risk of fragmentation, and it often formed a foundation on which other rights could be successfully allocated.

From a literal national perspective, the body of international human rights norms consolidated after 1945 appeared as external constraints on domestic political systems. This perspective is still widely replicated in literature addressing these phenomena.<sup>58</sup> From a wider sociological perspective, however, the institutionalization of international human rights at this time often enabled transitional national states to expand

<sup>57</sup> Close to my claims on this point see Ahlhaus and Patberg (2012: 25).

<sup>58</sup> See p. 70 above.

their inclusionary structure, and to stabilize a basic legal apparatus. The assimilation of international law meant that historically weak political systems were able to legislate at a heightened level of autonomy, and, effectively, to assume a position of inner-societal sovereignty.

## TRANSITION 2: PORTUGAL AND SPAIN

The democratic-constitutional transitions of the 1970s, and especially those on the Iberian Peninsula, which followed the collapse of the authoritarian regimes created in the 1930s by Salazar and Franco, had some sociological characteristics which resembled those of the post-1945 transitions. These transitions also reflected a pattern of compensatory structure building through international human rights law.

First, for example, the constitutions created in the wake of the democratic transitions in Portugal (beginning 1974) and Spain (beginning 1975) mirrored earlier transitional constitutions in that they imputed very great significance to international law, and they made extensive provision for the domestic application of international human rights norms. In Spain, notably, in the course of the transition, international law and human rights law based in international treaties were accorded singularly high standing, and the transitional Spanish state was designed around a monistic reception of international legal norms (Peces-Barba Martínez 1988: 36; Lara and Pérez Gil 2009: 7; Rafols 2005: 90). Under Art 96(1) of the Spanish Constitution of 1978, notably, international treaties were defined as part of the domestic legal order. Second, the post-transitional constitutions in Portugal and Spain mirrored post-1945 constitutions in that they established strong Constitutional Courts, which were authorized to ensure that international law, especially international human rights norms, prevailed over domestic law in cases of conflict (Marín López 1999: 42, 65). This was rather less pronounced in the 1976 Constitution of Portugal. In Portugal, the radical military units, which had led to the overthrow of Caetano in 1974, retained a position of influence in legislative and judicial procedures after the first stage of transition. Indeed, in transitional Portugal, the ordinary judiciary was often suspected of harbouring sympathy for Salazarism (Magalhães 2003: 93–6), and a court able to conduct independent review of statutes did not exist until constitutional amendments were passed in 1982. However, the new constitutions in Portugal and Spain both established strong Constitutional Courts, which had

power to conduct abstract and concrete review of statutes. In both cases, international human rights agreements provided a normative framework for control of domestic statutes and administrative acts.<sup>59</sup>

As in earlier transitions, further, the rise of judicial power in Spain and Portugal occurred as part of an adaptive social process, and the implementation of international human rights norms occurred in historical contexts deeply marked by a history of weak state structure. Once again, this claim may appear rather counter-intuitive. Prior to the onset of the transitional reforms, the authoritarian regimes in Portugal and Spain were defined ideologically as strong, socially expansionist states. Like earlier authoritarian states, they used far-reaching regulatory mechanisms to control economic production, to integrate and regiment organized labour and to police social activities typically situated in the private domain. Like interwar Italy, in particular, authoritarian Portugal and Spain had developed a densely meshed syndicalist system for managing labour-market relations, and they used expansive judicial institutions in order to control and suppress conflicts in this sphere. Moreover, authoritarian Portugal and Spain were defined by one structural feature that very clearly separated them from other states in which reactionary authoritarianism took hold in the interwar period. Notably, Portugal and Spain had very long histories as national states, and they were not obviously affected by problems of disembeddedness or elite/society mismatch caused by accelerated processes of national unification and central state building. Nonetheless, in many respects, authoritarian Portugal and Spain were products of an evolutionary process similar to that observable in Germany, Italy and Japan. Like the fascist regimes of the interwar era, these regimes were beset by chronic structural problems, chronic depletion of autonomy and deep inclusionary crises. In particular, these states had evolved in societies defined, quite fundamentally, by the partial persistence of feudal order. Well into the twentieth century, both states remained afflicted by weak centralization and low density, by persistent inner pluralism, and, above all, by very deep reliance on local or private supports for the circulation of power. Even during periods of democratic experimentation, powerful local groups retained highly privileged positions in the political system, and often controlled access to public office (López Martínez and Gil Bracero 1997: 129–37). As a result, these states lacked deeply

<sup>59</sup> On the impact of international law in the review functions of the Constitutional Court in Portugal see Cortês and Violante (2011: 764).

founded inclusionary structures, and they were marked by low systemic abstraction and differentiation in relation to prominent social organizations. The authoritarian regimes created in the 1930s that survived beyond 1945 collapsed mainly for internal/systemic reasons: primarily because of low legal and institutional autonomy and weak inclusionary structure. Accordingly, the constitutional form that ultimately emerged in these societies, following the democratic transitions, can be explained, sociologically, against this background.

As in the authoritarian states addressed earlier, above all, the debility of the political systems created by Salazar and Franco was evident in their techniques for managing economic conflicts and class antagonism, and they were deeply unsettled by historical pressures resulting from their internalization of economic conflicts. In fact, the basic authoritarian design of these regimes was, in part at least, the product of a deep-lying systemic failure of labour integration, and each regime displayed structural deficiencies caused by this failure. For example, authoritarian Portugal was originally constituted by Salazar as a political system designed to absorb social pressures caused by unresolved class tensions, which had obtained expression in the Portuguese First Republic. Salazar's constitution of 1933 was programmatically committed to the balancing of corporate interests in society, and in Arts 31, 34 and 35 it provided a notional legal base for moderated capitalism and national corporatism based in consensual economic policies. Under Salazar's constitution, however, corporatist ideals were hardly more than fictions. In fact, economic policy making was ordered in guilds (*grémios*), which served the retrenchment of elite economic prerogatives against free organized labour, and governmental power was closely linked to prerogatives consolidated in social milieux outside the state (Makler 1976: 499). Salazar thus established a system of exclusionary corporatist capitalism, designed coercively to control economic dissent. The political system of authoritarian Spain had similar characteristics, and it was also defined by a background of intense socio-political fragmentation. Notably, the system of democracy established in the Spanish Second Republic (1931–1939) had been defined constitutionally by the attempt to derive legitimacy for the state from the corporatist integration of labour conflicts, from governmental arbitration in labour disputes and from the effective mediation of class antagonisms.<sup>60</sup> The establishment of democracy in Spain in the 1930s, however,

<sup>60</sup> On the corporatist structure of the Second Republic see Novak (2004: 250).

had given rise, first, to an intensification and polarization of labour conflicts, and, second, to a catastrophic politicization of the state structure. As in states discussed earlier, consequently, in Republican Spain the attempt at corporatist democracy was soon abandoned in favour of a selectively repressive brand of corporatism; the constitutional documents imposed in Spain under Franco resulted in a switch from labour-inclusive to labour-exclusive corporatist politics. Under Franco, ultimately, the basic principles of corporatist political-economic organization were set out in the Fundamental Labour Law (*Fuero del Trabajo*) of 1938, which stipulated that syndicates, acting as corporations under public law (XIII/3), were to represent and co-ordinate different productive sectors. These laws also provided for mandatory state arbitration in unresolved industrial conflicts (Gay de Montella 1939: 136). The organic laws of the state then stated clearly that economic interests were subject to state organization, and that, within constraints set by the state, different socio-economic groups (unions, professions, municipalities, etc.) could claim certain collective rights to economic security. However, as in Germany and Italy, these laws strictly subordinated workers' associations to the prerogatives of powerful private enterprises (Madureira 2007: 90), to which they accorded a key role in the developmentalist programmes underlying the regime, and they clearly recognized private initiative as 'the fundamental economic activity' in national society (Gay de Montella 1939: 36). Authoritarian Portugal and authoritarian Spain, therefore, were both originally created by a crisis of labour integration, and this left a deep imprint on their basic structure.

The authoritarian corporatist strategies underpinning political authoritarianism in Portugal and Spain were never comprehensively enacted. In Spain, in fact, the corporatist system was partly dissolved in the 1950s, and limited autonomy in collective bargaining was re-established in 1958. Nonetheless, owing to their corporatist orientation, both states were weakened through interaction with external economic bodies. Both states were internally fragmented through their complex channels of interaction with labour and business, and many powerful (originally private) interests and organizations were able to assume a stable and protected legal form in the margins of the state (Gunther 1980: 250). One result of these factors was that, in both societies, the state's capacities for autonomous policy making were reduced, and the governmental executive relied on complex, half-private bargains with private groups in order to produce policy, to authorize law

and to secure compliance.<sup>61</sup> One further consequence of this was that the positions of private actors were structurally consolidated in society, and the state obtained and demonstrated its legitimacy – in part – by placating and satisfying established external prerogatives. In fact, economic organizations and, in some cases, even particular families were able to establish positions in the margins of the political system, from which they could utilize political influence for the protection of personal and economic prerogatives, which were not necessarily consonant with the official direction of state policy (Makler 1976: 523). Often, this governmental privatism converged with older traditions of patronage, clientelism and private monopoly of public power, which were historically embedded in these societies, and it meant that the originally highly localized, quasi-feudal structure of society was intensified, even under the auspices of a coercive unitary state. Notably, Spanish and Portuguese society was traditionally marked, at a political level, by a persistent culture of *Caciquismo*: that is, by privatistic brokering of public office, especially in local office holding, by endemic clientelism in political constituencies, and by extreme personalization of political leadership roles.<sup>62</sup> These older traditions of patronage often shaded into the authoritarian personalism that became prominent in the 1930s, and traditional elites soon reappeared after the establishment of the new regimes (see Barreira and Sánchez 2008: 495). As their economies underwent partial liberalization in the late 1950s, further, these states were confronted with increasingly intense labour disputes, and enforcement of elite prerogatives placed the government under great duress. Notably, these states lacked sufficiently refined instruments to meet obligations regarding regulation of labour markets, control of industrial conflict and forcible pacification of dissent (Román and Delgado 1994: 198). Tellingly, these states also lacked full control of basic judicial functions, and they were often required, at different times for different reasons, to devolve judicial obligations to military courts and labour courts in order to meet the rising requirement either for rapid justice, rapid coercion or rapid judicial settlement, thus

<sup>61</sup> For the deep overlap between public and private power under Salazar see Makler (1976: 501, 513).

<sup>62</sup> This term is usually used to characterize the endemic clientelism in Spanish politics in the Restoration era (after 1875), in which local bosses exercised political control of different areas through patronage (Ortega 1977: 354). But, in my view, this term can also describe the social horizon of much of Spanish politics, and to a lesser degree, Portuguese politics under the authoritarian system up to the 1970s. To support my view see Mayer-Tasch (1971: 193) and Cazorla-Sánchez (1998: 128; 1999: 883). On *caciquismo* in Salazar's Portugal see Silva (1994: 31).



promoting a bewildering and uncontrollable proliferation of judicial office.<sup>63</sup> On both counts, disputes over labour relations drained the state's resources for legitimization and caused the basic inclusionary integrity of the state to fracture.

For these reasons, the political systems of pre-transitional Portugal and Spain possessed a very depleted inclusionary structure. Although proclaimed as authoritarian regimes, these systems relied on the support of external private actors for legitimacy, and they were required endlessly to broker acquiescence or compliance among different social groups. The foundations of the political system were pluralistically situated at different points through society, and the state was forced to construct the sources of its legitimacy at social locations lying outside the political system itself. Consequently, the legitimacy of the state was very susceptible to destabilization through changes in economic conjuncture, normative orientation of powerful organizations and dimensions of industrial conflict. To a large degree, in fact, the pre-democratic regimes in Portugal and Spain, like the main authoritarian states before 1945, were not conclusively formed as states, and they were only able to perform rather limited functions of societal control and inclusion. Moreover, these states operated in societal environments that were not fully formed as national societies, and in which even processes of legal/political inclusion were not solidified.

On this basis, the constitutional developments during and after the democratic transitions in Portugal and Spain in the 1970s can be seen in a distinctive sociological perspective. These transitions can be observed as parts of an adaptive process, in which traditionally weak political systems availed themselves of normative instruments to correct the problems of structural consolidation and inclusion, which had historically afflicted them. To be sure, the structure-building impact of these transitions cannot be ascribed solely to the impact of legal norms. Clearly, the expansion of parliamentary-democratic representation in the course of the transitions did much to erase the localistic fabric of society. Clearly, further, the integration of Portugal and Spain in a broader political-economic conjuncture reduced some pressures on national institutions.<sup>64</sup> Yet, in certain respects, the fact that the new

<sup>63</sup> For analysis of the 'spectacular expansion of special jurisdictions' under Franco, see Táboas (1996: 318). See also Bastida (1986: 185).

<sup>64</sup> It is widely noted for example that political and economic pressures from the European Community formed a powerful 'external factor determining political change' in pre-1975 Spain (MacLennan 2000: 5).

constitutions in Portugal and Spain placed national law making in a close relation to international legal norms acquired particular structure-building importance, and it assumed a vital role in obviating conventional pathologies of statehood in these societies.

In transitional Spain and Portugal, the assimilation of international law played an important role in reinforcing the *internal* organic structure of the state. For example, the salience of international norms brought the initial benefit that, even in highly contested settings of the early transition, the inclusionary structure of the political system could be consolidated in insulated form, and the terms of the transition could be negotiated in reasonably consensual fashion. This was especially pronounced in Spain. Even during the transition in Spain, the high-level commitment to international rights norms formed a point of common orientation for different political actors. This meant that the transitional process as a whole could be conducted within a pre-agreed framework, partly elevated above specific social conflicts, and that historically volatile controversies, especially over labour, could be held outside the transitional process (Hamann 1997: 124). As a result, prominent participants in the transition were able to utilize already existing channels of communication within the state to establish inter-elite consensus, and they mapped out a relatively smooth path for the transition to democracy (Linz and Stepan 1996: 91–2). Over a longer period, then, the fact that the constitutions of Portugal and Spain gave authority to courts to oversee legislative procedures and, where necessary, to declare statutes and administrative acts unconstitutional, meant that public powers were more strictly located in the state, and that private or local actors could less easily gain access to and deploy state power in order to pursue singular prerogatives.<sup>65</sup>

Most vital in this respect, however, was the fact that the new constitutions of Spain and Portugal sanctioned basic subjective rights in respect of labour disputes, professional representation and collective bargaining. This was originally less pronounced in Portugal, where, as late as 1987, the Constitutional Court ruled against liberal market reforms. In Spain, however, liberalization of union organization was introduced by a decree in 1977. This was consolidated in Arts 7, 28 and 37 of the democratic constitution of 1978. Importantly, early judgments of the Spanish Constitutional Court addressed industrial

<sup>65</sup> In post-1978 Spain, for example, one important duty of the Constitutional Court was (Art 141) to control the legality of public organs in autonomous regions (see Gil 1982: 561).

conflicts, and the court expressly applied international law to stabilize the autonomy of union activity, outside the organic order of the state.<sup>66</sup> One immediate result of this re-orientation in labour law was that, during the transition, the political system was not ceaselessly compelled to regulate labour markets, and it was able to release many aspects of economic regulation from state jurisdiction (see Foweraker 1987: 67; Román and Delgado 1994: 190, 210; Hamann 1997: 126). The sphere of labour law, consequently, lost some importance as a source of legitimacy, and both the historically generalized politicization of industrial conflicts and the endemic inner fragmentation of the legal and political order under corporatist authoritarianism could, in part, be avoided. Both Portugal and Spain clearly retained a very pronounced corporatist bias in and after the transitional period. Indeed, in both societies, this model was at times crucial for the survival of the democratic system as a whole. Yet, as in other post-authoritarian societies, both states developed a less concentrated, or pluralist, model of corporatist organization, based in a displacement of economic conflict from parliament to sub-executive fora (Perez-Diaz 1986: 9; Yruela and Giner 1988: 144; Royo 2002: 84). One further result of this re-orientation in labour law was that it gradually led to a reinforcement of social rights through society as a whole.<sup>67</sup> As in post-1945 transitions, in fact, international human rights law came to overlie, and stabilize, other strata of rights in society. The fact that states were able to extract one defining tier of rights from the international arena meant that they could distribute political and socio-material rights without engaging in deeply, intensely consuming conflicts, they could derive legitimacy from multiple sources, and they could promote political inclusion in relatively neutralized procedures. As in cases discussed earlier, the rise in the impact of international rights as sources of legitimacy meant that conflicts which had traditionally been held at a very unsettling level of intensity in the state could be re-located to positions outside the state. In most cases, labour policies were negotiated at sectoral level, and

<sup>66</sup> See Spanish Constitutional Court 11/1981. As in other transitional settings, in post-1978 Spain, collective bargaining was defined as a basic right, protected by international law, but not as a part of public law or as 'one of the fundamental rights and public liberties' given special protection by the constitution. See Spanish Constitutional Court 98/1985. A strict separation between rights of collective bargaining and fundamental individual rights was also made in Spanish Constitutional Court 58/1985.

<sup>67</sup> See the early defence of universal labour rights, ruling restrictions on labour rights unconstitutional, based on citation of UDHR, and using proportionality arguments, in Spanish Constitutional Court 22/1981.

inclusionary conflicts concerning labour and production did not converge fully around the central organs of the state. Often, in fact, judicial actors, operating within pre-defined normative constraints, could intercept such problems before they entered the political system.<sup>68</sup> Overall, therefore, the rising use of internationally defined rights as a source of legitimacy meant that states could generate some socio-material rights without risking extreme destabilization. The emergence of a stratum of international rights, placed on top of earlier strata of rights, incrementally augmented the inclusionary structure on which the state relied, and it substantially increased the overall autonomy of the political system.

The assimilation of international law also impacted on the *external* organization of the state in post-authoritarian Spain and Portugal. Most distinctively, the increasing use of rights norms to authorize legislation in these polities meant that different social actors were brought into a more even relation to state power, so that the facility with which powerful local and private bodies had gained exemption from, or privileged access to, state authority was diminished (see Almeida 2013: 135). Generally, this reduced the traditionally localized, pluralistic character of national society, and it raised the inclusionary reach of the legal/political system as a whole. On one hand, the new constitutions placed a more uniform structure on the national environments of the political system. Naturally, both Spain and Portugal retained many features from their pre-transitional structure. In both states, organized interests retained entrenched influence (Royo 2002: 79). Moreover, Spain in particular remained highly regionalized; clearly, regional separatism has remained a volatile factor in recent Spanish history. Nonetheless, the historical link between local power and private government was partly severed, and local authority was increasingly exercised within hard constitutional constraints. In Spain, in fact, the jurisprudence of human rights promoted by the Constitutional Court was often strongly weighted against regional autonomy, and it was developed to impose a unified legal order over all parts of society.<sup>69</sup> Overall, the ability of the state to legislate, from within its own resources and without co-optation of private bodies, was

<sup>68</sup> See the cases in note 67.

<sup>69</sup> Notably, Art 149.1 of the Constitution made the state responsible for enabling all citizens to exercise their constitutional rights. This provided scope for expansion of central power. Early Constitutional Court rulings also restricted the power of autonomous regions. See in particular Spanish Constitutional Court 1/1982.

intensified, and the state developed more expansive capacities for applying law throughout society as a whole. Indicatively, the increasing inclusivity of the legal/political system was reflected in growing social confidence in law, so that citizens showed increasing willingness to access the courts, to pursue litigation and to utilize the law as a medium of conflict resolution.<sup>70</sup> Rising access to law naturally brought society into a more even relation to the legal system, and it further elevated the standing of the legal system as the focus of a broad inclusionary order.

As in earlier cases, therefore, in the Iberian transitions the domestic filtration of international law, and especially of international human rights law, played a key structure-building role, allowing political systems to compensate for traditionally acute problems of depleted inclusivity. Above all, the fact that states were able to utilize abstracted rights norms to sustain their legitimacy meant that they could diminish their reliance on external support, and they could police their absorption of societal conflicts and actors, often depoliticizing traditionally volatile contradictions (especially those resulting from industrial conflict) across society at large. This meant that state institutions could occlude themselves against unsettling external forces, and they could perform their functions of mandated legislation and inclusion, both political and material, in increasingly autonomous fashion. In some respects, the fact that national political institutions and actors were integrated into an international normative order provided the basis for the extracted construction of a clear and autonomous corpus of national public law, and thus also for the reliable consolidation of a national political system. It was only as these states were locked into a transnational political system, constituted through human rights norms, that their formation as inclusionary national-political entities could be brought toward completion.

## CONSTITUTIONALISM AND STRUCTURE BUILDING IN EASTERN EUROPE

Broadly similar patterns of structural formation can be identified as features of the next major wave of constitutional transition, or *systemic transformation*, in Eastern Europe in the 1980s and early 1990s.<sup>71</sup>

<sup>70</sup> It is calculated that in Spain the number of contested civil cases increased by nearly 100 per cent in the five years after transition (Giles and Lancaster 1989: 825).

<sup>71</sup> In much of Eastern Europe and the former Soviet Union, *systemic transformation* seems a more accurate term than *transition* to capture the process of institutional and economic restructuring. For related claims see Carothers (2002: 13).

These upheavals were comparable to previous periods of constitutional rupture and re-direction in their legal-institutional consequences, as most Eastern European polities undergoing systemic transformation after 1989 developed constitutions that accorded high status to international law, especially international human rights law. Moreover, either immediately or gradually, most states in Eastern Europe developed powerful Constitutional Courts, which, with obvious variations, assumed responsibility for assessing the conformity of statutes with international human rights instruments. In many national states during the Eastern European regime changes, judicial actors in fact acquired unprecedented levels of influence and autonomy, and their role in stabilizing the political system was intermittently very substantial. In some instances, judicial bodies actually led the reform process, acquiring competences, partly founded in international law, that extended far beyond functions ascribed to courts in polities marked by typical separation-of-powers arrangements.

In addition, the transformations in Eastern Europe were similar to earlier transitions in their social backgrounds, and different national reform processes occurred in societal settings in which national political institutions were marked by weak statehood, depleted inclusionary structure, and protracted inclusionary crisis. Of course, crises of inclusion in Eastern European polities did not find the same expression as in other authoritarian polities. It was fundamental to these polities that, prior to 1989, they defined their legitimacy by claiming that they had eradicated class conflict, so that problems caused by the inclusion of obdurate economic antagonisms did not have the same ideological valence as in other societies. Nonetheless, the regimes in Eastern Europe had striking constitutional similarities to earlier reactionary dictatorships. On one hand, these regimes were designed – purportedly – to exercise far-reaching social control, and they were typically based in constitutions enshrining declaratory group rights, which incorporated substantial areas of social practice, especially relating to economic production and development, immediately within the political system.<sup>72</sup> Moreover, the constitutions of Communist states were premised in unitary, neo-Jacobin conceptions of national sovereignty, and they proclaimed legitimacy through the objective identity of the political system and society, purporting to allow the untrammelled *material will* of the national proletariat to run immediately through all

<sup>72</sup> For general comment see Markovits (1998: 615–17).

organs of the state.<sup>73</sup> The enactment of popular sovereignty through the neutralization of material disparities in society was thus the primary basis of legitimacy in these regimes, and they pursued this objective partly through repression, and partly through the reduction of material distinctions between social groups. In this process, Eastern European regimes usually gave restricted standing to political rights, which were selectively applied through controlled party procedures, so that political inclusion was largely forcible and regimented. As a result, classical political rights did not impact expansively on the political system. The diminution of political rights, however, provided a foundation for the allocation of some socio-material rights, and, in most cases, the political system secured its hold on society through a mixture of coercion and material rights allocation.

Social inclusion through socio-material rights, impacted deeply on the basic structure of the political system in pre-1989 Eastern European societies. Owing to their dense fusion of political direction and economic/distributional management, notably, these political systems were exposed to powerful pressures of inclusion, and they encountered difficulties in sustaining functional autonomy in face of the societal conflicts and resultant obligations which they internalized. As they lacked formal/legal or political-representative mechanisms for resolving social conflicts and legitimating legislation, they tended to use their bureaucracies as frameworks either for the resolution or for the coercive regulation of social antagonisms and disputes. They were only able to discharge their regulatory obligations by expanding their peripheries to include local and private agents and organizations for purposes of societal control. As a result, the regimes in Eastern Europe were typically defined by very high reliance on persons and bodies whose position in relation to the political system was uncertain, and their peripheries were marked by at times deeply debilitating levels of porosity to interests and actors with nebulously defined public/private status (Willerton 1992: 9; McFaul 1995: 221; Easter 1995: 576). Typically, these systems possessed the following hallmarks: high personalization of office, deep and obdurate interpenetration between public organs and private agents, the use of informal power by entrenched personal elites, and, because of this, a

<sup>73</sup> See provisions in the 1952 Constitution of Poland (Art 4), the 1949 Constitution of Hungary (Art 2), the 1977 Constitution of the Soviet Union (Art 1). Owing to their commitment to full sovereignty of the proletariat, these constitutions also promoted the politicization of the judiciary, defining judges as organs of the political will of working people. See, for example, Art 41 of the Hungarian Constitution.



shortage of policy options and low flexibility in legislation. In addition, partly by consequence, most Eastern European regimes suffered high levels of localized power and corruption, and society as a whole was shaped by at times extreme centrifugality. Overall, the basic presence of a uniform inclusionary structure for the political system was often questionable.

Such fragmentational tendencies were particularly acute in larger societies in Eastern Europe, such as the Soviet Union. Here, the political system had its functional basis in the fusion of official party directives and informal local prerogatives, and local elites often operated as hinges, connecting the centralized elements of the political system to the diffuse regions (Willerton 1992: 227; Anderson and Boettke 1997: 38; Garcelon 2005: 51). Although widely construed as a totalitarian state, the political system of the Soviet Union was in fact marked by evident characteristics of quasi-feudal disaggregation. Its underlying structure had weak inclusionary force, and its socio-structural bedrock was located in 'personal network ties' at different local junctures, so that the 'infrastructural powers of the state' were sustained, if at all, by rather crude patterns of patrimony, corruption and locally embedded venality (Easter 2000: 69, 165). This meant that the general autonomy of the political system was low, and elite actors with powerful vested interests were able to assume positions inside the political system in order to consolidate their separate interests. As in earlier one-party systems, the lack of clear formal/constitutional mechanisms for the rotation of office and the removal of elites from inside the political system meant that the political system was reliant on very particular sources of external support, which sapped the legislative autonomy and the basic functional differentiation of the state.

The processes of systemic transformation in Eastern Europe were driven, manifestly, by factors outside the political system. For example, they were stimulated by international pressures, by changes in international economic conjuncture, and, in some cases, by anti-systemic action in national civil society. Like earlier cases, however, these transformations were also propelled by forces internal to the inclusionary structure of the political system of the societies in which they occurred. In different ways in different settings, regime changes in Eastern Europe occurred as part of a process of national structural formation, and the rise of a constitutional order linking national processes of norm formation to an international system of human rights norms helped to remedy historical problems of weak abstraction in the political system. As

in other cases, in fact, it was only as these societies were incorporated as integrated units within a transnational constitutional system that sociologically embedded processes of state building, and national formation more widely, could approach completion.

To illustrate these points, first, the early phase of constitutional re-orientation in Eastern Europe was stimulated by principles enunciated under international law. In particular, the Helsinki Accords of 1975, although not established as a binding treaty, created a powerful momentum for the expression of human rights norms in national polities. The principles declared in these Accords impacted deeply on the normative structure of different societies, and they gradually elevated the autonomy and distinction of national political systems across Eastern Europe (see Kurczewski 1993: 12; Thomas 2001: 255). The structure-building impact of international human rights law in Eastern Europe became evident, initially, before the transitional reforms had fully commenced. In some societies, strikingly, the growing resonance of international law led to a reform of the judicial apparatus, which in turn led to a wider transformation of the state. For example, in Poland, a Supreme Administrative Court was created in 1980 and a Constitutional Court, with weak powers of review, in 1985–86. In 1983, a Constitutional Law Council was established in Hungary. (Dupré 2003: 5; Kuss 1986: 343). In Poland, moreover, norms spelled out in the Helsinki Accords provided support for independent trade-union activity, and the growing presumption in favour of human rights as independent constitutional norms proved a strong impulse both for judicial and for wider political-systemic reform. Tellingly, Jacek Kurczewski has noted (1993: 95) that the Polish Martial Law Decree of 1981, suppressing trade-union activity, was initially contested on grounds of (un)constitutionality, defined through reference to internationally proclaimed norms. However, in the executive-led system of the Communist regime, no provisions for judicial review existed to give expression to such challenges. The thwarting of expectations of constitutionality, review and normative redress, consequently, intensified resistance to martial law, and it eventually triggered a longer process of incremental constitutional reform. However, the assumption that rights had an independent normative reality acquired the greatest importance in the most important process of constitutional re-direction: in the reforms pioneered by Gorbachev in the Soviet Union. In this setting, the political restructuring was initially heralded, specifically, through judicial reforms, and the origins of the transition can be traced to attempts by the Communist

Party leadership in the mid-1980s to commit the political system to the general rule of law, and even to impose principles derived from international law on the domestic order. Both the first programmatic plans for transformation of the political system and the first practical steps towards the implementation of reform measures in the Soviet Union resulted from projects to raise the independence of the judiciary, and to formalize its powers to control legislation and administrative acts (Thorson 2012: 28). Gorbachev in fact expressly promoted legal unity and uniformity as a revolutionary strategy to strip the state apparatus away from its obdurate linkage with private and personalistic sources of power, and to increase the quality of law as a formal inclusionary medium for the political system (White 1990: 37; Solomon 1990: 185; Devlin 1995: 40). In each of these contexts, international law pervasively re-shaped the inclusionary structure of national political systems. International law entered domestic law as a form of abstraction for the political system, and it began to construct domestic law as a more generalized medium, capable of legitimating actions, institutions and legislation at a certain degree of autonomy.

The structure-building impact of international human rights norms on the structure of national political systems in Eastern Europe was not exhausted in the early stirrings of reform. On the contrary, international human rights law played an enduring role in the internal and external activities of transitional polities. For instance, most post-Communist states were keen to accede to the ECHR as quickly as possible during the transition, as membership in the Council of Europe promised to open a pathway both to international recognition, and ultimately to membership in the European Union (EU). Moreover, the collapse of Communism gave impetus to international initiatives in support of human rights, and the later part of the process of transformation was influenced by the Vienna Declaration and Programme of Action (1993), which accorded clear supra-constitutional rank to human rights laws throughout Europe.

Through the second stage of systemic transformation, moreover, national judiciaries, especially Constitutional Courts, acquired increasing strength, and they promoted international norms to re-define the basic fabric of national polities. In this period, many states began constructively to utilize international rights norms as a primary legitimational basis for their functions. International human rights often became an independent source of state structure, enabling national political systems to operate independently of embedded organizations

and to construct autonomous foundations for legislation. In many cases, international law provided the normative premise for the consolidation of an autonomous corpus of public law within national societies, and national political institutions relied on international norms to form their basic inclusionary structure.

In some societies, notably Poland and Hungary, Constitutional Courts were established at an early stage in the process of re-structuring, and these courts rapidly assumed the power to shape the course of political reform. In many cases, courts developed a very activist jurisprudence, at least in part based in international law. In such examples, typically, senior figures in the judiciary insisted on the inviolability of certain formal rights norms (derived from international law) in order to review statutes and to adjudicate disputes in national societies. In addition, however, some judges assumed duties extending well beyond classical judicial functions, and they invoked international human rights norms to initiate new laws, and to provide normative guidance for legislation and acts of state.

In both Poland and Hungary, for example, Constitutional Courts at times acted as *de facto* constituent actors during the democratic transition, and they utilized international norms to define the fabric of a working constitution, before a final formal constitution had been fully elaborated. In Poland, the drafting of a new democratic constitution took place in two stages after 1989. A first constitution (the small constitution) was enacted in 1992, and this was superseded in 1997 by the final constitution. The 1992 Constitution provided for a Constitutional Court, but it did not contain a free-standing Bill of Rights. However, both before 1992, and then after the first constitution had entered force, the Constitutional Court assumed authority to solidify the constitution by promoting a distinctive rights jurisprudence, and it filled in the gaps in the texture of positive public law through its own interpretive/legislative acts, based in part in international law (Osiatynski 1994: 164). On this basis, some of the Constitutional Court's case rulings possessed authority close to that of a constituent power, and they constructed normative parameters, not only for single acts of legislation but for the entire architecture of the emergent state. In 1993, tellingly, the Constitutional Court ruled that judicial independence was an inviolable component of statehood,<sup>74</sup> and that certain principles formed global standards for judicial rulings. In 1992,

<sup>74</sup> Polish Constitutional Court (9.11.1993) (K11/93).

it ruled that courts were authorized to give effect to international treaties, unless expressly defined as not self-executing.<sup>75</sup> Therefore, although the 1992 Constitution did not expressly concern itself with the domestic standing of international law, the Constitutional Court decided that international law had to be applied *ex proprio vigore* in municipal law (Vereshchetin 1996: 8).

In Hungary, the post-1989 Constitutional Court acquired even more far-reaching competence; its powers during the transition have been described as ‘the most extensive on earth’ (Küpper 1998: 267). This court performed vital system-consolidating functions, reviewing and striking down a high volume of laws. In fact, the powers of the Hungarian court at times clearly deviated from those of a purely constituted institution, and it acted both to initiate legislation and to order parliament to implement human rights laws (Sajó 1995: 259). It was authorized under Art 7(1) of the amended constitution of 1989 to apply international law as the bedrock of legal order (Sajó 1995: 256), and judicial rulings were shaped by the view that the courts had a duty to use international norms to dictate the legal order of the new Hungarian state (Klingsberg 1992: 47; Küpper 1998: 271). On this basis, the court developed a distinctive, quasi-constituent jurisprudence, through which it strategically exploited international laws to build a solid jurisprudential basis for the emerging polity. For example, it began to cite the ECHR before Hungary was signatory to it (Sólyom 2003: 144). Indeed, on occasions, the court even invoked international law to override express national constitutional provisions. The most notable example of this is Decision 53 (1993), in which the Court stated that ‘generally recognized rules of international law’ needed to be seen ‘without any (additional) transformation’ as ‘part of Hungarian law’. This ruling declared participation in the ‘international community of people’ a ‘constitutional imperative for inner-state law’, having immediate effect through democratic legislation (see Brunner and Sólyom 1995: 524–5). In this respect, the Hungarian Constitutional Court at times effectively *constituted* the national constitution: acting both as constituent and constituted power, it established a powerful body of transnational jurisprudence. The court characterized its interventionist jurisprudence as *indirect constitutional review*, which it promoted to give meaning and substance to the emergent, but as yet unformed constitutional order (see Trang 1995: 8; Bos 2004: 270).

<sup>75</sup> Polish Constitutional Court (7.1.1992) (K8/91).

During the transitions in Poland and Hungary, therefore, international human rights became primary constituent components of the political system. Their impact on national states meant that, even in highly unstable transitions, defined by institutional weakness, these states could build relatively autonomous inclusionary structures, and they could articulate common principles to support positive acts of legislation at a reasonable level of generalization. In particular, this allowed the evolution of an inclusionary structure through which new states could legislate with increasing autonomy, and it diminished the historical reliance of political systems on external, personal sources of support.

These functions of international law were replicated in other transitions. In Bulgaria, for example, a strong Constitutional Court was established, which also (in Art 5(4)) sanctioned the primacy of international law over domestic statutes. Here, too, there is evidence that the creation of a strong independent court formed a basis on which the state could act in relative autonomy. Indeed, the court was able to obtain legitimacy for even the most unpopular rulings through inner reference to rights (Melone and Hays 1993: 253). At key junctures in the early period of transition, it defined the scope of interim governments and insulated the government against the claims of rapidly fluctuating parliamentary majorities (Ganev 2003: 601). Even in Russia, in which the process of transformation was repeatedly imperilled, judicial autonomy was often questionable, and the basic level of commitment to human rights norms remained uncertain, the ability of domestic courts to extract rights from an international legal domain played a key role in sustaining an inclusionary structure for the political system during the longer period of reform. Indeed, in Soviet Russia, there was no clearly defined body of public law, and from the late 1980s onwards judicial professionals, often using international law for support, played a leading role in devising a system of public law, *ex nihilo*, both for the state and for society as a whole.

In analysis of Russia in this respect, quite self-evidently, certain caveats are required. At one level, it can easily appear absurd to imagine judicial actors as serving to stabilize state structure in Russia in the 1990s. First, it is well documented that, although Gorbachev promoted judicial autonomy and ultimately established procedures for judicial review, Yeltsin attacked the Constitutional Court in 1993, after it supported the Duma in conflict over presidential authority. After that time, arguably, the Constitutional Court assumed a more acquiescent role,

and its ability to function as a fully separate organ of state has often been queried.<sup>76</sup> Moreover, through the middle of the 1990s, it is generally difficult, in any plausible way, to apply concepts of state autonomy or independent inclusionary structure to the Russian political system. At different points in this period, national statehood approached a condition of near conclusive collapse, and the traditionally endemic weaknesses of public order in the Soviet era (office grabbing, extreme corruption, clientelism, personal arrogation of public goods and offices, low levels of legislative consistency and general pathological *re-feudalization* of public life) re-emerged, in acutely exacerbated fashion.<sup>77</sup> This process has been neatly summarized as *state capture* by powerful elites (see Gel'man 2004: 1024). Despite this, nonetheless, it is perceptible that even in Russia the role of internationally extracted rights, applied through a national Constitutional Court and other superior courts, played an important role in preserving, and finally in reinforcing, some degree of inclusionary structure to sustain the Russian political system.

This impact of international law in Russia was visible – initially – in the early years of systemic transformation (1989–1991). During this time, a Constitutional Supervision Committee, created by Gorbachev, acquired powers, close to those of a Constitutional Court, to scrutinize new laws for compliance with international law, and it provided a normative framework for the early reforms (Hausmaninger 1990: 302, 306). Both prior to and after the formal adoption of the Russian Constitution in 1993, an appointed Constitutional Court (founded in 1991) acted as a vital source of legal direction. This court used international law to support rulings before the 1993 Constitution was adopted, and it autonomously fleshed out a legal basis for some of the most controversial functions of the reformed state (especially those linked to guarantees over property and contract) (Danilenko 1999: 56; Trochev 2008: 167). Ultimately, Art 15(4) of the 1993 Constitution made strong provisions for the standing of international law throughout society. In 1995, in fact, international law was defined by the Supreme Court as a basis for lower-court rulings (Danilenko 1999: 58, 63). The 1993 Constitution also provided for a very powerful Constitutional Court, which, like other courts, had authority to apply international

<sup>76</sup> For very polarized views on this question see Trochev (2008: 185), Thorson (2012: 120–52) and Mazmanyan (2015: 214). For my opinion on this question, see note 88; it seems quite clear that the Constitutional Court still plays an active role in checking the executive.

<sup>77</sup> See Shlapentokh (1996: 394, 396), Easter (2002: 602, 606), Tompson (2002: 936–37), Garcelon (2005: 7, 221) and Taylor (2011: 25).



law directly. Even after its dissolution and its reconvention in 1995, this court continued to play a significant role in hardening normative structure, and it emerged as one of the most consistent pillars of the state, retaining the capacity to use international norms to address very controversial questions (Trochev 2008: 185; Thorson 2012: 44, 144). Importantly, for example, the reconstituted court developed a strong line of jurisprudence regarding trade unions and industrial relations, and it used international human rights norms to provide limited guarantees of trade-union autonomy.<sup>78</sup> Indeed, Yeltsin viewed reform and improvement of judicial functions as a key part of the path to regime stability (Solomon 2010: 439).

Under Putin's presidency, however, judicial bodies began to play a very distinctive and significant role in expanding the inclusionary structure of the political system, and the assimilation of international law had great importance in this process. At this time, questions of judicial politics became locked into Putin's wider political strategies, designed to promote growth in state capacity and state autonomy, after its near implosion under Yeltsin (see Gerrits and van den Berg 2000: 8; Sharlet 2001: 201; Taylor 2011: 2). Notably, Putin initiated a series of ambitious judicial reforms, which were intended to heighten the uniformity of law enforcement, to tighten procedures for use of judicial power and to separate public functions from control by oligarchs. In initiating this reform process, Putin expressly declared that a state not governed by law is a *weak state*.<sup>79</sup> Indeed, Putin's judicial policies were designed, programmatically at least, to promote *dictatorship through law*.

At an evident level, therefore, judicial reform under Putin contributed to state abstraction and political structure building in quite predictable ways. One clear motive behind Putin's judicial reforms, for example, was to restrict private monopoly of judicial office, to manage corruption (however selectively) and to bring consistency and authority to the application of legislation across society (Fogelklou 2001: 244; Kahn 2004; Trochev 2004: 541). This had particular significance in the context of Russian federalism, as under Yeltsin many regional governors had become semi-independent, and the President had routinely contracted out power to the republics in return for personal support (Sharlet 2001: 208; Easter 2008: 216). Accordingly, Putin pursued judicial reform as a strategy for tying the regions more closely to

<sup>78</sup> Russian Constitutional Court, Decision on merits (Postanovlenie) No. 5-P (17.5.1995).

<sup>79</sup> Open letter from Putin to Citizens (February 2000). Published in the newspapers *Izvestia*, *Kommersant* and *Komsomolskaya Pravda*.

Moscow and to create a *unified legal space* across the whole of the Russian federation.<sup>80</sup> In promoting relative consistency in judicial functions, consequently, the Constitutional Court reinforced procedures for the vertical enforcement of political power from Moscow, and it brought institutional support to an increasingly hardened, even semi-authoritarian executive that began to develop under Putin's leadership (Nußberger 2007: 228). To this extent, judicial reform was pursued to solidify the executive-led system of the partial democracy created in Russia, and the general growth in judicial power and regularity clearly reflected a strategy to augment the effective executive power of the state (Trochev 2008 185).

Alongside this, however, the changing status of judicial power under Putin did not solely reinforce state power because the courts acted as instrumental adjuncts to the executive. On the contrary, the rising independence of judicial institutions intensified the power of the state precisely because it detached the organic form of the state from the authority of particular persons in the executive, and it constructed a legal-normative core for the state that was distinct from single agents and single holders of power. Under Putin, in fact, the constitution created in 1993 was increasingly consolidated as a free-standing corpus of norms, which could be successfully mobilized against public authorities. By many indicators, under Putin the legal system experienced a striking increase in autonomy, and the constitution obtained more substantial and more independent binding force. Equally importantly, *access to law* for single social agents, even in proceedings against the government, expanded quite substantially at the same time. These factors also directly promoted an increase in state structure and autonomy, and the changing character of the judiciary discernibly extended the inclusionary reach of the political system into society.

Overall, the legal form of the Russian state as it evolved during the long period of Putin's influence had a paradoxical character. On one hand, evidently, this period saw a partial return to governance by strong executive, in which leading figures in the executive exercised some control over access to governmental office and limited the immediate *political accountability* of government bodies (see Balzer 2003: 191). Yet, on the other hand, this period experienced a continuous increase in the independent authority of the law, and in the willingness of judges to

<sup>80</sup> One of Putin's most important early orders was Order No. 1486 of 10 August 2000: 'On Additional Measures to Ensure the Unity of the Legal Space in the Russian Federation'.

rule against public bodies. Indeed, this period was marked by a general rise in the quality of law and in the *legal accountability* of state authorities.

To support these claims, first, the early period of Putin's first presidency saw a rapid rise in litigation against government actions, and the entire period of Putin's influence witnessed a significant increase in the number of cases successfully brought against the government (see Trochev 2012: 18).<sup>81</sup> In many respects, in fact, the government deliberately facilitated, or even actively encouraged, the growth of litigation. Indicatively, as a part of his wider policies of legal and judicial reform, Putin signed into force the Civil Procedure Code in 2002. Before this, anti-government litigation had mainly been regulated under a law of 1993, which was finally replaced in 2015. Notably, the 2002 code made anti-government litigation in general much easier. It also recognized international law as a source of law for considering civil claims. In both respects, it provided an important opening for the mobilization of human rights law in Russian society. In 2010, further, federal legislation was passed to provide compensation in cases in which courts had failed to hear applications or failed to execute rulings, including rulings regarding human rights violations, in reasonable time. This law was motivated by a pilot judgment of the ECtHR in *Burdov v. Russia* (no. 2) (2009), which criticized the lack of domestic remedies for non-enforcement of judicial decisions in Russia. This law expressly defines the civil-law mechanisms that can be used to protect human rights harmed by public authorities. Eventually, in 2015, Putin passed the Administrative Litigation Code, giving effect to Art 118 of the Constitution, which consolidates procedures for anti-government litigation, including litigation regarding human rights abuses, and permits courts to play a very activist role in scrutinizing executive agencies.<sup>82</sup> Through the period of Putin's influence, therefore, the power of courts was substantially elevated, and the independence of the courts was reinforced, even in politically sensitive litigation. In 2011, in fact, a presidential

<sup>81</sup> Much of the data on Russia discussed in the sections below was compiled by my brilliant Research Associate, Maria Smirnova, who extracted this data from the public legal database, ConsultantPlus and from other publicly available sources. It is difficult to show due appreciation of the value of Maria's assistance in this research. She also added material to these sections after their first preparation in draft. Of course, all usual caveats apply.

<sup>82</sup> The Constitutional Court has also played a prominent role in facilitating use of petitions against public and private bodies performing public functions. See Russian Constitutional Court Decision on merits (*Postanovlenie*) No. 19-P (18.7.2012).

decree (passed by Medvedev) was introduced to monitor implementation of rulings of the Constitutional Court, and to ensure that laws struck down by the courts were rendered invalid.

As further support, second, Putin's policies of state reinforcement coincided generally with an increase in the force of international human rights law, especially the ECHR, which now penetrates very deeply into the national political system in Russia. Here, by way of qualification, it needs to be stated, clearly, that the recognition of international human rights law in recent Russian history has remained patchy. Since the ECHR came into force in Russia in 1998, Russia has repeatedly been criticized in the ECtHR. For example, in 2013 alone the ECtHR delivered 119 judgments finding Russia in violation of the ECHR. Nonetheless, although debate has persisted as to its efficacy, the ECHR has impacted pervasively both on judicial and legislative practice and on patterns of legal adjudication in Russia, and Convention rights form an important foundation for the law.<sup>83</sup> In *Kalashnikov v Russia* (2002), notably, the ECtHR criticized legal remedies available in Russia, thus prescribing improvements for the domestic legal system, and this gradually produced an alignment between domestic norms and international expectations. In 2003, the plenum of the Supreme Court issued rules and recommendations regarding the application of the ECHR in domestic hearings.<sup>84</sup> Draft legislation and even draft judicial rulings are commonly referred to external independent experts for scrutiny for compliance with international standards. Moreover, although in *Konstantin Markin v Russia* (2012) the ECtHR overturned one of its rulings, the Russian Constitutional Court has contributed greatly to promotion of ECHR standards in Russian law, and it has repeatedly referred to the case law of the ECtHR in important hearings (Nußberger 2006: 266–7; Marochkin 2007: 333, 341). In fact, the landmark ruling in *Maslov* (No. 11.P. 2000), in which a domestic judgment was formally supported by the ECHR, led to extensive citation of the ECHR in Russian courts. In very recent cases, the Constitutional Court, while allowing a margin of appreciation in domestic law, has defined dialogue with the ECtHR as a vital source of legal authority

<sup>83</sup> For an early balanced view of Russia's compliance (or otherwise) with the ECHR, see Bowring (2000).

<sup>84</sup> Decision No. 5 (10.10.2003) 'On application by the courts of general jurisdiction of the universally recognized principles and norms of international law and international treaties of the Russian Federation'.

and improvement.<sup>85</sup> Even in remote regional courts, the ECHR is used as a core source of authoritative jurisprudence.<sup>86</sup> By 2013, the annual citation rate of the ECHR in Russia reached 6,000. Between 2002 and 2013, the number of cases ruled through reference to the ECHR in the highest courts increased from less than fifty to over 350. Although Convention rights have mainly been enforced against lower government agencies, there are also notable cases in which the courts have used the ECHR to obstruct high-level policies.<sup>87</sup>

For both these reasons it is clear that recent years have seen the formation of an increasingly autonomous legal order in Russia, whose autonomy is partly constructed and sustained through international human rights law. The increase in the autonomy of the Russian legal order, and its resultant receptivity to international norms, has had a deep structural impact on the state, and it has helped to stabilize an inclusionary structure for the domestic political system. To some degree, of course, it remains observable that, under Putin, the government has tightened principles of legal accountability and widened access to law for quite strategic reasons. For example, opportunities for litigation allow a vent for public disaffection in a society in which political accountability is restricted and political representation is largely mediated through one party. Moreover, litigation establishes fora for dissent in a political system in which political institutions have a partly clientelistic character, and the political system is unresponsive to classical patterns of ideologically motivated interest expression (see Remington 2008: 984). Increasing legal accountability in Russia might, on these grounds, be seen to compensate for the incompleteness of the process of democratization, such that the legal system is deployed to insulate the political system against its own legitimational deficiencies. However, as in other societies in a longer process of institutional rebuilding, the fact that single citizens have recourse to free-standing rights norms has brought many structural, inclusionary benefits for political institutions. In particular, the underpinning of law – however incompletely –

<sup>85</sup> Russian Constitutional Court Decision on merits (*Postanovlenie*) No. 21-P (14.7.2015). For comment, see Smirnova (2015).

<sup>86</sup> Rare and invaluable insights into this process are given in Zazdravnykh (2010), an account written by a regional judge giving details of the transmission of ECtHR rulings and practice to regional courts, and of rapidly expanding use of international norms in lower courts.

<sup>87</sup> Note the Russian Constitutional Court case No 4-P (March 2015), in which the court declared the policy of deporting HIV-infected foreigners unconstitutional. In Decision No. AKPI12–588 (April 2012), the Supreme Court, following an ECtHR ruling, overruled the liquidation of a political party.

by expectations regarding international human rights has served to strengthen the basic integrity of the state and significantly to widen its inclusivity.<sup>88</sup> On one hand, as mentioned, this is connected to the federal structure of the Russian state, and it reflects Putin's endeavour to offset the egregious loss of power to the regions under Yeltsin, which the superior courts have supported (Kahn, Trochev and Balayan 2009: 326). The use of international norms in cases involving a collision between federal and regional legal norms is common, and international norms are often applied to bring authority to rulings on such questions. Alongside this, however, the use of international law also enhances the basic public quality of the state, and it has helped to reduce the centrifugal pull of private actors, and to intensify the societal reach of the political system. This is illustrated, for example, by the fact that, in some cases, higher courts use international norms to overrule judgments in lower courts, often located far from the political centre, especially in cases of litigation against government bodies or politicians. In fact, the 2010 law on compensation specifically penalizes local authorities under standards derived from international law for ineffective processing of cases, and it actively encourages rights-based litigation against regional authorities. Notably, an early draft of this law was prepared following a visit of the UN Special Rapporteur on judicial independence. Since 2010, the Supreme Court has adopted the practice, previously very rare, of overturning the decisions of lower courts on grounds derived from international law, especially in politically sensitive issues such as deportation. In 2013, the plenum of the Supreme Court set out guidelines regarding use of Art 8 ECHR in such cases.<sup>89</sup>

In each respect, international law has played a vital role in reinforcing the inclusionary structure of the Russian political system. Quite clearly, international law is utilized as a means to ensure legal consistency between centre and periphery in Russian society, and it allows the national political system to reach more consistently into peripheral parts of society, stabilizing the political system as a whole against traditionally corrosive centres of local power.<sup>90</sup> As a result, international law heightens the authority of the political system, and it constructs the

<sup>88</sup> The close connection between international law and anti-government litigation is clearest in the Russian Constitutional Court Decision on merits (*Postanovlenie*) No. 2-P (17.2.2015). In this case, certain provisions of the Federal Law on the Prosecutor's Office regarding the agency's power to inspect non-government organizations and suspend their activities without a court decision were held unconstitutional. The application was made by a group of NGOs.

<sup>89</sup> Supreme Court Plenary Ruling No. 5 (24.3. 2005).

<sup>90</sup> See Supreme Court Decision No. 10-KG13-2 (10.12.2013).

political system as an effective sovereign actor, at the centre of national society. As in other cases, the increasing consolidation of the legal order around internationally defined rights has underpinned the extraction of a generalized, relatively autonomous system of public law in a setting which had previously, for embedded sociological reasons, resisted the enduring formation of independent institutions, with functions defined by public legal norms. Indeed, the political system increasingly now partly relies on international law as its basic inclusionary structure.

In addition to this, the growing interaction between national and international law in Russia has meant that law is transmitted more consistently and authoritatively through society, and law's general capacity for public inclusion is enhanced. Tellingly, one outcome of the growth of human rights in Russia is that common access of individual persons to law has increased, and public willingness to use law as a means for claiming rights or addressing perceived violation by public institutions has grown. After 1998, as mentioned, Russian courts heard a rapidly growing volume of cases brought by individuals against government bodies. In 2007, there were over 500,000 cases in which individuals took action against regional and federal government bodies, and 91 per cent of cases were successful for the applicant.<sup>91</sup> As mentioned, further, such litigation has at times been openly encouraged by the government. Notably, the 2015 Administrative Litigation Code is designed to simplify public-law litigation, and it clearly endorses collective action and public interest litigation, previously less formally recognized in Russian law. However, the increasing impact of international human rights law appears to have stimulated a broader change in attitude towards the law. Quite generally, the period of Putin's influence has witnessed a dramatic increase in litigation across Russian society. The number of civil cases heard in court increased by well over 100 per cent in the longer period of Putin's influence (Sakwa 2010: 201),<sup>92</sup> and the total number of cases brought before the highest courts increased very substantially between 2005 and 2013. In 2014, Russian courts received a total of well over 2,000,000 cases of litigation by individuals. In some respects, predictably, the increasing litigiousness of the population has had unsettling implications for the political order; as mentioned, this is expressed, in part, in a high volume of litigation against public authorities. Yet, the increase in cases heard by courts has clearly extended legal

<sup>91</sup> The Judicial Department of the Supreme Court annually issues official statistics at: [www.cdep.ru](http://www.cdep.ru).

<sup>92</sup> For precise statistics, see Hendley (2009: 243).



order across society, and it has reflected an increasing demand for law across society, so indicating a rising recognition of the legal/political system as a dominant source of public arbitration. In turn, this has brought social agents in different, geographically diffuse parts of society into a more immediate, controlled and inclusive relation to the political system, and it clearly suggests an increase in the public power of the state.

In each of these respects, the growing power of the Russian judiciary, sustained by strong presumptions in favour of international human rights, proved vital for the Russian political system both because it served to abstract a public-legal structure for the state and because it helped to circulate law more evenly across society. Indeed, against a background of endemic legal and political collapse in the 1990s, the gradual growth of human rights as elements of legal order made it possible for Russian society as a whole clearly to identify and apply certain statutes and procedures as clearly *lawful*, and it enabled institutions within society to underline clear distinctions between lawful power and non-lawful power, and authentic law and mere acts of private command. Putin in fact made this point quite clearly when he initiated the judicial reforms in 2001; he claimed that lack of trust in the state had led to the promotion of 'shadow justice', in which citizens were inclined to seek remedies for legal problems by private means, thus fragmenting the power of the state.<sup>93</sup> The use of internationally defined rights to underline the public quality of the law would appear to be a core dimension in the emergent inclusionary structure of the Russian political system. Actors in the Russian political system would appear to be willing to accept that recognition of international human rights law means that they must, on occasions, be exposed to criticism and censure by domestic superior courts, or even by international rights tribunals. However, they appear willing to accept such opprobrium as the price for acquiring external authorization and legitimization for law, and for elevating the authority and inclusivity of law throughout domestic society. The fact that domestic law obtains a source of authority outside the national domain means that the political system in Russia is able to solidify its

<sup>93</sup> Annual Address of the President of the Russian Federation to the Federal Assembly, delivered on 3 April 2001. As background to Putin's policies, see the account of shadow justice as a legal order in which the state does not have full social control in Baranov (2002). By 2012, Putin claimed that great success had been achieved in ending shadow justice. See Speech of the President of the Russian Federation at the VIII National Congress of Judges, 18 December 2012.

basic inclusionary structure, and it can presuppose relative institutional hardness, consistency and evenness in legislation, and increased societal acceptance of legal decisions.<sup>94</sup> In this setting, international human rights law has not magically eradicated private power from the political system. It is widely documented that the Russian political system retains a partial basis in patronage, and, more importantly, that party offices are not strictly distinct from the state (Makarenko 2012: 63). However, the systemic assimilation of international law has allowed principles of general legal rationality to take hold both within the political system and in society at large. It has made it possible for society to differentiate, on the basis of abstracted norms, between private power and public power, and it has facilitated the increasingly uniform distribution of law into different parts of society. In a society defined even in very recent history by extreme privatization of power and by extremely depleted confidence in law, this use of external norms has become a precondition for the entire abstraction of a political system, able to produce, and to assume acceptance of, law across society (Hendley 1999: 89, 94).

In the processes of systemic transformation in Eastern Europe that began in the 1980s, in sum, two distinct constitutional factors can be observed. First, the linkage of national states to an international legal order, mediated through rights-based constitutions and through the acts of powerful independent courts of review, helped to consolidate the basic inclusionary structure of national political systems. As in earlier cases, the rise of a multi-normative legal order formed a precondition for the evolution of national political systems, able to perform their functions at a sustainable level of stability and positive/inclusionary independence. Vital in this process, second, was the fact that states used international norms in order to construct reserves of legitimacy, which they were able to store internalistically, without obligation to include the national people as a factual set of social agents. At certain key junctures, the fact that political actors deployed rights norms, originally extracted from the international domain, to support and underwrite legislation (primary and secondary), meant that political institutions could be insulated against the unmanageable external

<sup>94</sup> This role of international law has been widely noted in Russia. One commentator (Tjunov 2011: 82) observes: 'Development of international law suggests that it manifests itself as the main instrument of harmonization and unification of domestic legal systems by putting into action universally recognized principles, norms and standards that are universal democratic rules of conduct, which are used in interstate relations of the Russian Federation, including those generated by decisions of the Constitutional Court of the Russian Federation'.

pressures with which they had been confronted by their previous national-constitutional form. At an immediate level, internationally defined rights norms proved important in securing political institutions against private interests, and in authorizing laws, relatively consistently, against precarious and contested societal backgrounds. Seen in a broader historical perspective, international human rights norms created a constitutional formula that hardened the inclusionary structure of national political systems, and helped to solidify political institutions which had traditionally experienced deep inclusionary crises because of their fusion of political and socio-material rights. In each respect, internationally defined rights formed a basic premise for the emergence of societies whose political systems were marked by at least a degree of autonomy, and by an inclusionary structure able to lend authority to laws at a reasonable level of national uniformity. In each respect, in fact, internationally defined rights formed a basis for sovereign statehood in social contents in which national inclusion had traditionally experienced endemic obstruction. Indicatively, sovereign statehood evolved at a point where the political system no longer derived its legitimacy solely from the formula of national sovereignty.

## CHAPTER SIX

# CONSTITUTIONAL RIGHTS AND THE INCLUSION OF THE NATION: SYSTEMIC TRANSFORMATIONS II

Class conflict has very distinctive importance in the history of European state formation because the underlying form of most modern European societies was, with variations, originally defined, in the eighteenth and nineteenth centuries, by the transformation of estates into classes and the transformation of corporations into class-based organizations. The basic construction of modern European societies was determined, quite essentially, through a process in which states created nations, nations created classes, and national states, through their progressive inclusion of nations, were obliged to moderate the resultant inter-class and inter-organizational tensions. In addition, however, class conflict has particular significance in Europe because most European states had conducted other processes of physical integration before they projected their legitimacy as bound to the inclusion of the sovereign national people. In particular, few modern European states have been confronted with deep challenges caused by regional or ethnic diversity, and state institutions have not regularly been challenged by ethnic insurrection: class conflict was much the most potent obstacle to inclusionary nation building. There are partial exceptions to this of course, and some European states remained affected by unsettling fissures between *core and periphery* until very recently. As discussed earlier, there are some societies in Europe that retained a persistent centre/periphery split well into the twentieth century, and in which local power, often sustained by clientelistic links, long evaded central control. Nonetheless, by the time that they were exposed to class conflicts, most European states presided over societies with moderately secure geographical boundaries, in which affiliation (or subjection) to a political community was reasonably solid.

Outside Europe, in contrast, the rise of political systems based in national sovereignty was affected by two quite distinct, although often interdependent, pressures of inclusion. On one hand, as in Europe, the growth of national political institutions depended on the ability of these institutions to mediate pressures arising from divergent class interests, which were released by the nationalization of society, and by the assumption that an integrated national people was the essential bedrock of state power. On the other hand, state institutions, proclaiming legitimacy derived from an integrated national people, were expected to resolve pressures caused by salient divisions between *core and periphery*, often intensified by ethnic antagonisms, the acuteness of which frequently rivalled that of pressures caused by class conflict. Most notably, in fact, many national states outside Europe were exposed to conflicts resulting from core-periphery relations at the same time that they were forced to incorporate and resolve class conflicts, so that two sources of deep structural pressure became interlinked. In such cases, in consequence, the inclusionary structure of the political system was challenged both by acute social/material adversity and by intense core-periphery or inter-ethnic conflicts, and the political system depended for its stability on the resolution of antagonisms in both these conflictual dimensions. Outside Europe, therefore, the formula of the sovereign nation has commonly triggered multiple inclusionary expectations for national states, and most national states have been confronted with pressures of inclusion in two separate dimensions.

Inclusionary pressures on states caused by centre-periphery conflicts usually occur in one of two quite distinct ways. First, these pressures are common in societies with large geographical surfaces, in which central institutions are required to impose legal uniformity on very diffuse territories, in many of which local power has retained some autonomy in relation to the political centre. Examples of this, both historically and still today, are Russia, China and the USA. Additionally, however, such pressures are often prevalent in post-colonial societies. In many post-colonial societies, new political parties and governments have sought to construct their legitimacy on an inclusionary/nationalist platform, and the establishment of stable state institutions has usually depended on the expansion of the national political system across precariously associated territories, in which inter-ethnic conflict between regions, sectors, and groups was historically, and still remains, widespread. This latter category is exemplified by some Latin

American societies. Of course, formal colonialism ended in much of Latin America in the early nineteenth century. However, many countries in Latin America still display obvious remnants of colonial rule, especially complex ethnic structure, uncertain national affiliation and unity and weak institutional density, all of which have presented deep challenges to the evolution of national political systems. The exposure of states to complex centre-periphery conflicts, however, has been most prominent in Sub-Saharan Africa, during and after decolonization. In much of Africa, the end of European imperialism coincided with the constitutional proclamation of nationhood as the firm substructure of post-colonial states. However, this ideology of nationhood did little to obscure the fact that newly independent African states were marked by a fatal mismatch between centralized state administrations and the pluralistic, localized design of society. Pressures of ethnic inclusion thus defined many African states from the outset.

In state-building trajectories outside Europe, moreover, states have often proven unable to withstand the overlaid pressures resulting from the inclusion of nations defined simultaneously by socio-material and by ethnic divisions. In European societies, states were required materially to create the national people which they claimed to represent by using different strata of political and material rights to incorporate their populations. In many post-colonial societies, the state's attempt to assert legitimacy by claiming to represent the integrated national people meant that it was required to create the people that it was supposed to represent not only through political and material rights but also through ethnic solidification. In most cases, however, attempts at state and nation formation in post-colonial societies have been affected by deep crises. Generally, national states created through imperial withdrawal or collapse proved unable, as states, to withstand the pressures caused by the endeavour to incorporate divergent class-based and regional/ethnic groups, and these states struggled to consolidate a position of national inclusivity and public authority between, or above, these groups.

In Latin American societies, experiments in national structure building usually made only limited progress in removing the localized form of society. Often, these societies remained defined, both institutionally and structurally, by a pervasive privatism, which meant that the national political system could barely lay claim to supremacy within society as a whole, and many other sources of authority stood alongside the state in particular sectors and particular functional

domains. In Africa during decolonization, attempts at institutional construction were still less successful. In most societies in Southern Africa during decolonization, state authority was only very uncertainly solidified as a public resource, positioned above economic and ethnic divisions, and organs of the state were commonly based either in prerogatives of one dominant ethnic group or in informal interactions between national governments and private or regional elites. In such environments, the asymmetry between a relatively uniform legal/political order, based around centralized national institutions, and the historically given fabric of society, characterized by extreme localism and the persistence of private or customary authority, often presented an insurmountable obstacle to the emergence of fully generalized and inclusive state authority.<sup>1</sup> Usually, in fact, as the state proved incapable of constructing a unified people to sustain its power, it was unable to transmit power across society in even, uniform fashion, and, by way of alternative, it resorted to reliance on private/patrimonial foundations. This normally led to the formation of political systems with highly detached executives and personalized legislative instruments, which interlocked unpredictably with local, private actors, and with judicial systems whose societal reach was variable. Few post-colonial societies, using resources particular to their own national structure, were able to construct themselves as national societies, centred around sovereign state institutions.

In such societies, however, the recent assimilation of international human rights law has assumed vital importance. Both South America and Africa have witnessed a wave of systemic transformation, which began in the 1980s and 1990s. In these processes, the rise of international human rights norms instilled a new inclusionary dimension in historically depleted political systems, and the growth of transnational judicial constitutions played a vital role in consolidating a basic inclusionary structure for historically weakly integrated societies. Often, in fact, international human rights came to construct a *fourth tier* of rights in the inclusionary structure in national political systems, and this facilitated the effective reinforcement of other rights through which societies had attempted to perform effective processes of inclusion. In such cases, as in Europe, international human rights law acquired core structure-building effects for national societies and their legal and political systems.

<sup>1</sup> See excellent analysis in Bratton and Chang (2006: 1068).



## CONSTITUTIONALISM AND INCLUSIONARY STRUCTURE IN LATIN AMERICA

There are obviously enormous national distinctions in the vast legal-political landscape of South America. Indeed, there is no uniform tendency in Latin America towards judicial constitutionalism and judicial filtration of international human rights law. For this reason, a nuanced and discriminating approach to the constitutional impact of international human rights law across Latin America is required.

In recent years, notably, some Latin American Republics, especially Colombia, Venezuela, Ecuador and Bolivia, have promoted a very distinctive line of highly mobilized constitutional formation, which is designed, in certain respects, to construct a broad active social will to support the political system. In fact, a constitutional pattern has recently become widespread in some parts of the central and northern Andes, which attempts to distil legitimacy for the political system by integrating the people, sometimes formed pluralistically through the inclusion of multiple prior populations and social organizations, as a *live* source of constituent authority (see Cameron and Sharpe 2010). For example, many articles of the Venezuelan constitution of 1999 (especially Arts 6, 62, 70, 168, 182 and 184) are intended to incorporate an incessantly active constituent power in the state. Art 96 of the 2008 constitution of Ecuador also recognizes the exercise of a live constituent power. Clauses analogous to this are evident in the 2009 Constitution of Bolivia, especially Arts 241 and 196, the latter of which declares that the will of the constituent power must always be taken as the highest normative imperative in national legislative and judicial processes. In some cases, notably Venezuela and Bolivia, these constitutions also diminish the horizontal force of judicial power, and, symbolically, they even constrain the force of international legal norms in domestic law.

Even in polities where judicial constitutionalism is more clearly endorsed, the authority of judicial institutions is subject to important variations. For example, in some polities that express a strong commitment to independent judicial agency, the existence of ultra-authoritative presidencies has reduced the real power of the judicial branch (Chavez 2004a: 5). The pattern of *delegative democracy* that has evolved in many Latin American systems since the late 1980s clearly weakens the force of strong horizontal checks on executive authority. In consequence, there are numerous cases, even in polities with notionally powerful judiciaries, in which presidents have

forcibly restricted the autonomy of Constitutional Courts or other leading judicial organs.<sup>2</sup> A prominent example of such judicial manipulation occurred in Argentina under the Menem presidency. From 1989 onwards, Menem altered the composition of the Supreme Court through strategic court packing, so that it could be more easily exploited to approve decrees and to weaken the powers of congress.<sup>3</sup> An even more infamous case of judicial manipulation was Fujimori's *autogolpe* in Peru in 1992, which resulted in the direct suspension of both the legislature and the independent courts. In addition, the high levels of corruption and clientelism typically accompanying hyper-presidential governments have often undermined the independence of the judiciary in Latin America. Some Latin American societies, notably Argentina and Venezuela, have experienced endemic problems with judicial corruption and political brokering of judicial office. As a result, public perceptions of judicial actors tended, historically, to be far more critical in Latin America than in other transitional democratic settings (Domingo 1999: 156). This is of course exacerbated by the fact that, in many cases, courts historically had close links to military governments, and they have in some cases protected military leaders after the collapse of dictatorial regimes (Navia and Ríos-Figuero 2005; Schor 2006: 22).

It is in South America, therefore, that some of the most important exceptions to the generally broadening prevalence of the transnational judicial constitutional model are located, and in South American societies the recognition of hyper-abstracted constitutional norms is clearly not uniformly entrenched. Despite this, however, in most Latin American societies, a notable increase in the status of judicial power accompanied the reform processes that have been conducted in recent decades, and in many countries judicial review of legislation has become a central aspect of the governmental order. The great variations in recent constitutional design in Latin America have been widely noted (see Negretto 2013: 237). However, many South American states have developed constitutions, either new or amended, which, at least formally, accord important functions to Constitutional Courts or to powerful Supreme Courts, and they make extensive provision

<sup>2</sup> See for general comment, O'Donnell (1994b: 61), Chavez (2004a: 3).

<sup>3</sup> The *Peralta* and *Aerolíneas Argentinas* rulings (1990) are usually cited as examples of judicial compliance with Menem's emergency economic decrees. From 1989–1993, Menem enacted 308 laws by emergency decree. On this phenomenon in general, see Larkins (1998: 430, 431, 434), Chavez (2004a: 51) and Gargarella (2002: 189). One observer states of the Menem court: 'The Court's conduct often displayed complete subordination to the demands of the Executive' (Miller 2000: 394).

for judicial supervision of legislation and administration. Examples of entirely new constitutions providing for powerful courts are the 1988 Constitution of Brazil and the 1991 Constitution of Colombia. In fact, the Brazilian Constitution has been repeatedly amended since 1988 to ensure the continuing reinforcement of judicial power. In Colombia, partly owing to the historical weakness of public institutions, the judicial branch has assumed unprecedented significance in the consolidation of constitutional rule since 1991. Examples of existing constitutions that have been amended to elevate the standing of the judicial branch are those of Costa Rica, Argentina and Chile. The constitution of Costa Rica was revised in 1989 to create a Constitutional Chamber within the Supreme Court, assuming sole responsibility for adjudicating in constitutional questions. The Argentine Constitution was substantially amended in 1994, by a new Constitutional Convention. The resultant amendments, which effectively created a new constitution, increased the authority of the Supreme Court, and they made provision for the creation of a Judicial Council to oversee lower-court appointments and to reinforce judicial independence (Chavez 2004a: 30, 71).<sup>4</sup> Similarly, the Chilean democracy consolidated after 1989 has been shaped by a steady rise in judicial independence. Amendments to the Chilean constitution in 2005 substantially enhanced the power of the high judiciary.<sup>5</sup>

Variations in the position of courts in different Latin American societies are accompanied by variations in the standing accorded to international law. In Venezuela, for example, international law has weak purchase; Venezuela announced that it would withdraw from the IACtHR in 2012. As mentioned, other Andean Republics are also shaped by a cautious approach to some aspects of international law, and, placing emphasis on national constituent power, they derive particular legitimacy from a stance against international economic legislation. For example, Bolivia's constitution of 2009, written in part because of protests against foreign expropriation of natural resources, is programmatically designed to protect both national and indigenous goods against foreign expropriation (Schavelzon 2012: 60, 180). The constitutions of both Ecuador and Bolivia make provision for national control of resources, and for food sovereignty. In Chile, further, the force

<sup>4</sup> The constitutional revisions of 1994 were part of a deal, building on long-standing negotiations, in which Menem was allowed to seek re-election to the Presidency if he accepted constraints on executive office. See on this Negretto (1999: 212–14), Chavez (2004b: 453).

<sup>5</sup> See for evidence pp. 277, 281, 384 below.

ascribed to international law is (albeit ambiguously) constrained, and international law cannot easily prevail directly over national legislative decisions.<sup>6</sup>

In other societies, however, international law has played a very immediate role in domestic polity building. The most striking example of this is post-1991 Colombia. In Colombia, international human rights norms, activated in part through constitutional provisions for individual petition [*tutela*] against human rights violations, have assumed an unmistakable structure-building role during the attempted demilitarization of society following decades of social violence. Since 1991, the Colombian Constitutional Court has pursued an extremely activist jurisprudence, establishing the core doctrine of the *block of constitutionality*, through which, building on earlier innovations in French and Spanish public law,<sup>7</sup> some international norms, especially human rights provisions, have been declared part of the unshakable core of domestic constitutional law.<sup>8</sup> On this basis, the Constitutional Court has enforced international human rights norms in order to promote pacification of guerrillas and paramilitaries, tension between whom historically fractured the power of the state,<sup>9</sup> and to assert state control and preserve security in spheres of society previously detached from the state by criminality and private violence (Schor 2009: 188). Similarly, international law is highly entrenched in the constitution of Paraguay (1992). Under Art 48 of the revised constitution of Costa Rica, all citizens are entitled to enjoy and to appeal rights guaranteed in international law, a provision vigorously applied by high courts.<sup>10</sup> The 1994 amendments to the Argentine constitution involved the direct incorporation of international treaties. In fact, even under Menem, important rulings of the Argentine Supreme Court had already

<sup>6</sup> See below p. 277.

<sup>7</sup> The origins of this doctrine can be traced to a freedom of association case heard in 1971 by the French *Conseil Constitutionnel* (71–44 DC, 1971), in which the court declared itself authorized to review legislation for breach of fundamental rights. For the Spanish elaboration of this doctrine, which widely informed Latin American constitutional law, see Spanish Constitutional Court 38/1983.

<sup>8</sup> In 1995, the Colombian Constitutional Court defined the block of constitutionality as the set of 'norms and principles which, without appearing formally in the articulated text of the constitution, are used as parameters for controlling the constitutionality of laws' (C-225/95). Over the years, this doctrine was fleshed out by the courts to establish a thicker body of higher supra-constitutional norms, effectively forming a *constitution within the constitution*. Rodrigo Cespedes provided wonderful assistance in helping me with cases from courts in Colombia, Chile, Argentina and Bolivia.

<sup>9</sup> Colombian Constitutional Court T- 267/11.

<sup>10</sup> See for example, Costa Rica Supreme Court, Constitutional Chamber, Res. 2011-08724.

confirmed the constitutional standing of international treaties in federal law and the liability of the state for breaches of international laws; the Supreme Court thus played an important part in inducing the constitutional reforms of 1994.<sup>11</sup> The post-1988 revisions to the Constitution of Brazil, especially Amendment 45 introduced in late 2004, have also increased the standing of international law as a basis for domestic jurisprudence. This has been consolidated in subsequent rulings of the Brazilian Supreme Court, which gave some international human rights treaties supra-legal standing in the hierarchy of domestic laws.

In consequence, the tendency towards constitutional incorporation of international law is at the heart, either solidly or more marginally, of most systemic reform processes in Latin America. Notably, virtually all South American states are party to the ACHR, and, with exceptions, acceptance of the rulings of the IACtHR (formally instituted in 1979) has been common. The IACtHR promotes a highly monistic, hierarchically ordered transnational jurisprudence, and it acts jointly with national courts to impose at times deeply interventionist rulings, often declaring national law invalid and prescribing remedies of a clearly political nature, often with fiscal implications (Binder 2001: 3, 10, 11, 27). The IACtHR has played a singularly important role in buttressing the power of national courts, and some of its most important rulings are designed to protect national judges from their own executives.<sup>12</sup> In important recent cases, the IACtHR used provisions for ensuring effective remedies in the ACHR to reinforce the independence of national judiciaries, to insist on fulfilment of judicial rulings, and even, in Ecuador and Venezuela, to reinstate or compensate judges subject to unfair dismissal.<sup>13</sup> A case has recently been decided by the IACtHR in which inappropriate treatment of judges by a regime was deemed implicit grounds for its de-legitimization.<sup>14</sup> Above all, the IACtHR expressly favours the principle that both states and individual persons are subjects of international law, and

<sup>11</sup> Argentine Supreme Court, *Ekmekdjian, Miguel A. c/ Sofovich, Gerardo y otros* (7.7.1992). This was reinforced in later decisions. See Argentine Supreme Court, *Giroldi, Horacio David y otro s/ recurso de casación – causa No 32/93* (7.4.1995).

<sup>12</sup> IACtHR, *Case of the Dismissed Congressional Employees (Aguado Alfaro et al) v Peru* (2006).

<sup>13</sup> IACtHR, *Case of the Constitutional Tribunal (Camba Campos et al.) v Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 28 August 2013. Series C No. 268; IACtHR, *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of 5 August 2008. Series C No. 182

<sup>14</sup> *López Lone et al. v Honduras*. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 05, 2015. Series C No. 302.

that both states and individuals have duties and rights that are strictly defined under international law (Pasqualucci 2002: 242). On this basis, most South American countries share with other contemporary states an (albeit variable) trajectory towards transnational judicial constitutionalism.

Furthermore, the rise of the judicial constitutional model in Latin America has sociological foundations similar to those in other societies. Naturally, it is not possible here to provide even a sketch of inner-societal conditions in all Latin American societies before and during recent processes of constitutional re-orientation. Clearly, attempts to generalize across a number of societies, or even across single societies that are geographically very expansive, are likely to be simplistic. Nonetheless, historically, these societies have displayed certain common characteristics. As in other contexts, the judicial dimension to the processes of systemic reform became prominent in a context marked by problems of incomplete state and nation formation, precarious political-systemic abstraction and only partially developed inclusionary structure. With important distinctions from society to society, statehood in Latin America typically included the following three features: high levels of clientelism; rife private/patrimonial transacting of public goods; and – above all – frail normative distinction between the political system and private actors. Owing to the last factor, it was characteristic of many South American states that their administrative functions were distilled in part from personalized arrangements and had limited societal penetration, their underlying legal order was precarious<sup>15</sup> and political institutions were subject to fundamental transformation with each change of governmental executive. In Latin America, therefore, the rise of transnational judicial constitutionalism is also explicable as a process of compensatory inclusionary structure building.

On one hand, the origins of weak state structures in many South American societies can be traced to the fact that contemporary states originally evolved from colonial administrations established under the Iberian Empires. In Spanish colonies, initially, colonial administrations were externally imposed on society, and, unlike the British colonies in early America, they did not possess separate and independent legislative assemblies. As a result, colonial administrations had very shallow social foundations, and political authority often faded rapidly outside

<sup>15</sup> See pp. 232–3 above. See also Vellinga (1998: 2, 5).

metropolitan centres, assuming secondary status next to local power circuits (O'Donnell 1993: 1359). To the extent that their powers extended beyond simple coercive extraction, these colonial administrations originally relied on the co-opting of private groups and disparate elite actors for support, often using semi-feudal corporatist techniques to achieve this. Ultimately, most of the colonial administrations in Latin America were uprooted very rapidly as new nations gained independence in the early nineteenth century. However, the post-colonial political systems which replaced imperial institutions were hardly constructed as fully evolved national states, and their penetration into society remained low (Oszlak 1981: 17). Most independence struggles against the Iberian Empires in the early decades of the nineteenth century transferred power from colonial elites to resident elites, but they did not transform the basic construction of society. Accordingly, the ensuing process of state construction through the nineteenth century was not accompanied by the consolidation of cohesive national societies. In many instances, states in Latin America lacked a discernibly public foundation and source of authority in society, and their powers remained defined and constrained by actors holding local and private status (Wiarda 1981: 42, 43). Further, post-colonial states in Latin America were usually confronted with highly polarized, multi-centric populations, inhabiting enormous tracts of land and containing multiple rival interest groups or corporations, and they were originally unable to muster sufficiently institutionalized mechanisms for the inclusion of different societal groups that surrounded them (O'Donnell 1984: 21). In many cases, moreover, the military apparatus of early Latin American states had roots that reached more deeply into society than states themselves, as colonial armies pre-existed, and sometimes in fact originally created, the administrative institutions of the state. In consequence, military actors traditionally enjoyed a high degree of autonomy within and against the state (Weeks 2003: 26).

On the other hand, the weak inclusionary force of many states in Latin America can be ascribed to the economic policies promoted by different states through the twentieth century, and by resultant pressures of conflict mediation and class inclusion that states were required to internalize. In many cases, owing to the slow process of industrialization in Latin America, many states, like fascist states in Europe, claimed legitimacy by implementing *developmentalist* policies. In most cases, states originally devised these policies as part of a nationalist strategy of economic protectionism and co-ordination. In this strategy,



national states integrated economic organizations (on both the business and the labour side of the industrial production process) in order to stimulate the modernization of selected spheres of production and to consolidate the position of the national political economy within a global division of production (Wirth 1970: 7). In particular, industrial development was normally promoted by means of a political/economic system based in strong lateral connections between economic ministries and semi-private bodies (e.g. business associations and unions), and in which policy making and industrial design were shaped by close interactions between government, business and organized labour. At different points in their development, many Latin American states (e.g. Brazil 1937, Paraguay 1940, Ecuador 1946, Argentina 1949, de facto Bolivia 1952) were organized around constitutions with corporatistic elements, and, diversely, they sustained their political functions by giving constitutional force to labour law, by recruiting support from trade unions through pacts and bargains, and, with variations, by co-opting a range of organized economic bodies for the exercise of government functions. In different ways, these constitutions defined trade unions as holders of material group rights, and, with varying degrees of coercion, they integrated trade unions directly within the state structure. Often, moreover, developmentalist economic policies and corporatist constitutionalism played a vital role in a longer-term process of nation building. The state-led steering of the economy, normally backed by quasi-corporatist mechanisms of inclusion and integration, was widely intended to anchor the political system in a unified national people. It did this, ideologically, by proclaiming the people as the integrated basis of government. It did this, practically, by binding together different regions, different professional sectors and different classes in societies otherwise marked by low levels of national integration and unity (O'Donnell 1973: 57). Indeed, the corporatistic ordering of labour law was a vital practical and symbolic state- and structure-building instrument in much of Latin America, and labour law was often applied as a legal medium to cut inclusively across different regions, and to forge elemental bonds between different socio-economic groups, different regional minorities, and the central state.

In some Latin American societies, constitutional experiments in corporatism, although never without an authoritarian dimension, were first pursued as part of a clearly inclusionary, integrationist plan: they were designed to distribute selected socio-material rights across society, and to establish cross-class premises for national political-economic

direction. In some instances, these experiments led to a significant redistribution of wealth through society.<sup>16</sup> However, the states established through experiments in corporatist conflict management were typically unable, over a longer period of time, to hold a balance between divergent class interests in society. In fact, corporatist class balancing through collective rights invariably failed to create a strong inclusionary structure for the state. As in Europe, endeavours in Latin America to create a constitutional order able to mollify class antagonisms were undermined by the fact that state institutions were not able to withstand the political pressures which they confronted and internalized as a result of their widened mediating functions. The attempt constitutionally to dampen or resolve class conflicts through corporatist mediation thus typically led, as in post-1918 Europe, to a dramatic fragmentation of public order. Indeed, the *crisis of inclusionary structure* which characterizes states marked by unsuccessful mediation of class conflicts has been very prominent in the institutional history of Latin America. A salient feature of corporatist constitutional experimentation in Latin America was that, as they internalized organizations expressing deeply rooted social conflicts, state institutions added to the political intensity of conflicts between these organizations, and they exposed their institutions to constantly escalating cycles of politicization. In such cases, classical political resources (i.e. monopoly of office, control of public policy, access to revenue, etc.) were perceived and contested as primary objects of political antagonism (i.e. spoils), and rival social groups exploited their proximity to the state in order to monopolize certain public goods to secure particular sectoral advantages. As in interwar Europe, in consequence, one common outcome of the corporatist expansion of the state in Latin America was that the state developed an amorously blurred periphery, and private actors, their relative power dependent on momentary economic conjunctures, were easily able to gain access to public directional authority (Geddes 1990: 225; Erro 1993: 26). Most Latin American states, in consequence, were weakened in their inner organic structure by the processes of social politicization, which they (in part) engendered through their corporatist design,<sup>17</sup> and they struggled to consolidate a position of reliable

<sup>16</sup> See, generally, Collier and Collier (1991: 100–157). Note in particular the account of redistribution under Perón in Lewis (1990: 209).

<sup>17</sup> See in this regard the theory of the politicized state set out in Chalmers (1977: 30–31, 38). On over-politicization in Argentina, see Munck (1998: 51). On over-politicization in Chile, see Valenzuela (1978: 33), Faúndez (1988: 254) and Remmer (1989b: 6).

autonomy and public authority, elevated above rival groups and hostile private interactions in society (Sikkink 1991: 171). The typical result of this, in turn, was that the state apparatus was unable to separate itself from economic actors, and it lost the ability to regulate societal conflicts with any degree of autonomy. One observer has argued generally of Latin American states that, up to the 1980s, they were determined by unmanageable levels of 'statist politicization', which meant that the 'state's capacity to enforce its own measures was considerably undermined'. On this account, the corporatist 'state-centric mix' that defined many Latin American states after 1945 provoked a deeply deleterious 'hyper-politicization', both of society and of the political system, which eventually caused a 'chronic weakness of the over-extended state'.<sup>18</sup>

In most Latin American societies, as earlier in Europe, attempts at consensual/integrationist corporatism eventually led to the promotion of alternative, more authoritarian lines of corporatist state formation. From the 1960s, and more properly from the 1970s, onwards, most states in Latin America abandoned (notionally) consensualist patterns of corporatism, and the corporate-developmental model of social co-ordination was widely reconstructed on a resolutely coercive pattern. In most societies at this time, some corporatist institutions were left in place. However, these institutions were re-designed as instruments of collective repression and retrenchment, intended to secure the privileged status of large-scale industrial enterprises within the state through the forcible, often violent, regimentation of organized labour. In prominent examples, notably post-1964 Brazil and post-1976 Argentina, a model of developmentalist corporatism emerged that was designed to accelerate production by binding organized labour into a system of highly coercive industrial management. In these polities, the bargaining force of trade unions and the material benefits of organized labour were reduced, and repression of free trade unions was sharpened.<sup>19</sup> Yet, at the same time, previous patterns of interest aggregation and articulation were not entirely liquidated, and trade unions retained a (strictly controlled) role in the co-ordination of production. In most such cases, states remained closely interlocked with powerful private

<sup>18</sup> See Cavarozzi (1994: 131–2, 144, 148). For wider analysis of 'hyper-politicization' in Latin American polities and economies see Gerchunoff (1989: 59).

<sup>19</sup> The anti-labour stance of these regimes has even been described as their 'raison d'être' (Drake 1996: 2, 142, 158).

groups, and political institutions were transformed into instruments for enforcement of powerful economic prerogatives, integrating and giving formal support for particular and identifiable interests in society at large (O'Donnell 1977: 48, 64).

In many Latin American states, consequently, it is possible to identify a correlation among attempts at corporatist inclusion of class conflicts, a resultant *hyper-politicization* of the political system, and a process of subsequent systemic *re-privatization*, in which the state, invaded by private organizations, forfeited its position (in any case only restricted) as an autonomous centre of public order and direction. During the period of general authoritarianism in Latin America from the 1960s to the 1980s, a political reality became prevalent in which the state apparatus operated as a centre of relatively detached, and often extremely repressive, direction, but in which certain elite social groups were able to exempt themselves from the control of central institutions, to deploy these institutions for their own benefit, and to impose hegemonic interests on society as a whole (Chalmers 1977: 30–31, 38; Cavarozzi 1978: 1337). As in other authoritarian societies, this privatism had the result that, many Latin American states were structurally deficient in their *internal organization*: they struggled to develop strong administrative capacities, and the institutionalization and resultant stability of government and governmental bodies (especially parties) remained generally low. The military or hyper-presidentialist governments that ordained the authoritarian-corporatist experiments in the 1960s and 1970s were defined, almost universally, by low rationalization of the state administration and high personalization of governmental roles. In addition, this privatism had the result that many states suffered structural weaknesses in their *external organization*: they became enmeshed in networks of private social violence, and they were unable to enforce general legal order across society (Cavarozzi 1992: 677; Geddes 1994: 79). This imprinted an external form on society in which historically pervasive neo-feudal tendencies were exacerbated. In most regimes, private power monopolies were solidified outside or in parallel to the state, so that public offices were widely linked to private prerogatives, and the monopoly of power by categorically *public* institutions remained questionable. In more extreme cases, acute patrimonialism led to the 'obliteration' of public legality and the disappearance of the 'public, lawful dimension' of the national state and its normative structure *in toto* (O'Donnell 1993: 1365; Farer 1995: 1301). Obviously, there are very important

cross-polity variations in this regard; some Latin American polities proved less endemically susceptible to patrimonialism than others.<sup>20</sup> However, a 'severe incompleteness of the state, especially of its legal dimension', was a general and common feature of many Latin American polities up to the 1980s (O'Donnell 1999: 314). In many cases, national political systems in Latin America were defined by a general lack of an autonomous inclusionary structure, making the state susceptible to re-feudalization and to loss of inner-societal sovereignty. This can be equally ascribed to deep-lying weaknesses of statehood resulting from the colonial era, to later failed corporatist policies, and, ultimately, to patrimonial attempts to compensate for this weakness (Oszlak 1981: 28).

On this basis, the processes of constitutional transformation that took place in different parts of Latin America in the 1980s can be linked in different ways, following the paradigm outlined above, to longer trajectories of state building and inclusionary or structural formation. In particular, the interlocking between national and international normative systems helped national states in Latin America to respond to traditional problems of reduced inclusivity and hyper-politicization. It made it possible for states to re-commence processes of public-legal formation and institutional abstraction, which had previously been obstructed by pressures ingrained in national societies. As in other transitions, the incorporation of Latin American societies within an international legal/political order often proved vital to the establishment of national political systems as moderately autonomous public organs. Most importantly, the internalization of international human rights norms in domestic legal systems allowed different states, for different reasons, to compensate for and partly to eradicate their traditional problems of weakly consolidated inclusionary structure, and to harden their institutions against privatistic collapse.

To illustrate these claims, the following sections of this chapter aim to show how the constitutional, and especially judicial, reforms beginning in the 1980s in South America were related to historical problems of residual privatism, low inclusivity and weak differentiation in national political systems. Moreover, the analyses below examine the impact of international norms, and they seek to show how, through these reforms,

<sup>20</sup> Chile might be one example of this. See Teichmann (2004: 24). For a contrasting account see Remmer (1989a).

international norms were configured to expand the inclusionary structures of national political systems, and generally to elevate their basic autonomy.

There are some very striking exemplifications of structure-building by international law in Latin America. One such case is Colombia. Historically, the Colombian state displayed alarming signs of institutional weakness, including very patchy national enforcement of authority, weak support from social elites, and resultant reduced fiscal and judicial capacities: one account even describes the formation of the Colombian national state as a process of state building *vetoed* by dominant social groups (López 2013: 145, 287). In addition, from the 1960s onwards, the Colombian state was beleaguered by extreme violence between leftist groups and independent paramilitaries, such that it lacked control of large parts of society, and it often relied on patrimonialism for its limited authority (Martz 1997: 308–9; Kline 1999: 4–5). In its traditional form, in fact, the Colombian political system barely possessed sovereign statehood, it was unable to dictate conditions of order within its territory, and paramilitaries effectively replaced the state in large geographical areas (see Oquist 1980: 165; Stafford and Palacios 2002: 298; Arvelo 2006: 421). In Colombia, notably, paramilitary groups possessed an ambiguous relation to the state. They had originally been created, legally, in the 1960s in order to suppress revolutionary guerrillas. Once established, however, they became autonomous. In alliance with drug traffickers, they established private fiefdoms in some parts of the country, often forming an alternative, or even parallel, to ordered state power (Kline 2009: 174). Ultimately, a number of cases were brought to the IACtHR, accusing the Colombian state of responsibility for murders committed by paramilitaries. In *Mapiripán Massacre v Colombia* (2005), in particular, the IACtHR found the Colombian government responsible for such violence, arguing, as previously claimed by domestic NGOs, that the government should be imputed accountability for all acts in its territories, and effectively insisting that the state should impose a uniform normative domain on all parts of society, even in areas in which state power had failed (see Arvelo 2006: 421, 461). Over a longer period, this external attribution of comprehensive domestic accountability to the Colombian state reinforced the basic capacities of the national political system. In fact, the Colombian government accepted the IACtHR's assessment of its complicity in murders by paramilitaries, and it introduced legislative packages to prevent common causes of human rights violations, raising

standards of criminal prosecution accordingly. Such rulings prompted a substantial increase in the levels of societal control exercised by the Colombian state, and they contributed greatly to an ongoing process of state consolidation. Importantly, the Colombian Constitutional Court has strongly supported domestic policies implementing directives of the IACtHR, it has used international human rights to justify repressive policies against paramilitaries and other public actors involved in organized violence, and it has applied international norms as part of an inter-institutional strategy of domestic state expansion.<sup>21</sup> In some cases, the Constitutional Court has declared an ‘unconstitutional state of affairs’ in cases of widespread human rights abuse, and it has implicitly ordered the government to align internal conditions to international human rights expectations.<sup>22</sup> Recently, in fact, the Colombian government has argued before the IACtHR that judicial performance has improved dramatically and that the remedies provided by the state are now sufficiently robust to obviate proceedings in the court.<sup>23</sup> In these respects, the interaction with the international legal system has palpably reinforced the domestic penetration of the state in Colombian society, and it has quite evidently created a compensatory inclusionary structure for the political system. More widely, the Colombian government has also promoted the reception of international human rights as part of general policy of economic development, designed to enhance both the internal capacity of the national state and the economic position of Colombia in the regional economy as a whole.<sup>24</sup>

To illustrate the wider sociological role of international law in Latin America, however, this chapter devotes less attention to such extreme and exceptionalist cases of international structure building. Instead, it concentrates mainly on political systems with histories of moderately secure state institutions, but in which fragmentation of inclusionary structure, usually caused by class conflict, has nonetheless been prevalent. Therefore, the first three analyses below, focusing on Argentina,

<sup>21</sup> One famous case is C-802/02, in which the Colombian Constitutional court used international norms to uphold the declaration of a state of exception in some regions. More recently see Colombian Constitutional Court C-334/13 (2013).

<sup>22</sup> Colombian Constitutional Court T-025/04. This has been acknowledged by the IACtHR. See *Case of the Afro-Descendant Communities Displaced from the Cacarcica River Basin (Operation Genesis) v Colombia* (2013), pp. 146–7.

<sup>23</sup> IACtHR, *Ana Teresa Yarce et al v Colombia* (2015).

<sup>24</sup> Current and recent development policies in Colombia contain repeated commitments to promote human rights in domestic law. For excellent discussion, see Borda Guzmán and Camilo Sánchez (2013: 171).



Brazil and Chile, are intended to show how, in these contexts, the domestic integration of international human rights law transformed the inclusionary structure of national political systems. Ultimately, the fourth analysis focuses on the structural impact of international law in societies marked not only by class conflict but also by deep inter-population splits. This analysis is intended to show how international law has enabled some political systems to secure their inclusionary structures, not only in the face of class polarization but also in the face of deep core-periphery divisions.

### **i. Argentina**

Argentina is a society whose political system is a history of very unsettled statehood and weak inclusionary structure. Notably, for a long period of time, Argentina was, and in fact still partly remains, pervasively shaped by its origins in the post-colonial era. In this period, attempts to centralize state organs provoked protracted contest, and even short civil wars, between factions seeking to preserve local, semi-feudal privileges and factions supporting the rising power of the national state. Historically, therefore, the Argentine state was acutely marked by regional fragmentation. Until 1880, of course, Buenos Aires province itself retained partial autonomy within the federal system. Moreover, the state was affected, historically, by low national institutionalization of core parts of the polity. Owing to its fragmented regional origins, it did not provide full scope for institutionalization of orthodox national parties (Rock 2002: 23). Its fiscal capacities were originally limited. Moreover, institutional roles of the military and the judiciary were not clearly determined (Oszlak 1997: 23, 261). On the latter point, at least formally, the Argentine constitution had made early constitutional provisions for strong judicial authority; the Supreme Court was inaugurated in the 1860s, and it first declared a statute unconstitutional in 1887. At key junctures, however, the power of the judiciary was subject to systematic constraint, and it was routinely exposed to personalistic manipulation. Most famously, in 1947, Perón impeached four of the five judges of the Supreme Court, and after three subsequent military coups – in 1955, 1966 and 1976 – Supreme Court judges were relieved of their offices (Chavez 2004a: 38–9).

In addition, the political system in Argentina has a history of dense intersection between public and private organizations, and most

governments have been closely linked to specific societal interest groups, usually with a manifest class basis. In periods of economic crisis, most importantly, the state has often lacked the power to integrate powerful private actors, it has proved highly susceptible to instrumental capture by extra-state elites, and the coercive apparatus of the state has repeatedly been annexed by one social group to suppress its rivals (O'Donnell 1984: 24, 39; Bonner 2005: 57). This is reflected in the fact that, from the 1940s to the 1980s, powers of government were transferred in unregulated, usually violent, fashion, from one group to another, and, through this process, the composition of successive executives closely mirrored the fluctuating balance of class forces and interests across society more widely (O'Donnell 1984: 37). This is also visible in the fact that, through modern Argentine history, governmental blocs have implemented unpredictably shifting patterns for ordering industrial relations, and different executives, close to specific social interests, have installed dramatically divergent models of corporatism to integrate and control the workforce and regulate the labour market (Collier and Collier 1991: 148). Organized labour first became a potent political force in Argentina in the 1940s (Horowitz 1990: 125, 180), following a period in which trade unions and collective labour law had acquired rapidly rising social prominence.<sup>25</sup> After this time, the constitutional techniques for incorporating organized labour underwent a number of profound transformations, each of which reflected starkly polarized societal interests and starkly polarized approaches to the regulation of labour conflicts.

Techniques for the political integration of labour in Argentina have ranged from *inclusionary* models of political corporatism, exemplified by Perón's government in the 1940s, which gave relatively privileged status to the labour movement as part of a strategy of integrated developmentalism, to highly *exclusionary* models of elite-led industrial co-ordination. Initially, before Perón was elected to the presidency (1946), the military regime formed in 1943, and in which Perón played a significant role, had introduced pieces of corporatist legislation, mainly with an authoritarian character. These included the Syndical Statute (1943) and the Law of Professional Associations (1945), which placed trade unions under state control, allowing only one union in each sector.

<sup>25</sup> Pre-Peronist Argentina was not defined by highly mobilized trade unions or by acute class conflict (see Torre 2012: 176). But one observer calculates that between 1936 and 1943, 660 collective bargains were formed in Buenos Aires province. By 1942, industrial action was largely subject to government mediation (Del Campo 2005: 71, 77).

However, even during the military interlude, Perón began to direct the corporatist design of the polity away from the simple coercive regimentation of organized labour, and to establish a more consensual system of collective bargaining, integrating the people in the political system as material rights holders (Del Campo 2005: 279). Eventually, Perón's constitution of 1949 cemented the classical corporatist principle of the citizen as a social rights holder, bound to the state by trade unions, and thus acting as an organized internal source of constituent power. This constitution provided for state control of the national economy, promising material protection of the labour movement, and subjecting all parties in the industrial process to state supervision. For example, Art 37 of Perón's constitution guaranteed a long catalogue of social rights. Art 38 declared that 'private property has a social function', and is subject to the dictates of the common good. Art 40 pronounced that production of wealth should be organized in an 'economic order reflecting principles of social justice'. These articles authorized the state to intervene directly in economic practices in order to stimulate development, linking both parties in the production process to a basic strategy of developmentalist import substitution. By 1947, Perón announced that his intention was to 'suppress class conflict, replacing it instead with an understanding between workers and management in favour of justice emanating from the State' (Epstein 1979: 45). By 1953, he elevated collective wage agreements to the standing of public-legal norms. In each respect, Perón achieved the unusual feat of absorbing trade unions in the state, and, to some degree, of transforming organized labour into a moderately integrated, even partially conservative social bloc. Personally, Perón may have felt some sympathy for European fascism, especially in its Franquist strain. However, his *Justicialista* movement was manifestly distinct from the brand of authoritarian capitalist corporatism associated with European fascist movements.<sup>26</sup> Although he clearly subjected trade unions to state jurisdiction, Perón effected a significant downward redistribution of public wealth. His first presidency (1946–1955) witnessed the nationalization of key industrial sectors, it saw a very significant increase in wages and legal rights for organized labour, and, self-evidently, it undermined the position of previously dominant social groups (Collier and Collier 1991: 342; McGuire 1997: 53–66).

<sup>26</sup> One historian states: 'Unquestionably, there is a family resemblance between fascism and Peronism' (Hodges 1976: 132). See also Lewis (1990: 242). In my view, the family resemblance between Peronism and fascism is not very close.

In consequence of this, however, Perón's policies led to a deep and enduring polarization of Argentine society. At least up to the 1980s, non-Peronist governments were defined by a deep aversion to Perón's brand of labour-friendly corporatism. On replacing Perón in 1955, for example, Aramburu decreed a radical weakening of trade-union power, and all subsequent non-Peronist regimes used military resources to suppress union-based populism (see Epstein 1989: 20–21).<sup>27</sup> As an alternative to inclusionary corporatism, post-Peronist regimes normally promoted distinct models of exclusionary corporatism. That is, they created corporatist systems which did not fully renounce collective labour protection, but in which unions were tightly controlled, union leaders were hand-picked, assuming regimentational functions, and wage settlements and other arrangements between unions and management were clearly tied to macro-economic policies, linked to entrepreneurial prerogatives. These policies were concertedly imposed first by Onganía (Epstein 1979: 457; Arceneux 2001: 56), and they were ultimately re-activated, in more repressive form, by Videla's military dictatorship.<sup>28</sup> Videla's dictatorship displayed great hostility to trade unions. However, in 1979, it began to order relations with unions in more formal or *normalized* fashion, and it established corporatist bodies in industrial units, albeit with strictly apolitical functions and bound by clear constraints, to protect certain socio-material rights and to support formal inter-organizational negotiations.<sup>29</sup>

At every stage of its pre-1983 formation, the corporatist orientation of the Argentine polity meant that the political system was marked by low reserves of independent legitimacy, and by very weak inclusionary structure, and it was eviscerated by its position at the centre of deeply rooted societal hostilities. Owing to its corporatist emphasis, the primary conflicts running through Argentine society as a whole were transmitted directly, integrally and undilutedly, through the institutions of the state, and organizations linked to different parties, both Peronists and anti-Peronists, sought to utilize state resources to consolidate particular societal demands. At each change of government, actors that entered the state endeavoured to monopolize the state bureaucracy in

<sup>27</sup> The dictatorship established in 1976 followed fascist models in replacing free union representatives with appointed trustees (Munck 1998: 77).

<sup>28</sup> Note the distinction between in- and exclusionary corporatism in Argentina, which is formulated in different ways in O'Donnell (1973: 53–5; 1977: 48) and Buchanan (1985: 62). Videla's dictatorship beginning in 1976 was initially shaped by a violent repression of trade union activities and a strict reduction of traditional corporate channels of representation.

<sup>29</sup> This was attempted in Law 22.105 (1979).

order to exclude rival social groups (Munck 1998: 51), and neither side in the socio-political antagonisms refracted through the state was prepared to recognize the state as a publicly constituted structure, normatively and functionally distinct from persons or groups holding office at one given moment. Progressively, this engendered a *hyper-politicization* of the state, which, over time, drained the state of autonomy, and left it vulnerable, cyclically, to annexation by external groups. This fragmentation of the state became especially acute during periods of authoritarianism, in which elite actors manifestly dominated public offices. By the late 1970s, in fact, the Argentine state was in a condition close to institutional implosion, as it was deeply destabilized by office capture by rent-seeking groups, which exploited state resources from entrenched positions outside the public administration (Ranis 1992: 38–9; Falletti 2011: 146). One analysis of the military dictatorship formed in 1976 claims simply that by the early 1980s the Argentine state had forfeited ‘autonomy vis-à-vis rent-seeking pressure groups such as the military, labour unions or certain business groups’. In consequence, ‘the state had lost the power to act as a state’ (Borner and Kobler 2002: 340). Through this process, further, Argentine society as a whole lost its specific national character, and it was clearly dominated by very particular sectors and corporate groups.<sup>30</sup>

Against this background, it is notable that in Argentina the transition from military rule beginning in 1983 was impelled, to a not insubstantial degree, by human rights movements and international legal initiatives. Generally, international advocacy networks had played a prominent role in Argentina prior to systemic transformation, and they had done much to draw international attention to political abuses perpetrated by the military dictatorship (Lutz and Sikkink 2000: 657). In the background to the regime change, moreover, the IACtHR had been constituted in 1978–1979, and, although it did not hear contentious cases until 1987, it had begun to promote supra-national rights jurisprudence across the region, especially through advisory opinions. During the preliminary stages of the transitional elections in 1983, the eventual President, Alfonsín, was quick to identify the inclusionary/structural benefits of human rights norms, and he seized on human rights as the basis for a new political agenda, ultimately utilizing rights as a platform for negotiating the democratic transition

<sup>30</sup> Notably, although the military junta of the 1970s used the regalia of nationalism, its nationalism always rang hollow, and its leaders never really presupposed that they were supported by the nation (Pion-Berlin 1985: 67).

and for proclaiming legitimacy for the emergent democratic polity as a whole.

Through the early part of the transition, Alfonsín, introduced a raft of legislation to establish adequate standards of protection for human rights. He also convoked a constitutional Advisory Committee (*El Consejo para la Consolidación de la Democracia*), which even demanded that the constitution should be reformed in order to elevate the authority of international treaties and organizations. In 1983, a commission was convened to investigate human rights violations under the dictatorship, and this produced the report *Nunca más (Never Again)*, condemning the regime in light of human rights norms, and – implicitly – projecting rights as principles of direction for future political order. Tellingly, Alfonsín ordered the arrest of the nine Generals who had led the first three military juntas; this ultimately meant that criminal law evolved particularly strong protections for individual liberties. In 1984, then, the Argentine Congress ratified the ACHR. Later, as discussed, in 1994, the existing constitution (which in its basic provisions had remained unchanged since 1853) was reformed, and a long body of international treaties and human rights declarations was incorporated in domestic law (Art 75(22)), giving higher formal status to international rights law than other polities in the region (Levit 1998: 291–5). To be sure, this was not an unambiguous process. Paradoxically, in fact, Menem's period of presidential office witnessed both a rising reliance on legislation by decree and a semi-monistic consolidation of international law as part of the domestic legal system. Despite the growing impact of international law, judicial independence was weakened after 1989 and the judicial branch retained a personalistic and deeply politicized character (see Zaffaroni 1994: Chapters 6, 22). At the beginning of the transition, however, the integration of international human rights declarations and treaties in municipal public law was intended graphically to underline the separation between the reformed state and the parties which had traditionally asserted their interests through the political apparatus (Miller 2003: 859–62). The vocabulary of human rights acquired a clear symbolic status for the new democratic political system in Argentina, and the legitimacy of new institutions was widely both asserted and assessed through reference to rights-based norms (Brysk 1994: 95, 107).

The vocabulary of international human rights, naturally, performed a broad range of functions in the wake of the collapse of military rule in Argentina. As stated, human rights provided both a focus for

anti-authoritarian mobilization and a source of symbolic legitimacy for the process of democratization. Alongside this, however, human rights were also used objectively to transform domestic institutions, and to erase traditional sources of state instability and inclusionary debility from the political system. Clearly, for example, the rise in the normative standing of rights was intended to sharpen distinctions between executive and judicial institutions. This was especially evident in judicial proceedings against leading figures in the military regime. Moreover, in the early stages of reform, human rights norms were applied (Law 23.049 1984) to reduce the pluralism of the judicial system, and in particular to limit the military's personal encroachment on judicial functions. International legal norms were thus used to shape the structure of the state, and to limit personal control of state offices.

Most distinctively, however, the elevation of human rights as principles of legitimacy was employed as a means to transform the corporatist form of the political/economic system in Argentina. By express design, human rights were applied under Alfonsín to disarticulate the state structure from collective organizations traditionally vying for a stake in its power, and to consolidate clear divisions between areas of public responsibility and areas of private-economic practice (Brysk 1994: 125–6). One reason why Alfonsín utilized the vocabulary of human rights as a political platform was that rights created a diction of legitimacy, through which it was possible for him to diminish the significance both of trade unionism and of military authority as inner pillars of national government (Munck 1998: 155). In fact, after 1983, Alfonsín accused the trade unions of having entered a secret pact with the military during the dictatorship, which he saw as a product of the undemocratic, personalistic, corporatist nature of Argentine institutions (Gaudio and Thompson 1990: 7, 17). Accordingly, immediately after having assumed the Presidency, Alfonsín proposed a legislative act (*Ley de Reordenamiento Sindical*, 1983), which addressed the status and structure of trade unions. On one hand, this law was intended to end the coercive monopolization of unions under the military regime, and to give express recognition to the freedom of trade unions. However, this law was designed to weaken the corporatist structure of trade union organization, to de-couple the unions from the political system and to prohibit anti-democratic tendencies within unions (Gaudio and Domeniconi 1986: 427; Patroni 2001: 268). Notably, this law narrowly failed to clear the Senate, and legislation eventually enforced to democratize unions was less restrictive. Ultimately, Alfonsín was forced to



pursue a more vacillating and conciliatory line towards trade unions. In 1988, he introduced laws permitting general and binding collective bargaining. However, he also tried to introduce further reforms to union law in ensuing years, which were aimed to decentralize collective bargaining, and to prohibit strikes during the term of an agreed contract (Cook 2007: 64–5). In 1988, he also passed Law 23.551 on Union Associations, which insisted on liberty of union affiliation as a basic norm of industrial relations, but which also, in Art 31, preserved monopolies of powerful unions in legal representation of members and in negotiation of collective bargains.

Underlying Alfonsín's constitutional policies was an attempt to replace the Peronist concept of the person as a holder of collective social and material rights with a concept of the person as a single citizen, holding simple political rights. This shift from collective rights to singular rights was designed to modify the basic source of law's authority. It was intended, at once, to locate the sovereign people outside the political order, to place government in a more immediately accountable relation to individual persons in society and to simplify the lines of articulation between individual persons and the government, removing the corporatist periphery to the Argentine state. Leading constitutional consultants close to Alfonsín in fact argued programmatically that policies promoting singular political rights would make it possible to detach the state from its interlocked relation with the 'network of power relations and privilege' that had become attached to the political system through historical experiments with corporatism (Nino 1989: 154). As an alternative to this, the architects of the new Argentine state envisioned a democracy centred on single human rights, through which they aspired to elevate the state above the private milieu to which it was linked, and to transpose the state as a whole onto more abstract and normatively stable legitimating foundations (Nino 1996: 132). On that basis, in fact, Alfonsín was able – uniquely – partly to strip the Argentine state structure away from the trade unions without relying on the army to accomplish this, and he created a legitimational foundation for the state which did not require endless and systemically internalized conflict over conditions of labour, production and development. This shaped a wider move away from collectivist political vocabularies (derived from corporatist populism, or Peronism) in the 1980s (Peruzzotti 2002: 82–3), and it promoted a growing de-collectivization of society, and an increasing separation of public office from private power.

Of great importance in this process is the fact that the government formed by Alfonsín's Radical Party, legitimated in part through its insistence on international human rights as categorical political norms, was, since 1943, the first non-Peronist government voted into power through free and fair elections in Argentina. Significantly, the open election of Alfonsín meant that organized labour, traditionally represented (however haphazardly) through *Justicialismo*, was forced to recognize, for the first ever time, that it formed the opposition to a government which had a perfectly plausible claim to exercise power in a legitimate fashion. This meant that the varying factions attached to the Peronist movement were required, to some degree, to form a *loyal opposition*, bound to interact with the sitting government within certain prescribed legal rules. After this time, rival political parties remained deeply polarized, and newly elected parties of government tended to reject all continuity with previous executives. However, Alfonsín's policies led to an unprecedented formalization of the division between political parties and the organs of state, and it weakened the tendency of Argentine political parties (or movements) to seek permanent monopolization of state offices against irreconcilably hostile rival associations. Overall, the salience of human rights in the Argentine transition created a quite new political cleavage, in which the classical fissure between Peronists and anti-Peronists was replaced by the opposition between those favouring and those opposed to a rights-based political system (Panizza 1995: 172). The longer-term consequence of this was that a party system evolved in which the state was reflected as possessing a constitutional base that made it distinct from the parties momentarily located in the executive. The state was progressively defined by its relative autonomy and normative distinction against specific persons and societal interests, and, accordingly, by the fact that it could legislate in independence of particular groups and prerogatives.<sup>31</sup> Arguably, in fact, the rights-based rhetoric of legitimacy promoted by Alfonsín established a distinct foundation for an independent inclusionary structure in Argentina, and it heightened the normative autonomy of the political system as a whole. As discussed below, in Latin America, both national and international courts ultimately developed refined mechanisms for promoting and enforcing social and material rights. This was quite pronounced in Argentina, where, after 2000,

<sup>31</sup> In support see Peruzzotti (2001: 142, 145). Close to my position, Peruzzotti sees the process of 'constitutionalization' in Argentina as expressed through a growing 'institutional differentiation between state and society', induced by the 'emergence of rights-oriented politics' (148).

social rights, often justified under international law, were clearly recognized and enforced by the courts.<sup>32</sup> In transitional Argentina, however, international human rights norms were absorbed in domestic law because they favoured universal *singular rights*. Crucially, the use of human rights as principles of legitimacy was effective because this separated the legitimacy of the state from acts of collective social mobilization within domestic society, it reduced the vulnerability of the state to private capture, and it placed the state on autonomous normative foundations.

The entire process of transitional reform in Argentina is frequently observed with scepticism (see Jouet 2008: 461). It has been widely claimed that the democratic constitution itself, reinstated after 1983, only obtained tenuous legitimacy. In particular, it is often asserted that the extensive absorption of international law in the transition and in the revised constitution of 1994 had only slight impact on the integrity of the judiciary and the normative consistency of the state (Levit 1998: 313, 325; Jouet 2008: 461; Kapiszewski 2012: 8, 31, 92). This view is not without justification. In some ways, the Argentine constitution provides a less strict order for government than in some other societies, and political parties, especially those in opposition, are less clearly institutionalized than in other reformed democracies. Moreover, judicial institutions are manifestly politicized, and rulings of the high judiciary have at times marginal impact on political practice. This is partly due to the fact that rulings of the Supreme Court are binding only for given parties, and have only limited importance for enforcement of statutes. This is also due to the diffuse structure of national government, which militates against uniformly binding judicial decisions. Importantly, further, the background to the constitutional reforms of 1994 was marked by a series of secret agreements between Menem and Alfonsín, and the process of amendment was intended to bring constitutional benefits for both parties. Partly as a result of the opaque nature of these debates, the Constitutional Convention that approved the revised constitution in 1994 was only dubiously legitimized. Moreover, post-1983 Argentina has seen long periods of para-constitutional rule; Menem passed more laws by fiat than all other Presidents in Argentine history (García-Mansilla 2004: 356, 385; Negretto 2013: 142). Even the incorporation of international law in 1994 was flanked by provisions to authorize rule by decree (Rubio and Goretti 1996: 450). On these

<sup>32</sup> See Argentine Supreme Court, *Vizzoti, Carlos Alberto c/ AMSA S.A. s/ despido* (14.9. 2004).

grounds, caution should be exercised in examining the structural benefits of Argentine constitutionalism. Despite this, nonetheless, the intersection of constitutional reform, the growth in judicial independence under Alfonsín, and the rising presumptions in favour of international human rights surely led to an (albeit clearly limited) differentiation of state institutions (Peruzzotti 2002: 87). These processes generally promoted, across society, a more distinct specialization of political functions, and they discernibly intensified the inclusionary structure underpinning the Argentine political system.

To illustrate this, for example, the structure-building impact of human rights on the political system in post-transitional Argentina is apparent in the fact that the legal consistency of the state was heightened. In general terms, as discussed, this was due to the fact that the intersections between public and private power became less ragged. It was also due to the fact that judicial integrity increased, and judicial actors were able (to some degree) to police the ways in which offices of state were distributed and utilized.<sup>33</sup> Notably, however, this structure-building impact of human rights is sharply exemplified by the fact that in the wake of the transition *the law itself* assumed greater importance as a framework for conflict resolution, and it was more commonly utilized as a relatively consistent, apersonal medium of social exchange. Indicatively, the number of cases filed in Argentine courts increased dramatically after the transition, and in the period 1991–2002 the total number of cases filed rose by more than 100 per cent. The increase was most pronounced in cases filed to the Supreme Court, which increased from just over 5,000 to almost 42,000 per year in the same time span. At one level, this suggests that the growing independence of legal institutions stimulated a more pluralistic culture of litigation in Argentine society (Smulovitz 2005: 163). In fact, the incorporation of international law in the constitutional reforms of 1994 meant that new patterns of legal/political activism and mobilization became widespread through society, especially as political organizations traditionally holding a monopoly on interaction with the government became weaker. To some extent, a widening variety of social actors, including social associations and single citizens, often led by progressive human rights lawyers, replaced more established organs

<sup>33</sup> The 1990s saw some major corruption cases in the Criminal Courts. See, for example, *IBM-Banco Nación Dadone, Aldo y otros s/defraudación contra la administración pública*. Tribunal Oral, Criminal Federal N 3/ Juez Guillermo Montenegro Caso Nr. 509/05 (12/05/2010).

of political activation.<sup>34</sup> However, as in other societies undergoing systemic transformation, the growth of litigation also indicates that agents through society gained increasing confidence in law and in the systemic resources and actors which supported the law, and they showed growing willingness to conduct their exchanges with the state through formal legal instruments. In turn, this implies that social agents increasingly observed the state as a formal entity, and they were prepared to assume a formal external relation to the legal/political system, accepting law as a general medium of inclusion, of which persons availed themselves as agents standing outside the political system. In this respect, again, the everyday over-politicization of government frequently diagnosed in Latin American history was, in part, remedied, or at least palliated, through the transformation of the legal system and by the use of rights as fixed norms, around which social controversies could be articulated. The growth of litigation reflected a significant extension of the inclusionary structure of the political system, and it clearly brought societal exchanges into a more controlled relation to formal political institutions.

Over a longer period of time, most importantly, the impact of internationally defined rights in Argentina was visible in the fact that political actors were able to use and presuppose principles of legitimacy which they were not required endlessly to produce by integrating external social actors in the state. In particular, this meant that the state was less strongly compelled to define the terms of its legitimacy in relation to conflicts over labour and production conditions, and its inclusionary functions depended less on its immediate internalization of highly charged economic conflicts. As a result, state organs were able to insulate themselves against traditionally dominant social pressures, and, to some degree, they could close their boundaries to private or external organizations which had conventionally attempted to monopolize state power. Immediate or fully internalistic state control of social exchanges became less common, and even the most deep-lying social conflicts showed lower propensity to trigger politicized strategies for state capture. In this respect, international norms became part of the deep inclusionary structure of the state, and they significantly increased its basic autonomy and differentiation.

<sup>34</sup> On the 'expansion of constitutional activism' in Argentina after 1994 see Delamarta (2013: 154).

To be clear, none of this means that, in and after the Argentine transition, societal conflicts lost volatile resonance, and none of this implies that traditional patterns of Argentine corporatism disappeared. Labour-market policies and labour law retained a highly controversial position in Argentine society, and reforms to the labour market were often implemented in very inflammatory fashion. In the early 1990s, for example, Menem pursued a policy of far-reaching liberalization, and he came close to provoking a general strike through decree laws of 1991 and 1993, which threatened legal provisions enabling unions to manage their own funds and welfare programmes (*obras sociales*) (Cook 2007: 74–5). In addition, Peronist trade unions retained extensive social responsibilities for welfare provision, they proved very resistant to internal democratization, and they preserved close links to the Ministry of Labour. As a general point, it is observable that, owing to the influence of vested union interests, labour law in Argentina has been less susceptible than criminal law to transformation through the influx of singular rights.<sup>35</sup> Nonetheless, over a longer period of time, the linkage between state and labour was weakened, and the cyclical tendency towards hyper-politicization was interrupted: conflicts over labour could be more easily conducted within commonly accepted normative rules, and outcomes of conflicts over production less frequently acquired absolute directional implications for the structure of the state itself.

Under Alfonsín, first, a public economy was constructed, in which single trade unions lost some monopoly powers in representing particular industrial sectors. Alfonsín did not fully abolish union monopolies; the power to negotiate collective bargains for different productive sectors remained limited to a small number of dominant unions, which had been assigned a recognized legal personality. Nonetheless, Alfonsín's period of office saw an increasing diversification of trade unions, which meant that economic agreements were less strictly institutionalized, and agreements with trade unions lost their status as dominant sources of legitimacy for the state (Acuña 1995: 391, 402). After the 1980s, then, trade unions revised the terms of their engagement with the political system, so that, although many basic elements of political corporatism remained intact, unions began to conduct negotiations in a more localized fashion (Murillo 1997: 431,

<sup>35</sup> See the recent case in the National Criminal Appeal Court (312/2015), declaring part of the Criminal Code unconstitutional.

440). Under Menem, in fact, the position of trade unions was partly re-defined. Trade unions retained some limited judicial protection at this time, and, even when supporting Menem's policy of rule by decree, the courts continued, with clear reservations, to defend the autonomy of the unions, sometimes using international law to this end.<sup>36</sup> Ultimately, the constitutional reforms of 1994 meant that international treaties, especially ILO treaties, were used both to heighten the liberty of trade unions and to limit union monopolies (Alvarez 2014: 3267). Overall, however, the Menem era clearly witnessed a marked weakening of trade-union privileges and a pronounced reduction in trade-union activity. After the deep economic crash of 1998–2002, subsequently, a distinctive neo-corporatist system of industrial management began to take shape. In this system, unions retained great importance in industrial sectors outside the state, but state control of union negotiations was limited, and it slowly became possible for a plurality of unions to operate in each sector (Etchemendy and Collier 2007: 265, 381, 394). Ultimately, this revised corporatist model was strongly promoted by the Supreme Court, which fostered a liberal jurisprudence of personal rights, at times using international law to declare union monopolies unconstitutional.<sup>37</sup>

One result of these changes in the political status of trade unions was that it elevated the basic autonomy of the government. Notably, state intervention in union negotiations was reduced, and the ability of union memberships to mobilize society around collective rights was curtailed. Yet, strikingly, the partial de-coupling of corporatist bodies from the state also instilled flexibility in the Peronist movement itself. In the longer term, this process meant that the Peronists began to de-emphasize labour conflicts as a dominant focus of mobilization and legitimacy. As a result, governments could be created which recruited broad support from industrial labour but which deviated from classical Peronism in that they rejected full corporatist inclusion of the workforce in the political system, and they preserved their autonomy towards particular trade unions.<sup>38</sup> Overall, the partial separation of state and

<sup>36</sup> See Argentine Supreme Court, *Cocchia, Jorge Daniel (Sindicato de Encargados Apuntadores Marítimos) c/ Estado Nacional y otro s/ acción de amparo* (2.12.1993). This ruling clearly supported a reduction of union rights, and it permitted Menem to change collective bargains. But it also prescribed strict conditions for this. Even under Menem judicial protection of union rights remained quite strong.

<sup>37</sup> See Argentine Supreme Court, *Rossi, Adriana María c/Estado Nacional – Armada Argentina* (9.12.2009); *Asociación Trabajadores del Estado contra Ministerio de Trabajo sobre Ley de Asociaciones Sindicales* (‘‘Fallo ATE’’) (11.11.2008).

<sup>38</sup> On this process, see Levitsky (2003a: 217–19, 225, 228).



labour created a historically unique framework in which partly labour-friendly governments, eventually exemplified by Néstor Kirchner, could promote a neo-corporatist social pact, negotiating with labour organizations on reasonably consensual terms, yet in which fiscal and distributional policies could be directed without full politicization of labour conflicts.<sup>39</sup> Ultimately, the state was able to promote policies sympathetic to organized labour, but its historical susceptibility to office grabbing or obdurately politicized opposition remained dampened.

It would naturally be exaggerated to imply that the Argentine state was honed to a high degree of functional autonomy or structural inclusivity through the democratic constitutional reforms beginning in the 1980s. Nonetheless, these reforms played an important role in securing the inclusionary structure and in raising the basic autonomy of political institutions in Argentina. In fact, political institutions in Argentina eventually displayed a surprising degree of robustness, independence and rule-dependence, even through the acute economic crises of the early 2000s. On one hand, this transformation presupposed the use of single human rights to control the socio-political inclusion of the military and other actors likely to sabotage democracy. However, this transformation also presupposed the use of singular rights, both monetary and political, to stabilize market practices, partly, outside the state, and to diminish the power of trade unions as fully internal elements of the political system (Borner and Kobler 2002: 339; Levitsky 2003b: 17). On both counts, the absorption of international human rights norms within the state created a socio-institutional setting, in which many sources of conflict and destabilization could be displaced from positions within the state to varying locations throughout society – or even civil society. The fact that the state was able to extract principles of legitimacy from an external normative domain meant that it was not endlessly compelled to generate all the legitimacy that it consumed in legislation. Moreover, it did not need to construct all exchanges in society (especially those relating to labour and industrial activities) as implicated in its production and consumption of legitimacy. To some degree, the expansion of human rights law allowed the political system to compensate for its traditional instabilities, to avoid the concentration of legitimacy on simple acts of inclusion and to diminish

<sup>39</sup> For analysis of changes in the status of the *Confederación General de Trabajo* (CGT) under Kirchner see Wylde (2011: 442). Kirchner had close links to the CGT and to its leader Hugo Moyano. Under Kirchner, union strength rose impressively. Between 2000 and 2011, collective wage agreements increased from less than hundred to almost 1,800 (Duarte 2013: 7).

the private/monopolistic claims on state power which had conventionally obstructed its autonomy. In other words, as it extracted some of its legitimacy from human rights, the state was no longer required to extract all its legitimacy from the national sovereign people, and this contributed greatly to its functional stability. Through this process, in fact, the political system eventually acquired the capacity to distribute social rights through society in a form that was partly disconnected from trade-union mobilization; legal institutions gave heightened protection to a variety of social rights, partly defined under international law, while also using international law to curtail the political influence of industrial organizations. In this context, overall, international human rights law provided a vital, compensatory source of inclusionary structure for the national political system, facilitating patterns of deep societal inclusion, and cementing the sovereign position of the political system against rival sources of power. Moreover, in a setting in which the construction of society itself as distinctively inclusive and *national* had been obstructed by potent private actors, the linkage between the national and the international legal order promoted the basic formation of society as a national inclusionary system.<sup>40</sup> On each count, the fact that it was no longer entirely founded in the formula of the integrated national people acted to secure the political system as a national entity.

## b Brazil

To a somewhat lesser degree, similar tendencies can be observed in the process of constitutional reform in Brazil. The process of transformation in Brazil, from the end of military rule in 1984/85 to the final ratification of the new democratic constitution in 1988, also in part exemplifies a pattern of compensatory state building and inclusionary structural formation through judicial power and international human rights law.

Traditionally, it is presumed that in Brazil the state structure was significantly more solid and autonomous than in Argentina, and indeed

<sup>40</sup> Very importantly in this respect, in some cases, national courts have taken cases concerning acute human rights violation out of regional courts and assigned them to federal courts, thus using human rights norms to solidify the precedence of the national legal system. See Argentine Supreme Court, *Contra Nunez y otro / trata de personas C. 117. XLVIII. COM (12/11/2012)*. In some cases, prosecutors have even re-classified crimes relating to human rights to ensure that they come to the federal courts.

in all other Latin American states, except – perhaps – Chile, and that the Brazilian polity possessed greater resilience towards economic conflicts (de Carvalho 1975: 35, 355; O'Donnell 1984: 43; Collier and Collier 1991: 104; Sikkink 1991: 22). Like other Latin American states, the modern Brazilian state was built on a strongly corporatist model, and, as it evolved in a climate of sharpened industrial conflict in the 1920s and 1930s, it was designed at an early stage as a polity deriving legitimacy from corporatist inclusion of rival economic groups in national society. Concerted attempts at corporatist constitutionalism, with a strongly authoritarian emphasis, were first conducted in Brazil in the 1930s. These developments resulted, initially, in Vargas's constitution of 1937 (never effectively implemented), and especially in the provisions contained in Arts 137 and 138 of this constitution, which were expanded in subsequent regular legislation (Silva 2008: 163). These attempts then culminated in the Consolidation of Labour Laws, passed by Vargas in 1943. During this period, the Brazilian corporatist system acquired an important judicial dimension, and collective bargaining and union activity were subject to control by labour courts. Later, the corporatist order was partly preserved after the creation of a democratic political system. It was carried over into the democratic constitution of 1946, and it was extended during Vargas's period of democratic rule after 1950 (Silva 2008: 185).

Overall, corporatist labour law and guarantees for social and material rights had a vital position in the evolution of the modern Brazilian state, and trade unions appeared as a key organizational form for the nation within the political system. Importantly, however, Brazilian corporatism was historically less volatile than the Peronist system; Brazilian corporatism was less inclined to trigger hyper-politicization, and it provided a structure for the relatively smooth regimentation of labour. Moreover, although the corporatist state in Brazil was affected by high levels of patrimonialism, the distribution of patrimonial goods was subject to reasonably tight oversight, more effectively subordinating disparate regions and interests to the political centre, and it did not lead to a hollowing of public institutions to the same extent as in Argentina. Even authoritarian periods of government (for example, during Vargas's *Estado Novo*) were supported by moderately controlled patterns of patronage and clientelism. Patronage tended to reinforce state integrity, and even to forge a stabilizing link between state organs and economic actors (Cohen 1989: 257). This close link is typically seen as the basis for the policies of corporatist

developmentalism promoted both by Vargas (especially after his democratic election in 1950) and later by Kubitschek, in the late 1950s and early 1960s.<sup>41</sup>

Despite this, however, the Brazilian state has clearly experienced problems of structural depletion like those witnessed in other Latin American states, and its capacities have undergone significant fluctuations. Owing to its origins in the colonial era, for example, the Brazilian state was initially only weakly embedded in society, it was not founded as the centre of an (even inchoately) existing nation, and its inclusionary structure was not cemented across national society. Importantly, Brazil had the advantage over other Latin American states that it first acquired independence from Portugal with an already formed, moderately centralized territorial structure, so that the foundation of an entirely new state was not needed (see Adelman 2006: 342). However, the early construction of the state reflected classical patterns of post-colonial elite-led artifice. Until the end of the Old Republic (1930), a familiocratic dimension remained pronounced in Brazilian society, and political authority was sustained through *coronelismo* (the Brazilian analogue to *caciquismo*), in which local bearers of political power dictated the terms on which central state authority could be transmitted through society (de Carvalho 1975: 411; Pang 1979: 3, 28; Wiarda 1981: 11). As a result, the longer process of state and nation building in Brazil relied, at least intermittently, on privatistic bargaining or clientelistic patrimonialism,<sup>42</sup> and patronage and lateral links between political actors and regional elites, rather than organs of collective political participation, assumed a leading role in the construction of the national polity (Barman 1988: 202, 218; Graham 1990: 69–70). Further, until well into the twentieth century, parts of South Brazil were dominated by semi-independent European minorities, similar to informal colonies, whose obligations to the central state were weak, and whose affiliations to their countries of provenance (particularly Germany and Italy) remained strong, especially in the 1930s. One commentator has noted tellingly that, whereas in Europe most national polities were constructed through the incremental eradication of patrimonial ties and local structures by elites with a vested interest in centralistic state construction, the Brazilian polity developed on a reverse

<sup>41</sup> On the consolidation of developmentalism under Vargas, see Wirth (1970: 94) and Weinstein (1996: 87). On the later developmentalist policies promoted by Kubitschek, see Sikkink (1991: 37).

<sup>42</sup> For general discussion of patrimonialism in Brazil, see Roett (1992).

pattern. That is, state power was constructed ‘through the aggregation of ever-expanding solidarities’, which originated in more local interests, ‘until a national level was reached’ (Uricoechea 1980: 80). As late as the 1930s, statehood and nationhood in Brazil remained reliant on private foundations. In fact, the corporatist elements in the design of the *Estado Novo* under Vargas were expressly conceived as mechanisms for imposing a unified national order on state and society. As in other cases, corporatist labour law was applied across society as a core part of a strategy to expand the political apparatus into a national system, with a broadening social basis and a more extensive inclusionary structure. Nation formation was generally pursued by means of patronage-based, lateral techniques of inclusion (Erickson 1977: 16, 91; Cohen 1989: 86), and corporatist constitutional inclusion ultimately formed a key moment in this process.

As in other societies, moreover, Brazilian corporatism did not lead to an enduringly strong national state structure. This was linked to the fact that, as in other states, the corporatist system underwent a series of shifts across the left/right spectrum, vacillating between inclusionary and exclusionary patterns of governance, and different lines of corporatism exposed the political system to different pressures. Initially, Vargas created a reasonably integrative corporatist order, which, shaped by Mussolini’s example, subjected trade-union activity to strict control, and regulated and moderated the demands of organized labour. Although never labour-friendly to the same degree as Perón’s model of industrial economy, the corporatism pioneered by Vargas contained labour-inclusive elements, and, in some respects, it enhanced the bargaining position of trade unions (French 2004: 41, 59). In the system codified by Vargas, which was preserved after 1946, the economy was hierarchically organized in principal productive sectors, and a three-tier combination of unions, federations and confederations was established to manage national economic production. This system allowed actors representing different productive sectors to enter direct relation to relevant departments of state, and it brought potential security advantages to union members. However, it also made it possible for the state centrally to control the labour force, and to co-ordinate the labour market (Schmitter 1971: 115–18). Ultimately, this corporatist system was re-designed under the presidency of Goulart (1961–1964), who, in radical populist style, reconstructed it as a framework for far-reaching policies of re-distribution and social transformation (Erickson 1977: 59, 63; Silva 2008: 191). Whereas previously the

corporatist system had dampened labour conflicts, under Goulart labour conflicts became highly politicized, and the fact that they were conducted within the corporate legal framework around the state impacted damagingly on state capacity and stability (Lothian 1986: 1069; Collier and Collier 1991: 536). Notably, Goulart's populism relied on distinctive patterns of clientelism for recruiting popular support, which meant that departments of the civil service became susceptible to private office capture and loss of competence (Erickson 1977: 92; Geddes 1990: 225). This engendered hyper-politicized tendencies within the state, and it left democratic government vulnerable to internal sabotage. This depletion of state structure was then concluded in the establishment of the military regime (1964–1985). After 1964, the polity was transformed into an exclusionary corporatist system, consolidated in particular by labour-law reforms of 1967, which reduced collective bargaining rights, strengthened the hand of large-scale businesses and subject unions to strict political direction (Silva 2008: 200, 202). Corporatist mechanisms were thus utilized for the governmental suppression of left-oriented labour organizations and for hardening elite positions in society (Erickson 1977: 42; Keck 1992: 63; Sandoval 1993: 42). Notably, in 1964, Decree Law 4,330 suppressed strike action, and the first year of military rule saw a widespread purge of union activists.

At one level, in sum, the segmented corporatist organization of the labour force in Brazil reinforced the state. In particular, this system made it easier for the government to direct industrial production, and it meant that society remained sectorally partitioned and organizationally weak (Cohen 1989: 32). However, the corporatist order also obstructed the emergence of a solid inclusionary structure for the political system, and it limited the basic autonomy and social penetration of the state. It engendered a state structure that was reliant on horizontal channels of communication, linking departments of state to privileged lobbies or organizations standing outside the political system, which were able to obtain direct access to political offices. This meant that, up to 1964, the state was vulnerable to private annexation. These weaknesses then persisted into the authoritarian polity created in 1964, which was clearly marked by low autonomy. Notably, the military regime created an amorphously ordered political/administrative system, in which organs of state were laterally interlinked with powerful interest groups outside the state. Under military corporatism, networks of political-economic communication assumed a highly personalized

character, elites obtained high bargaining autonomy within the state and personal connections played a vital role in legislation and policy making (Schmitter 1971: 118, 307, 379). As a result, the state intersected in multiple ways with society, and both state and society were divided into particularistic sectors, each conducting specialized negotiations over political resources. Gradually, this fractured the structure of the state: the state was subject to internal disaggregation and exposed to obdurate vested obstructions to policy making (see Weyland 1998: 62, 66, 67). Over a longer period of time, therefore, its corporatist design did not provide a secure inclusionary structure for the state, and the Brazilian state's resources for autonomous political direction and legislation remained fragile.

In consequence, the process of transformation and reformist constitution writing in Brazil before the ratification of the democratic constitution of 1988 showed some similarities with other constitutional transitions. On one hand, this transformation occurred in a political setting in which the state's inclusionary structure was depleted. Additionally, the transition occurred in a context shaped by increasingly pervasive judicial power and by the growing impact of international law. During the dictatorship, notably, the judiciary in Brazil had retained a higher level of independence than in other South American military regimes. Even in the depths of authoritarian rule, the superior courts had a strong record of resisting vertical imposition of military authority (Osiel 1995: 535–6; Prillaman 2000: 78). In the post-authoritarian interim between 1984 and 1988, judicial independence and activism grew substantially, and independent rights-based legal action became more widespread. This was authorized, indicatively, through the Public Civil Action Act of 1985 (Law 7.347/85), which established procedures for anti-government litigation (Arantes 2005: 248). Ultimately, the constitution of 1988 placed a strong emphasis on judicial power and judicial authority, and it instituted a powerful Supreme Court. Although not originally conceived as an organ of constitutional adjudication in the strict sense, this court progressively acquired a quasi-constitutional position, evolving powers analogous to those of a Constitutional Court (Mendes 2012: 116–17). Art 103 permitted the court to receive and rule on direct petitions from numerous bodies (including federal unions, federal and state legislatures, political parties and the national bar association) regarding the constitutionality of legislation, which gave the court far-reaching powers of abstract review. As a result,



the judiciary became a pivotal institution in the new polity. After 1988, moreover, the constitution was repeatedly subject to revision; in particular, as mentioned, key amendments to the constitutional provisions for judicial authority were introduced in 2004 (Amendment 45). After this reform, the abstract jurisdiction of the Supreme Court could be exercised with binding force for all cases and all courts, and the list of petitioners to the court was widened.<sup>43</sup> In addition, international law was accorded high status in the constitution. During the preparation of the constitution in Congress, tellingly, influential figures had argued that the constitution should guarantee the primacy of international law over domestic law (Dolinger 1993: 1058). The final constitution established a long catalogue of basic rights, and it gave high status to international law as a foundation for such rights. For example, Art 5 of the constitution tracked the ACHR, and, although the contentious jurisdiction of the IACtHR was not recognized in Brazil until late 1998, the constitution allowed immediate incorporation of international human rights treaties (Rosenn 1992: 664). Later reforms significantly augmented the domestic standing of international human rights norms. Amendment 45 stated that certain international human rights treaties had the same status as constitutional amendments. This amendment was then interpreted by the Supreme Court to define international treaties as higher law within the domestic constitutional order, thus establishing international law as a system of *supralegality*.<sup>44</sup> Generally, the Supreme Court emphasized the elevated position of international treaties in the national legal order, and it used the ACHR as a parameter for national constitutional interpretation (Piovesan 2008: 28).

Judged from an immediate perspective, to be sure, it is not easy to align the post-authoritarian Brazilian Constitution to a model of transnational judicial structure building. It is widely claimed that constitutional democratization in Brazil produced a weakened, internally fragmented state.<sup>45</sup> There are a number of reasons for this interpretation. First, the Constitution of 1988 was drafted through a multi-level and highly decentralized process of constitution writing, open to multiple, often divergent pressures (Martínez-Lara 1996: 191; Barbosa 2012: 230). No fewer than 559 legislators played a role in drafting the constitution (Kapiszewski 2011: 164). In consequence, the drafting process

<sup>43</sup> See discussion in Oliveira (2006: 107, 110).

<sup>44</sup> This point was explained to me by Carina Calabria.

<sup>45</sup> See, for instance, Weyland (1996: 75; 1998).

gave expression to a series of complex compromises. Even leading players from the military regime retained positions of influence throughout through the course of democratization.<sup>46</sup> Moreover, the eventual constitution unstitched some of the more centralistic elements of earlier constitutions. For example, it re-designed the state as a three-tier federation, in which the municipalities, the states and the federal government were assigned relative regulatory autonomy in their own appointed functional spheres, thus, arguably, creating heavy peripheral counterweights to compact governmental power (Souza 1997: 170). In addition, the origins of the constitution in the reaction against military rule remained visible in its very extensive provisions for labour rights and welfare rights. This meant that many of its articles and rights clauses were only partly justiciable, and the extent to which the constitution fully distinguished primary norms from regulatory norms or policy provisions remained debatable. Furthermore, as the constitution underwent extensive amendment, legislative sittings did not always differ fully from constituent assemblies – the common function of constitutional norms as constructs which deflect social conflict from the state remained limited.<sup>47</sup> Clearly, moreover, the introduction of the constitution did not put an end to the dense interpenetration between public and private goods in Brazil. During the latter part of the transition under Sarney, the traditionally endemic private grabbing of office became acute, and the autonomy of the state was consonantly diminished (Weyland 1997: 67, 69, 74). Brazilian society preserved a corporatistic design, and clientelism remained prevalent as a line of access to public offices (Mainwaring 1999: 5, 28, 179–80, 200). The segmentation of the state under authoritarian rule then persisted into the democratic period, and the continued horizontal opening of the political system to private associations led to a proliferation of agencies and bureaucratic networks to manage contacts with society, which exacerbated the more general weak institutionalization of political parties and public organs (Weyland 1996: 60–61, 75). For these and other reasons, the constitution as a whole has repeatedly been described as a ‘failure’ (Reich 1998: 11).

In some respects, however, the Brazilian 1988 constitution can clearly be assimilated to a pattern of constitutionalism, in which the distribution of rights norms by judicial bodies, closely tied to

<sup>46</sup> For an account see Fleischer (1990: 230).

<sup>47</sup> See the excellent analysis in Arantes and Couto (2006: 41, 53).

international human rights law and jurisprudence, has assumed structure-building impact on the polity and throughout society as a whole. In fact, the emergence of a constitutional order with a strong judicial bias clearly served to heighten the integrity and the social penetration of the Brazilian political system, and it helped to remedy inclusionary and structural problems, which became endemic under military rule.

At one level, most obviously, the constitution established a balance within the organs of state, and personal arrogation of power was subject to formal constraint. This became manifest, clearly, in the threat of impeachment which led to the removal of Collor from the presidency in 1992. Moreover, the rise in judicial power significantly expanded use of the law in society, and it placed society as a whole in a more evenly inclusive relation to the political system. The increasing provisions for human rights in the constitution meant, as in other contexts, that access to courts increased, and the courts were required to address a rising mass of litigation. In 2002, the Supreme Court had no fewer than 160,453 filings (Oliveira 2006: 148). In the context of a geographically extensive federal polity, this meant that courts allowed individual persons to assume a more integrated position in the political system, and courts were able to play a vital role in transmitting legal decisions across society, so extending the societal reach of the political system. However, as in other countries, this also meant that controversial social themes could be incorporated within the political system in a relatively neutralized, rule-determined manner, so that the state was not endlessly confronted with volatile, personalized, or laterally disaggregating disputes. The rising formality of law thus served both to intensify the inclusivity of the political system, yet also to hold this inclusivity at a reduced level of politicization. At the same time, in key respects, the constitution helped to simplify the perennial problem of federalism in the Brazilian polity. On one hand, the 1988 constitution initiated a process of deep decentralization, involving a very substantial re-allocation of revenue from the federal government to the states and the establishment of multiple centres of power within the polity as a whole (Souza 2002: 33, 38). To this degree, as mentioned, the constitution led to a shift away from the centralistic policies of the military regime, dating originally from the system created by Vargas and perpetuated after 1964. On the other hand, however, the centralizing policies of the dictatorship had in reality merely cloaked covert, informal favouring of sub-national political actors and institutions. Accordingly, the polity

as a whole had been beset by deep centrifugalism. In formalizing the federal structure of the government, the 1988 Constitution eventually constructed a normative framework, within which the relation between centre and regions could be more precisely defined, and through which the functional hierarchy between federal and state governments could be determined. Notably, under Art 23 of the constitution, some governmental competences were shared between agencies at different societal levels. However, Art 23(1) stressed that all such agencies were bound to ensure the preservation of norms defined in the constitution. As a result, especially following the 2004 reforms, all holders of public power could only operate within norms extracted from human rights law. This was effected, in particular, by increasing supervision of lower courts by higher state courts.

The most notable structure-building function of the 1988 Constitution in Brazil became visible, however, in the sphere of labour-market regulation. As discussed, the constitution was not even remotely designed to erase the corporatist structure from Brazilian society. Emphatically, the Brazilian constitution did not rescind previous labour laws. In fact, post-transitional governments retained many elements of the corporatist system, including the unified structure of labour representation, state-sanctioned unions, extensive labour tribunals and mandatory union tax. However, the 1988 Constitution reduced the power of the state to control and integrate trade unions, and it established a basic framework for free unionization.<sup>48</sup> In an early important ruling, the Supreme Court opposed the imposition of restrictions on trade-union liberty.<sup>49</sup> After 1988, autonomy in collective bargaining, sectoral self-organization, and freedom of union activity became the 'structuring principle' for the constitution (Silva 2008: 239, 437–9). Vertical pacification of collective labour conflicts was no longer a primary source of legitimacy for the state apparatus, and instead it became one amongst a series of functions through which organs of state could acquire and display legitimacy. As in other transitional settings, therefore, the constitution applied subjective rights to separate social and political rights from the intensified mobilization of labour, and the rights guaranteed in the constitution implied a distinct functional partition between the state and other social organizations.

<sup>48</sup> On the preservation of pre-1985 labour laws after the transition, see Boito (1994).

<sup>49</sup> Brazilian Supreme Court, MS 20829, Relator Ministro Célso Borja, Tribunal Pleno, julgamento em 03.05.1989, DJe de 23.06.1989.

This re-definition of the state's legitimacy impacted on different dimensions of the Brazilian political system. At the basic level of workplace organization, the reconstruction of the state was reflected in the judicial regulation of employment conditions. Notably, the democratic political system preserved a dense system of judicial tribunals in the labour market, including, in Art 114 of the constitution, some provisions for compulsory arbitration. In some respects, the constitutional amendments of late 2004 widened the scope of the labour courts, and they extended judicial control over employment relations. Nonetheless, post-1988 labour legislation was slowly redesigned to weaken the intensity and unsettling impact of industrial conflicts. Tellingly, the reforms of 2004 contained provisions to ensure that such conflicts were treated on a singular basis, to limit mandatory use of arbitrational force in collective disputes, and generally to obviate the expansionary collectivization of labour unrest.<sup>50</sup> As mentioned, this was partly linked to the growing force of international law. At sub-executive level, further, the reconstruction of the state after 1988 reflected a discernible shift from *state-corporatist* to *neo-corporatist* patterns of economic co-ordination, in which emphasis was placed on mediated consensualism, instead of integrated state direction, as the basis for economic growth management (Doctor 2007: 144). At the highest directional level, moreover, by 2000, the Brazilian political system had evolved into a condition in which the governmental executive could obtain popular legitimacy through the support of trade unions and organized labour while at the same time pursuing fiscal policy, autonomously, on terms not directly dictated by union pressure. This became evident during Lula's presidency after 2003. Under Lula, the social policies of the government showed a strong anti-liberal emphasis, and the executive drew vital support from trade unions to pursue a moderate, but transformational distributionist agenda. At the same time, the expressly political functions of trade unions remained limited, and the unions operated outside the immediate apparatus of the political system (Araújo and Oliviera 2011: 93, 105, 109). The result of this was that, under Lula, a political system was consolidated which extracted general support from organized labour, yet which did not derive and consume all its legitimacy through the internalization of labour-related conflicts. This meant that both the governing party and the state were able to demonstrate some independence in relation to the social groups to which they owed their societal

<sup>50</sup> For examples of this view, see Martins Filho (2005: 40, 47) and Bensusán (2007).

support (Guidry 2003: 84, 103). As a result, the state was able internally to separate its legitimacy from specific conflicts, from specific acts of legislation and distribution, and from specific external actors, and it could promote the circulation of rights and the material inclusion of society while also constructing its legitimacy as a differentiated, and distinctly public, resource.

In each of these respects, the writing of the 1988 Constitution in Brazil enacted a process of state building, in which, in however inconclusive fashion, normative expectations in respect of basic human rights enhanced the inclusionary structure of the political system. Generally, the prominence of singular rights in the constitution hardened an autonomous legal foundation for the political system, and such rights raised its underlying inclusionary autonomy. Notably, the constitution allowed the political system to produce complex internal forms of legitimacy without presupposing full material-economic inclusion of society, and it enabled governments to steer a course between the traditional stark alternatives in policy making regarding organized labour: either violent repression or full incorporation. Importantly, the constitutional prominence of singular rights, partly based in international law, also facilitated the emergence of a system of legal inclusion, in which even the most conflictual aspects of social interaction were not incessantly politicized, in which departments of state could legislate in at least partial indifference to private status and organized interests, and in which rights of different kinds, including social and material rights, could be secured at a reduced level of intensity. This assumed particular importance in the context of a process of systemic transformation, in which democratic institutions were initially weak, and highly factionalized groups sought to colonize public resources. Equally importantly, the rising salience of human rights also reflected and reinforced a nation-building dynamic, in which the use of international norms to support national laws simplified the incorporation of a highly complex and both culturally and geographically diverse society within an overarching normative system. In this regard, rights-based judicial inclusion acted, in part, as an alternative to corporatist collectivism, based in highly contested social/material rights, as the foundation for national consolidation. In each respect, the constitutional reality of post-1988 Brazil distilled patterns of systemic abstraction and inclusionary structure-building that responded to pressures lying deep in the national political domain. As in other cases, international norms allowed the national political system

constitutionally to compensate for factors that had traditionally impeded its formation as an abstracted set of institutions, able to operate as the centre of a national system of inclusion. In particular, the fact that the political system no longer extracted its legitimacy solely from the national people expanded its sovereign power in society, and it enhanced its basic functions of even inclusion for its national population.

Clearly, neither post-1983 Argentina nor post-1985 Brazil developed through the democratic transitions as fully normalized national democracies. Nonetheless, in both societies, a political system was constructed in which the separation of the state from private organizations meant that public resources could be rotated between different parties. By 2000, the functions of government had been clearly defined as reserved to a distinctively public domain. This was evident, above all, in the fact that sequences of free presidential elections could be held, that previously dominant parties were willing to accept periods of time in opposition without attempting to sabotage the state as a whole (thus recognizing the formal distinction between state and government), and that military involvement in politics became much weaker. This was apparent, in addition, in the fact that both political parties and state executives became more established as organs separate from trade unions, able to create positive reserves of legitimacy for legislation independently of industrial antagonism.<sup>51</sup> Striking in these processes, above all, is the fact that, ultimately, both political systems developed increasingly autonomous inclusionary structures, and the integration of internationally defined rights in the political system made it possible for state institutions to distribute law across society without acute destabilization. The filtration of international human rights into domestic public law enabled state institutions to derive legitimacy from multiple sources, not all of which were externally politicized, and it meant that the state was not forced endlessly to manufacture its legitimacy through resolution of external conflicts. As they were supported by a stratum of international rights, then, states were eventually able to distribute other sets of rights across society without internalizing profound social antagonisms. Overall, the inclusionary structure, which, historically, states

<sup>51</sup> In this respect, it is important to note the way in which in Argentina through the late 1980s and 1990s Peronism transformed itself from a union-based movement party to a party with a diffuse and relatively unaligned agenda, often, especially under Menem, sympathetic to free-market policies. Menem's reconstruction of Peronism as a free-market movement does not often command great admiration (especially from myself). Yet, it illustrates an increasing autonomy on the part of political parties during this period. For analysis, see McGuire (1997: 236).



had built through the allocation of political and socio-material rights to their national populations, came close to completion as international human rights were added to this structure. International rights formed a vital fourth inclusionary tier of rights for society, and, once this tier of rights was established, states could integrate and legislate for their societies through other strata of rights without incessant disruption. The rise of judicial constitutionalism in Argentina and Brazil after the 1980s led, directly or indirectly, to the creation of political systems capable of complex processes of inclusion. The key to this was that they obtained a stratum of rights not based in domestic conflict, and they could allocate political and material rights without risking their legitimacy by integrating highly contentious organizations. This meant that other sets of rights could be secured more reliably, at a reduced level of intensity. As in other cases, therefore, the separation of rights from the concrete incorporation of the national people created a formula in which the capacities of states for national inclusion were enhanced.

### c Chile

The democratic transition in Chile, beginning in 1988/89, can also be seen, with some qualifications, as a process in which the intersection between independent judicial power, international human rights law and domestic public law had a compensatory structure-building impact on the political system. In consequence of this, the state as a whole evolved to a higher degree of autonomy, and institutions within the state became increasingly resistant to inner-societal pressures, which had historically weakened their abstraction.

The constitutional transition in Chile is not an ideal-typical case of judicial structure building. Initially, the Chilean judiciary played only a cautious role in the process of reform triggered by Pinochet's removal from the presidency in 1989, and in the ultimate assumption of government by an elected coalition of moderate democratic parties: the *concertación*, led by President Aylwin. After the end of Pinochet's military dictatorship, protagonists in human rights abuses were not as systematically prosecuted as in Argentina (at least up to Menem's pardon of 1989), and the policies of the *concertación* concerning military violations of international law were more pragmatic. Self-evidently, Pinochet's continued presence in the military until 1998 meant that international human rights norms did not become fully definitional for the transitional system, and the use of human rights to promote new

forms of legitimacy was restricted (Huneeus 2007: 434). Aylwin initiated inquiries into human rights violations under the dictatorship, yet his prosecution of such abuses was limited, and he argued that the need for reconciliation was at least as important as the need for prosecution. In 1990, importantly, the Supreme Court decided to uphold the Amnesty Law of 1978, which had been passed by the military junta in order pre-emptively to exempt military leaders from prosecution. This contrasted markedly with Alfonsín's refusal to acknowledge the attempted self-amnesty of the Argentine military leadership in 1983 (*Ley de Pacificación Nacional*). The recognition of military amnesty in Chile was later overturned, and the approach of the high judiciary to amnesty questions changed markedly after Pinochet's arrest for crimes against humanity in London in 1998. In fact, Pinochet's trial generally broadened the scope of human rights norms in Chile, and it ultimately gave rise to unusual transnational configurations in Chilean public law.<sup>52</sup> However, Aylwin's cautious approach was very significant for the early, most intensely contested period of transition.<sup>53</sup> In general, further, the Chilean courts were positioned at the weakest end of the spectrum of judicial activism. Initially, senior judges from the Pinochet era retained their position in the high judiciary, and they were reluctant to assume an activist role. Accordingly, observers have described the Chilean judiciary as a 'negative model' in this regard, or even as a 'judicial system that refuses to contribute to democracy' (Couso 2003: 88; Hilbink 2007: 239). Moreover, transitional and post-transitional Chile differed from other Latin American states in the unwillingness of the legal establishment to promote a full constitutional assimilation of international law. The view remained widespread (although not unchallenged) through the transition that international law had a normative status inferior to the standing of decisions enacted by the national *constituent power*, embodied in the 1980 Constitution, so that international law could only be domestically incorporated, not as an automatic higher law, but either through legislation or through formal constitutional amendment.<sup>54</sup>

<sup>52</sup> See pp. 281, 384 below. <sup>53</sup> For analysis, see Requa (2012: 83–84).

<sup>54</sup> This point was made repeatedly before the reforms of 2005. See most notably the Constitutional Court's advisory ruling on the Rome Statute, denying that international human rights treaties had constitutional rank, and insisting that sovereign powers pertain only to the people (Rol.346/2002). See for comment Zúñiga Urbina (2008: 826) and Martínez Estay (2013: 77). The current President of the Constitutional Court, Marisol Peña, has also written (2012: 611) important contributions concerning the authority of international treaties in Chilean domestic law, denying the validity of a doctrine of the block of constitutionality.

These reservations notwithstanding, however, judicial power and international law clearly acquired increased significance through the transition in Chile. Over a longer period, in fact, the Chilean political system was just as strongly defined by transnational judicial influence as other transitional and post-transitional states.

To illustrate this claim, first, in Chile, the origins of the process of re-democratization lay, in part, in the judicial domain. The dictatorship established by Pinochet in 1973 had the unusual feature that, by the late 1970s, leading figures in the regime had devised a body of constitutional law to legitimize the dictatorship, both internally and in response to rising pressures from the international community (Barros 2001: 16). Under the influence of Jaime Guzmán, a constitution was written in 1980; it was then approved by controlled plebiscite, and it came into effect, in partial interim form, in 1981. This constitution was designed fully to enter force in 1988, after a second plebiscite had been held to approve Pinochet's regime. After 1980, accordingly, governmental powers were exercised on an expressly provisional basis, in accordance with *transitory laws*, set out by the constitution, which meant that important elements of the regular constitution did not assume effect (Wühler and Lorca 1981: 854–5).

Pinochet's constitution was clearly conceived as a coercive document, designed to cement military authoritarianism. However, it contained certain general normative provisions, which ultimately curtailed Pinochet's authority. For example, it contained an extended catalogue of rights, enshrining freedom of conscience, privacy and equal treatment before law, which, although often circumvented, imposed certain constraints on the military executive. Moreover, Art 5, although declaring that sovereign power was vested solely in the *nation*, recognized that political sovereignty was subject to limitation by rights emanating commonly from human nature. In addition to these provisions, Art 81 provided for the institution of a Constitutional Court; a Constitutional Court had already in fact been created in 1970 under Allende. Under Art 82, this court was assigned a long list of functions, some of which were essentially repressive. Notably, it was designed to prohibit 'movements or political parties' whose objectives were contrary to the constitution, and it was supposed to enforce the spirit of the constituent power when authorizing decisions against political dissidents. Given that, under the 1980 constitution, constituent power resided in the executive, the court was construed as an immediate organ of sovereign state coercion (Zapata Larraín 1991:

283).<sup>55</sup> Through the 1980s, the court usually performed its designated repressive functions in due and diligent fashion. Most, although certainly not all,<sup>56</sup> of the judges sitting on the court implemented regime policy, and they even ceded repressive authority to untrained (and unrestrained) military tribunals (Snyder 1995: 270). Some observers have identified a liberalization in the rulings handed down by the Constitutional Court around 1985 (Zapata Larraín 1991: 287; Barros 2001: 21; Mac-Clure 2011: 230). Yet, as late as 1987, the court rejected the idea that guarantees of political liberty sanctioned under international law could be immediately enforceable in domestic law, and it insisted on the status of the national constitution, expressing ‘the power called “constituent”’ (i.e. the will of the executive), as the supreme source of normative guidance and authority in the polity (Larraín Cruz 1993: 74).

Despite this, nonetheless, the court was accorded some more regulative normative responsibilities. Significantly, it was allowed to review the constitutionality of laws, to ensure separation of competence between state organs and to control acts of state. Further, it was charged with responsibility for overseeing the integrity of plebiscites and other elections. On this basis, the Constitutional Court acquired powers that eventually played a vital role in terminating Pinochet’s regime. Most notably, the court insisted that the plebiscite for the extension of Pinochet’s presidency (1988) should be held in accordance with constitutional provisions, with similar opportunities for incumbent and oppositional factions, and subject to scrutiny by an Electoral Tribunal.<sup>57</sup> Through this process, the Constitutional Court gradually separated itself from the otherwise interlocked legislative and executive organs of Pinochet’s state. In discharging its functions as an organ required to ensure procedural regularity in political process, the court, in one important decision acted to detach the state structure from its physical coalescence with the dictator and the army, and it began to locate the state on free-standing legal-normative foundations.

<sup>55</sup> This view was set out in the famous *Almeyda* case in the Chilean Constitutional Court, Rol 46/1987, addressing the prohibition of dissident parties.

<sup>56</sup> In the wider judiciary, Carlos Cerda deserves mention as a most distinguished exception. He was suspended from the judiciary for implicating security police in the ‘disappearance’ of members of the Communist Party in 1976. In some cases in the 1980s the Constitutional Court rejected Pinochet’s laws on grounds of unconstitutionality. See, for example, note 57 below.

<sup>57</sup> Chilean Constitutional Court Rol 33/1985. For comment, see Barros (2002: 302), Weeks (2003: 3) and Huneus (2007: 434).

After the transition had begun, then, the legitimacy of the new democratic government in Chile was defined, to some degree, through reference to human rights. For example, the manifesto of the *concertación* in 1989 demanded a policy of open truth and reparation concerning Pinochet's regime, and it later convened a National Commission on Truth and Reconciliation – the Rettig Commission. Judicial bodies also gained increased importance at this time, and they played a substantial role in forging a close link between domestic and international law. Importantly, Reform Law 18.825 (August 1989) stated that organs of state, including the courts, were required to recognize international human rights norms and treaties. This involved a revision of the indeterminate recognition of natural rights expressed in Art 5 of the 1980 Constitution. Vitally for later developments, this meant that the amended constitution accorded higher normative force to international law. This ultimately proved an important sluice for the domestic assimilation of international norms, and it was later widely interpreted in the high judiciary as grounds to promote symmetry between domestic and international legal principles.

Subsequently, a number of decisions and events further intensified the authority of international human rights in Chilean domestic jurisprudence. In 1990, for example, Chile ratified the ACHR, which also elevated the political authority of judicial bodies. Later, as mentioned, the extra-territorial indictment of Pinochet in 1998 had a deep impact on Chilean law, raising the prominence and standing of international human rights law. Eventually, the Constitution was significantly revised through reforms of 2005, which reinforced the position of judicial actors, substantially altered the competence of the Constitutional Court and strengthened lateral controls on executive power.<sup>58</sup> These reforms also simplified appeals against legislation on grounds of constitutional incompatibility. After these reforms, the view still prevailed in the courts that international law was subordinate to the constitutional text, and that the national constituent power was the highest source of law.<sup>59</sup> However, these reforms clearly increased the importance of international law, and they recognized certain international norms as constituting *jus cogens* (Nogueira Alcalá 2007: 86; Requa 2012: 87–93). Notably, 2008 saw the ratification by Chile of

<sup>58</sup> See Carrasco Delgado (2008: 309) and Couso (2011: 309). One commentator argued that the 2005 reforms created in essence a 'new Constitutional Tribunal' (Ríos Álvarez 2006: 627).

<sup>59</sup> Chilean Constitutional Court, Rol 2387/2013.

ILO Convention 169 (1989) on rights of indigenous peoples, which assumed great importance in subsequent jurisprudence. As a result, changes in judicial behaviour also became evident, and the counter-vailing force of judicial actors increased significantly (Scribner 2010: 90; Couso and Hilbink 2011: 117). Recent years have seen a number of important cases in which the judiciary has assimilated international law to harden its position in the state. In *Urrutia Villa v Ruiz Bunger* (2009), the Supreme Court extended its reach, in fact *ex post facto*, over military figures by declaring there could be no statute of limitations for some crimes violating *jus cogens* norms. In *Vergara Toledo v Ambler Hinojosa* (2010), the Supreme Court overruled the principle of *res judicata* for some cases relevant to *jus cogens* norms heard under the dictatorship. In both instances, the Supreme Court invoked international law as a higher normative order for society as a whole. Perhaps most importantly, in *Eichin Zambrano* (2013), the Constitutional Court used rulings of the IACtHR to declare domestic laws unconstitutional. Overall, therefore, the longer process of reform in Chile reflected a pattern of democratization marked by a progressive intensification of judicial power, in which the intersection between domestic judicial authority and international norms played an increasingly important role. Notable in this is that the 1980 Constitution was never fundamentally re-written, and, throughout the period of transition, the basic constituent power remained associated with Pinochet's executive (Cristi 2011: 29, 169). The courts, therefore, assumed some attributes of a constituent power in re-directing the constitution through flexible interpretation, shaped by international law.

There are also more obviously sociological reasons why Chile does not seamlessly fit the model of judicial-constitutional structure building and state reinforcement. Traditionally, for example, Chile was widely identified as a relatively strong state (Valenzuela 1978: 13; Weyland 2009: 151), possessing both a strongly embedded democratic tradition and a high degree of constitutional continuity. The 1925 Constitution had served as the basic document of public law up to 1973, short periods of emergency rule, for example under Alessandri in the early 1930s, notwithstanding (see Lira and Loveman 2014: 148). Central to the general stability of the state was the fact that, until the 1970s, political parties were strongly institutionalized at a national level (Collier and Collier 1991: 108). Vitaly, moreover, political parties tended to be positioned at predictable points on a conventional left/right spectrum, similar to party-political positions in most European societies.

Corporatist and populist parties were not strong in Chile, and attempts to impose authoritarian corporatist strategies for managing industrial relations had been rather half-hearted and short-lived: for example, under Carlos Ibañez in the late 1920s and early 1930s (see Drake 1978: 102; Faúndez 1988: 23; Collier and Collier 1991: 194). Indeed, Chile had a quite distinctive capacity for the peaceful incorporation of parties of the political left within the framework of democratic politics, and acute industrial conflict did not typically place the same legitimating strain on the state as in Argentina and Brazil. In addition, although surely not absent, the fragmentational pull of patrimonialism that characterized many Latin American societies was not acute in Chile. Interventions of the military in regular politics were also very infrequent, and, before 1973, military activity was formally defined by rules of civilian politics.

Despite this, nonetheless, by the early 1970s, the Chilean state was showing signs of extreme duress and fragmentation, and previously stable patterns of inclusionary institutionalization had become fragile. Significantly, in the 1960s, Chile had witnessed a process of democratic mobilization, centred on a radicalization of the trade-union movement, which was promoted initially by President Frei (Valenzuela 1978: 33; Faúndez 1988: 254; Remmer 1989b: 6). This had triggered a rapidly polarizing increase in the intensity of political contestation, and a steep rise in the volume of conflicts regulated by the state. This process of intensified politicization culminated in the policies of Allende in the early 1970s. Although lacking proportionate electoral or congressional support, Allende attempted to reform the entire political and economic system on a democratic socialist model, aiming to nationalize key productive sectors of the economy, to incorporate organized labour in industrial planning and to subject industrial production to active co-determination by the workforce. Allende's transformative policies were emphatically not pursued to reconstruct the state on a corporatist design. Frei's government in the 1960s had displayed certain corporatist elements. Under Allende, by contrast, worker participation in industrial management was expressly de-coupled from union activity and membership, and it was intended to provide a basis, not solely for sectoral policies such as wage negotiations, but for macro-economic goal setting and broad social transformation. Nonetheless, the mobilization of Chilean society in the 1960s and 1970s created a conjuncture similar to that in other societies in Latin America: in extending the scope of political and socio-material rights, the state internalized social



antagonisms which it was unable to solidify or resolve, and these conflicts transformed the state into a hyper-politicized object of contest.

During Allende's short presidency, political institutions clearly lacked the institutional hardness and the basic inclusionary structure required to absorb or palliate rising societal polarization, and state institutions rapidly entered a state of seizure. On one hand, the model of industrial co-determination promoted by Allende was utilized by unions as a mechanism for forcing rapid wage hikes. This eventually led both to a deep alienation of traditional elites, and, more paradoxically, to a series of fissures between different left-oriented parties and factions, whose unity and cohesive support had been the precondition for the success of Allende's (in any case, weakly mandated) policies of socio-economic transformation (Zapata 1976: 89, 92; Faúndez 1988: 89, 92).<sup>60</sup> Owing to the hypertrophic mobilization of society, moreover, many groups on the left refused to accept systemic rules as parameters for political organization, and they by-passed formally institutionalized structures in pursuing their objectives (Valenzuela 1978: 80). Tellingly, Allende finally conceded before Congress that the redistributive demands expressed by the trade unions exceeded the capacity of the economy, insofar as it persisted within a legal framework offering protection to the capitalist mode of production (Landsberger and McDaniel 1976: 524). This condition was exacerbated by the fact that, as he insisted on pursuing a constitutionally circumscribed path to a socialist economy, Allende's opponents were able to politicize key clauses in the 1925 Constitution against the government's programme of nationalization, and anti-government forces used constitutional rules to legitimize resistance and insurrection (Sigmund 1977: 169–71).<sup>61</sup> Significantly, Allende's policies caused a deep and highly acrimonious alienation of the judiciary, in particular of the Supreme Court and the Constitutional Court. Leading judges on the two highest courts refused to support laws providing for expropriation of property and nationalization of industry. This meant that Allende was obliged recurrently to run new laws through Congress by decree, so that high-ranking figures in the judiciary could accuse him of erasing the commitment to a separation of powers set out in the 1925 constitution (Huneus 2007: 150). Moreover, Allende could not securely preserve the support of the

<sup>60</sup> Significantly, Allende denounced the 'economism' of striking workers, which he saw as destabilizing the wider process of structural transformation (Sigmund 1977: 209).

<sup>61</sup> A defining focus of constitutional controversy under Allende was the question of presidential veto of constitutional reform and the supermajority required to override this.

military. Near the end of his period of government, he introduced senior military figures into the executive. Yet he was unable to command their loyalty, and the army ultimately used its position in government to overthrow the democratic system to install Pinochet as head of state, resulting in Allende's (disputed) suicide.

The Chilean crisis of 1973 was, in total, a dramatic crisis of inclusionary structure in the political system. In this crisis, the state relinquished autonomy in face of the ultra-politicized conflicts which it had internalized, and, to some degree, generated through the accelerated expansion of the political and socio-material rights that it distributed through society. After Pinochet's coup of 1973, then, the state apparatus was transformed – effectively – into private spoils for the reactionary groups that invaded the political system. The Pinochet regime was consolidated through a strategy of *repressive depoliticization*, in which the directive powers of the executive were stripped out from the cycles of conflict caused by maximized inclusionary democracy, and public resources were utilized to silence potential opponents of the regime. Accordingly, the first years of Pinochet's regime revolved around three distinct policies. First, the regime was consolidated through a series of decrees declaring a state of exception and authorizing use of emergency laws to impose order across society. Second, the regime created a violently repressive military apparatus, authorized by decree, and perpetrating routine murder of dissidents and opponents of the regime. This was formalized in the 1980 Constitution, which defined the military as custodian of the 'institutional order of the Republic' (Art 90), and guaranteed far-reaching privileges for leading members of the military. Third, the regime was underpinned by a raft of policies intended sharply to reduce the legal standing and effective power of independent organized labour. Swinging measures were implemented in 1973 to diminish labour rights and to place severe restrictions on industrial action (Remmer 1980: 287). By 1978, the government introduced further decrees which weakened public-sector job security, cut legal representation of the workforce and defined membership in unsanctioned unions as contrary to national security objectives.

Corporatist arrangements in Pinochet's regime were not as pronounced as in other authoritarian states in Latin America. Initially, Pinochet's government selectively experimented with policies for the corporatist co-ordination of the economy. However, these experiments were mainly focused on the co-option of entrepreneurial elites, anti-Allende unions and some rightist peasant groups in political/economic

planning processes. To this degree, the early regime promoted a balanced or socially depoliticized corporatism, in which corporations were supposed to play a technical, subordinate role in promoting economic growth. Policies of this kind had in fact been promoted by some Chilean nationalists in the 1960s, and they were supported by the *gremialistas* (a reactionary quasi-party centred around Guzmán) through the 1970s.<sup>62</sup> In 1974, Pinochet promulgated the Declaration of the Principles of the Chilean Government, drafted by Guzmán. This document outlined some corporatist objectives for the regime, and it projected a distinctive model of the state as an overarching set of institutions, whose responsibility was focused on those higher-order social functions that could not be adequately performed, at a subsidiary social level, by ‘particular or intermediate societies’. This document defined the ‘principle of subsidiarity’ – that is, the granting of partial autonomy to sub-governmental corporatist units – as the key to the establishment of an ‘authentically free society’. However, this document differed from classical corporatist programmes as it reflected a distinctive pro-capitalist brand of corporatism, combining an authoritarian executive structure and a resolute defence of free ownership (see Cristi 2011: 73, 127). In similar spirit, the 1980 Constitution contained some very limited provisions for some apolitical sectoral representation (Art 23). Pinochet’s (generally repressive) new Labour Plan of 1979, which was introduced through a series of decrees from 1978–1979, assigned limited rights to trade unions and established restricted parameters for collective bargaining (Zapata 1992: 706). Nonetheless, by the late 1970s, the Pinochet government had effectively abandoned all, even notional, commitment to political corporatism. Instead, it pursued a policy of radical – although always selective – deregulation and de-collectivization, notably, in the Labour Plan, banning representation in central union federations, and in the 1980 Constitution (Art 19(16)), imposing harsh restrictions on some union activities.

Sociologically, therefore, some features of Pinochet’s regime, both in historical background and institutional design, set Chile apart from Brazil and Argentina, where corporatism and populism were far stronger. Nonetheless, in other respects, the constitutional transition in Chile occurred against a background which was similar to conditions in other societies. Clearly, the pre-transitional state in Chile was a

<sup>62</sup> See for discussion of these points the brilliant analysis in Álvarez Vallejos (2010: 326, 341, 350). See also Sigmund (1977: 221).

political system whose historical inclusionary structure had been eroded by the acute politicization of conflicts between socio-economic classes, and in which the expansion of material rights had triggered a quite catastrophic crisis. As a result, the state had been colonized by a military regime, primarily defined by its anti-labour policies and its proximity to powerful economic groups, both internally and internationally. In addition, Pinochet's regime was itself inherently unstable and vulnerable. In particular, it struggled to solidify its functions against society, and it was marked both by a privatization of governmental office and a progressive erosion of governmental autonomy. In absence of clear procedures for rotation of office, significantly, Pinochet used patrimonial techniques for appointments and for public decision making (Remmer 1989a: 150). Moreover, as the executive apparatus became more abstracted against society, it became vulnerable to de-legitimization – especially through economic crisis and military defection – and it was forced to rely more extensively on private support because of this. To be sure, the Chilean dictatorship retained important capacities for social co-ordination, and it did not finally relinquish societal control as had been the case in Argentina (Martínez and Díaz 1996: 66–9). In each above respect, however, Pinochet's regime was a political system marked by the typical problems of weak inclusionary structure resulting from bureaucratic authoritarianism.

In this setting, the Chilean transition was also a process in which constitutional revision served both to widen and to harden the inclusionary structure that sustained the capacities of the state. In Chile, as in other settings, the rise of judicial rights extracted in part from international law helped to establish an inclusionary structure for the state that enabled it to operate at a higher level of autonomy in relation to potent social actors, and to generate law in more independent and flexibly legitimated fashion.

First, the most obvious result of the growth of judicial power and rights-based norms in Chile was that the lines between branches of government were hardened, and checks were established against uncontrollable military involvement in day-to-day politics. Also important, however, is the fact that industrial relations were re-defined by a presumption in favour of singular rights. In this respect, some caution is required. The Chilean transition brought a less pronounced caesura in industrial policies than in other states. Many elements of Pinochet's model for the organization of labour were preserved through the transition, and support of the *concertación* for (limited)

liberalization of labour law did not translate into greatly increased strength for the labour movement (see Barrett 2001: 566, 577; Durán-Palma, Wilkinson and Korczynski 2005: 83, 86). In fact, the process of transitional reform in Chile was clearly overshadowed by a recollection of the disastrous loss of state capacity under Allende; great caution was exercised in economic policy making in order to avoid a repeat of any uncontrollable politicization of either the trade unions or the army. Despite this, however, the *concertación* promoted a liberalization of labour-market controls, and it repealed the more coercive laws regarding industrial administration. Pinochet's Labour Plan of 1979 and his 1987 Labour Code were subject to substantial, although step-wise, reform between 1990 and 1992, and a new Labour Code was enacted in 1994. Moreover, as in other transitions, the courts played an important role in addressing legal disputes initiated by trade unions. Notably, post-transitional Chile did not see a broad return to collective bargaining. In the longer transition, however, courts used international norms to regulate labour conflicts, at times applying international human rights law to produce relatively uncontentious, normally individuated, resolutions for union disputes.<sup>63</sup> As in other cases, further, the rise of judicial constitutionalism provided a basis for the development of a *neo-corporatist* system for policing industrial relations, in which unions obtained partial autonomy, but labour market planning was concluded without extensive trade-union participation. Through this system, the democratic government was able cautiously to increase rights for organized labour without internalizing deep industrial conflicts, and without locking unions into the state (Frank 2002a: 45; 2002b: 22). Ultimately, the growing separation between trade unions and state structure meant that political parties assumed heightened autonomy in relation to their constituencies, and unions themselves assumed higher levels of internal organization (Frank 2002b: 27, 52). This neo-corporatist bias was reflected in the modest increase in economic distribution achieved by the *concertación* (Muñoz Gomá 2007: 40).

Unsurprisingly, the democratic system that evolved in Chile in the 1990s is often characterized as a '*depoliticized* democracy' (Silva 2008: 22), in which primary processes of decision making were partly withdrawn from democratic contestation, and historical sources of class polarization were circumspectly excluded from the arena of political controversy (see Haagh 2002: 106). In some respects, such

<sup>63</sup> Chilean Labour Tribunal Ord. N 2328/130 (2002).

depoliticization was pursued, quite consciously, as part of a strategy of political structure building. After 1989, notably, leading actors in the political system avoided allocating sets of political and socio-material rights, which were likely to incorporate potent socio-political and economic organizations in the state, and so to expose the state to unsettling social antagonisms. Indeed, successive governments sought to build an inclusionary structure for the state by applying rights in a form that did not threaten to revive historically volatile patterns of collective mobilization. Throughout the transition, accordingly, the political system was consolidated through the incremental re-establishment of a system of rights, in which political and social/material rights were promoted by judicial bodies, securely authorized through international norms, and the allocation of rights under international norms prevented rights from transmitting unsustainable contests into the state.<sup>64</sup> Ultimately, the construction of less volatile system of rights, less strongly attached to national mobilization, became the basis for the re-emergence of a political system, able to preserve itself and to legislate and produce public policy, in a relatively autonomous relation towards powerful social groups. By the second presidency of Michelle Bachelet (2014), provision of social and material rights was greatly expanded. At the same time, the Constitutional Court made a series of path-breaking decisions regarding social rights, which were partly backed by consideration of international human rights law. Notably, these decisions extended social rights to cover areas of society that had previously been privatized by Pinochet.<sup>65</sup> As in other cases, therefore, the fact that the political system could reduce the intensity attached to political and socio-material rights meant that it was ultimately able to secure these rights at a level of stability that had historically proved impossible.

In each of these Latin American transitions, the assimilation of international human rights norms in national constitutional practices acquired vital importance because, to some extent, basic rights instilled an *internalistic* principle of legitimacy within the political system. In each case, the interlocking of national constitutional law and international law through the mediating functions of courts served, albeit to

<sup>64</sup> In the case above (note 63) the Labour Tribunal, with strong supporting reference to international law, argued that some workers' rights were not limited to contractual principles. Instead, they were subsumed under a broader, 'omnicomprehensive' construction of the person as subjective rights holder, based partly on German and Spanish concepts of rights of personality.

<sup>65</sup> See the recent high-profile case in the Chilean Constitutional Court on the limits of privatization in educational institutions: Rol 2787/2015.

varying degrees, to consolidate an autonomous inclusionary structure for the political system, which was relatively detached from every-day conflicts. This made it possible for the state partly to depoliticize class relations as sources of legitimacy, and it allowed the political system to harden itself against external organizations, often, in so doing, creating quite new policy opportunities for political actors. In each case, the penetration of international law into national societies acted to offset factors (especially recurrent exposure to hyper-politicized class conflict), which had traditionally weighed against stable statehood. Consequently, it created a legal/legitimational mix that eventually solidified the state at the centre of a reasonably secure inclusionary system within society. In Brazil and Argentina, notably, the partial shift in emphasis from corporatist conflict resolution to internationally defined rights as a basis of legitimacy also reflected a new dimension in a process of nation building. *Normative inclusion* (focused on citizens as holders of subjective rights) began to supplant, or at least supplement, *material inclusion* (focused on citizens as holders of collective rights) as the primary substructure of the national political system and of national society more widely. In each of the polities discussed, however, internationally defined rights assumed a central place in the inclusionary structure of the political system, and they insulated and stabilized inclusionary processes that the political system had not been able to conduct through domestically constructed strata of rights. In each case, the shift in the legitimational emphasis of the political system from the people as an integrated sovereign body to the people as an aggregate of international rights holders clearly consolidated the state's position within national society.

In this respect, it needs to be clear that in Latin America, human rights jurisprudence, both in the IACtHR and in national courts, ultimately began to place much greater emphasis on social and material rights than, for example, in the ECHR or under general international law. The IACtHR has handed down very important rulings on social rights, and, within certain constraints, it has constructively promoted the justiciability of social rights, often amalgamating classical personal rights and social rights to heighten the enforceability of social rights and to intensify positive obligations for states party to the ACHR.<sup>66</sup>

<sup>66</sup> The classical examples of this are the IACtHR rulings on the right to dignified life in *Sawhoyamaya Indigenous Community v. Paraguay* (2006) and *Yakye Axa Indigenous Community v. Paraguay* (2005). See excellent analysis in Keener and Vasquez (2009: 605). Most notably, however, see the fusion of classical personal rights and broader social rights in *Case of the "Street*



As stated, further, most national courts in Latin America have fostered a deep commitment to social rights. This is the case even in polities, such as Chile, which retained a relatively liberal emphasis.<sup>67</sup> In other states, however, the social rights rulings of superior courts often have far-reaching implications. In Colombia, for example, the Constitutional Court has taken an extremely active stance in promoting social rights;<sup>68</sup> this has involved interventions in budgetary planning,<sup>69</sup> use of international human rights treaties to prescribe material obligations to the national government<sup>70</sup> and even the creation of a monitoring system to ensure compliance with judicial rulings. In Argentina, as mentioned, the courts have also elaborated a strong corpus of social and economic rights.

However, the capacity of national states for expanding their inclusionary processes into the socio-material dimensions of national society is not easily separable from their incorporation of international human rights law, and international law has acquired great importance in the domestic strengthening of social and economic rights. Arguably, the recent rise of social rights in Latin America has been made possible by the fact that these rights were, initially, formalized and supported by international law, and, in their origins, they were relatively detached from collective inner-societal processes of collective mobilization, typically articulated through trade unions. This means that states can now distribute, and perform inclusionary processes through, social and economic rights from within a legal structure that is relatively abstracted against collective forces in national societies and national populations. Indeed, it means that states can circulate social rights without inducing and internalizing the unmanageable social conflicts, expressed through strong collective organizations, which had traditionally placed unsustainable pressures on national state institutions. In Colombia, most

*Children*" (Villagran-Morales et al.) v Guatemala (1999). In this case, judges Cançado Trindade and Abreu-Burelli argued as follows: 'The arbitrary deprivation of life is not limited, thus, to the illicit act of homicide; it extends itself likewise to the deprivation of the right to live with dignity. This outlook conceptualizes the right to life as belonging, at the same time, to the domain of civil and political rights, as well as economic, social and cultural rights, thus illustrating the interrelation and indivisibility of all human rights'.

<sup>67</sup> See Chilean Supreme Court Rol 5.727–2012.

<sup>68</sup> In T-025/14, for example, the Colombian Constitutional Court declared that living conditions of forcibly displaced persons was unconstitutional. See also the seminal definition of the right to health, linked to the right to life, in T-484/92. See also defence of the right to water in T-077/13. Since, 1992 the court has taken pains to ensure and accentuate the justiciability of socio-economic rights (see Iturralde 2013: 378).

<sup>69</sup> See Colombian Constitutional Court SU-995/99.

<sup>70</sup> See Colombian Constitutional Court T-426/92.

notably, where social and economic rights are most entrenched, these rights, including even rights to water and to education, have been justified by the high courts through their incorporation from international law in the domestic *block of constitutionality*.<sup>71</sup> In the Colombian setting, in fact, the power of organized labour was historically not strong, as trade-union organization was adversely affected by the general low centralization of society (see Delgado 2013: 103). Social rights were therefore eventually promoted, not through collective industrial organizations, but by human rights advocates, who were able to consolidate social rights law more effectively than trade unions. Across different Latin American societies, however, international norms appear to provide a more resilient basis for the legal inclusion of national society in its material dimensions than earlier policies for the corporatist organization of society.

Overall, it is arguable that Latin American states, historically committed to the extensive inclusion of the national people through a combination of political and social/material rights, have only evolved a sustainable structure of national political inclusion as they have added a *fourth stratum of rights* – international human rights – to the rights which they elaborated through inner-societal evolutionary processes. International human rights were first proclaimed, after 1945, as singular rights. Once consolidated as such, they were gradually extended, especially in Latin America, to provide a range of social and economic rights. Vital for the societal effect of international human rights, however, is the fact that they are declared, quite statically, in a legal domain above the cycles of politicization around national states. As a result, the allocation of such rights, often by courts, does not presuppose deep integration of societal conflicts and of organizations mobilized around such conflicts in the state structure: international rights harden the state against collectively organized expressions of constituent power. For this reason, the domestic circulation of international rights norms has enabled Latin American states to develop institutions with sufficient robustness to withstand the political pressures attracted to them by earlier processes of rights-mediated inclusion, and it has enabled them to allocate rights of different kinds, including social rights, more effectively. International human rights, therefore, have become formative elements in the inclusionary structure of

<sup>71</sup> See, for example, Colombian Constitutional Court T-077–13 (right to water); C-376/10 (right to education).

the state, and the relative abstraction of these rights against national populations has allowed states to penetrate far more deeply and inclusively into national societies than was possible under domestic systems of rights, defined by the mobilization of sovereign constituencies.

#### **d National states and indigenous rights**

In the Latin American polities discussed earlier, the penetration of international law into national constitutions assumed primary (although not exclusive) importance because it insulated states against historically unsettling pressures induced by *class conflict*. As noted earlier, however, in many societies outside Europe, inclusion of class conflict has formed only one of the pressures to which the national state, based in the integrated sovereign nation, and its legal apparatus have been exposed. In many societies in Latin America, the state was historically, and today still remains, vulnerable to pressures of at least equal intensity caused by the inclusion of multi-centric communities, reflecting stark centre-periphery divisions in society. In such cases, lateral affiliations, arising not solely from class prerogatives but also from regional or ethnic membership, have taxed and eroded the inclusionary force of the state. In fact, in many Latin American societies, owing to the original disjuncture between large territories, often containing ethnically diverse communities, and central state institutions originally imposed by colonial authorities, the power of the political system has suffered chronic depletion through the persistence of 'peripheral power loci', which stands outside central jurisdiction (O'Donnell 1994a: 162). Consequently, state power is often depleted as it is applied to regions and localities, in which power structures are partly closed against the state by local elites, and in which, in some cases, peripheral communities are organized by ethnic association. One important example can be found in Colombia. In Colombia, the general weakness of state structure has been exacerbated by ethnic centrifugalism, albeit amongst relatively small populations groups. An alternative example can be found in Bolivia. In Bolivia, a national corporatist state was created in 1952. In this state, close linkages between the government and the leading trade unions were intermittently promoted to paper over pre-existing ethnic affiliations, and to construct a uniform national state in a setting defined by low national cohesion and by the persistence of residually feudal organizational forms (Balenciaga 2012: 61). However, this state failed to impose a uniform national structure on society, resorting to deep reliance on patrimonialism to

secure regional support (Malloy 1970: 247). Both these states provide examples of structural debility caused by exposure to centre-periphery conflicts, often with an ethnic dimension. In such societies, however, the interaction between national and international legal norms has also – in some cases – contributed to the formation of an autonomous legal/political apparatus in society. In such cases, states have been able to utilize international norms, especially human rights law, to reduce the pressures resulting from conflictual centre-periphery relations, and they have been able to construct more reliably overarching inclusionary structures for their societies as a whole.

At a most obvious level, international norms have promoted structure building in multi-centric societies in Latin America through the jurisprudence of international judicial actors, and through the permeation of their rulings into national polities. As early as the 1970s, for example, institutions with supranational jurisdiction began to devise legal categories to facilitate the accommodation of pluralistic populations in national societies, and this obtained particular resonance in Latin America. Notably, in 1973 the Inter-American Commission for Human Rights adopted norms regarding rights of indigenous communities. With the entry into force of the ICCPR (1976), legal recognition was given (under Art 27) to indigenous communities and their rights (Eide 2006: 169). The legal recognition of rights of ethnic minorities was then strengthened in the 1980s. This was reflected in the formation of a UN Working Group on Indigenous Populations in 1982 (Boyle and Chinkin 2007: 48–9), and it gained expression, most importantly, in ILO Convention 169. Notably, ILO Convention 169 abandoned earlier assimilationist approaches to prior populations, and it began to confer distinct legal standing on communities not attached to dominant national populations. Progressively, the protection of communities was reinforced by policies of the UN. The year 2001 saw the establishment of a UN Special Rapporteur on the Rights of Indigenous Peoples. The *UN Declaration on the Rights of Indigenous Peoples*, adopted in 2007 but presented in draft as early as 1994, ultimately endorsed sustainable autonomy and separate collective rights for prior populations as core legal principles (Anaya 1991: 7). Through this process of recognition, a composite body of international statutes was created, expressing the presumption that pre-national communities could lay claim to collective personality and distinct shared rights. Tellingly, ILO Convention 169 revised classical definitions of nationhood, establishing that national self-determination need not be

identical with sovereign territorial control, and accepting that prior or pre-national populations could claim some rights of self-determination within existing states, some of which assumed protected status under international law (Errico 2007: 749). In parallel to these tendencies in the UN and the ILO, regional human rights conventions have also been interpreted in recent decades to provide protection for the complex rights claims of non-dominant, or prior, populations. For example, the IACTHR has used the provisions for a right for respect for life in the ACHR to harden the principle, originating in Colombian public law,<sup>72</sup> that all signatories must guarantee persons and collectives the right, not merely to life in abstract form, but also to 'life with dignity' (*vida digna*). This is widely construed to imply special rights regarding the protection of land and the preservation of culture for indigenous communities (see Pasqualucci 2008: 2–3, 14–15).<sup>73</sup>

To an increasing degree, therefore, international law reflects the fact that some societies contain pluralistic, perhaps hybrid, modes of attachment. This has particular relevance for societies containing large, and often in themselves disparate, pre-national populations, in which the imposition of central state power was originally tied to the administrative legacy of colonialism, and in which prior populations have rejected uniform lines of legal integration. In such cases, international human rights law has been able to create foundations for a *multi-inclusionary* legal/political system, in which different groups can seek legal recognition in categories that are not necessarily centred around national statehood. Increasingly, international rights norms have made it possible for some communities to reach outside the classical stratum of national public law, into the international arena, to demand and to secure distinct sub- or pre-national rights of inclusion (Yashar 2005: 289).

However, the structure-building impact of this change of emphasis in international law is most palpable in Latin America, not in supranational jurisdictions, but in legislative and judicial institutions within national societies with pluralistic, multi-original populations.<sup>74</sup> For

<sup>72</sup> See Colombian Constitutional Court, T-426/92.

<sup>73</sup> The Inter-American Court first upheld claims for indigenous collective land rights in *Awas Tingni* (2001), arising in Nicaragua. But this was more strictly formalized in the *Yakye Axa* (2005) case in Paraguay (Pasqualucci 2006: 299, 311).

<sup>74</sup> See Anaya (1991: 14), Nzouankeu (1994: 224–5), Van Cott (2000a: 210, 214), Eide (2006: 169), Viljoen (2007: 242) and Lenzerini (2007: 167). On the specific link between the promotion of tolerance for cultural differences and the openness to international law in many Latin American societies, see Uprimny (2011: 1593).

example, some societies with large prior populations, notably Bolivia and Mexico, were quick to accede to ILO Convention 169 and then to ensure its domestic enforcement (Brysk and Wise 1997: 90, 96; Postero 2007: 51). The Convention was actually drafted under Bolivian Chairmanship, and Bolivian courts have used it in important domestic cases (Anaya 2004: 24). In recognizing the existence of a multi-normative legal order, moreover, a number of Latin American states have adopted organic laws that promote the decentralization of national state structures, partly to simplify the separate incorporation of pre-national populations. As a result of this, municipalities, commonly populated by ethnic groups, have been able to assume high levels of autonomy within national states. Initially, for example, the 1991 Constitution of Colombia made broad provision for rights of indigenous communities. Later, the Ecuadorian Constitution of 2008 (Art 257) established autonomous indigenous territories, with collective cultural and political rights. However, the key example of this is the Popular Participation Law in Bolivia, which was introduced in 1994, and which was later assimilated in Arts 200–206 of the reformed Constitution of 1994.<sup>75</sup> Following the endorsement of ILO Convention 169, in fact, Sánchez de Lozada's government in Bolivia changed the national constitution to recognize Bolivia as a 'multiethnic' and 'pluricultural' nation. The same period also saw the introduction of laws in Bolivia guaranteeing collective titles for the territories of prior populations and laws providing for bilingual education (Postero 2007: 5–6). This tendency culminated in the revised constitution of 2004 and the final constitution of 2009, drafted during the presidency of Evo Morales, which defined Bolivia as a 'multiethnic' and 'pluricultural' Republic. In 2007, Bolivia incorporated the UN Declaration on the Rights of Indigenous Peoples in domestic law. Through such processes, states with a complex pre-national ethnic structure began to assimilate internationally defined norms in order to formalize a domestic legal order adapted to demands for pluralistic rights and multi-layered, often cross-cutting, claims for legal inclusion.

From the 1990s onwards, further, a number of different societies began to promote quite distinct patterns of state and constitution making, which expressly drew legitimacy from multi-focal processes of political inclusion and mobilization. This was partly initiated by Colombia, whose 1991 constitution was originally promoted by grass-roots organizations and which gave legal recognition to a variety

<sup>75</sup> For comment on Bolivia, see Centellas (2003: 94) and O'Neill (2005: 63).

of political subjects, including NGOs and indigenous groups. The 2008 constitution of Ecuador is also an important example. The most important example of such constitutional formation, however, is the 2009 constitution of Bolivia, which has the largest pre-national population. This constitution was founded in a multi-centric, plurinational construction of the sovereign national will, and many social groups played a role in drafting it (see Schavelzon 2012: 160). This constitution also sanctioned partial governmental autonomy for indigenous communities, to which it provided for the transfer of legislative and judicial powers. Moreover, the Bolivian high courts have often insisted on entrenchment of constitutional rights for indigenous populations.<sup>76</sup>

In some respects, multi-centric or plurinational constitutions can appear as striking exceptions to wider patterns of judicial constitutionalism. Notably, such processes of legal foundation have been marked by hostility to the universalizing implications of international law. Often, plurinational constitutions expressly associate international law with the legacy of imperialism and international economic hegemony. They promote local autonomy and localized expressions of constituent power both as alternatives to supranational normative systems and as parts of an ongoing process of decolonization. Moreover, the formation of plurinational constitutions was driven by a deep insistence on the importance of social rights as instruments of societal inclusion, which clearly prioritized socio-material rights over singular rights (Gamboa Rocabado 2010: 162). In some cases, furthermore, these experiments have created populist governments with limited respect for judicial autonomy, and in which the willingness of judges to rule against the government is not guaranteed. As a result, plurinational constitutions also restrict the independent authority of judicial institutions in national societies. For example, the Bolivian Constitution (Art 196) declares that the Constitutional Tribunal is bound to the will of the constituent power, which has to be recognized as the highest interpretive criterion for all law. Bolivian judges have openly advocated a strong doctrine of constituent power;<sup>77</sup> in some cases, this constituent power is associated with the will of the sitting government, and judges have tailored rulings citing this

<sup>76</sup> The Constitution of Bolivia (Arts 1–2) notably defines the state as a plurinational state and guarantees rights (at the time of writing, not fully realized) of indigenous self-government and autonomy. For comment see Lupien (2011). Despite the fact that these commitments still await full enforcement, rights of consultation for indigenous peoples were hardened by legislation of 2012.

<sup>77</sup> For one amongst a number of related cases, see Bolivian Constitutional Court 0168/2010-R, p. 14.



doctrine to accommodate the prerogatives of the dominant party.<sup>78</sup> In some cases, additionally, plurinational constitutions recognize indigenous law, in some spheres, as a source of legality,<sup>79</sup> and they define provision of justice as a prerogative of local communities, thus seemingly breaking with wider tendencies towards inner-societal promotion of universal norms. One observer even calculates that only 55 per cent of Bolivian municipalities have formal judges (Hammond 2011: 660).

Despite this, however, these plurinational constitutions, although concentrated on the activation of localized constituent power, are identifiably products of the rising impact of international law. In fact, the local decentration of political authority which they promote clearly reflects wider pluralistic developments in international law.

The significance of international law for plurinational constitutions is visible, first, in the fact that they are usually linked to the ratification of international treaties regarding indigenous rights, alongside more general rights, and they clearly reflect an interaction between national institutions and transnational norm setters.<sup>80</sup> As discussed, norms formalizing a complex rights structure for multi-centric national societies were first articulated in international law, and they entered national law from that source. Before and during the process of plurinational constitution making in Bolivia, for example, indigenous movements mobilized expressly around provisions of ILO 169, and they authorized their exercise of constituent power on that basis (see Lazarte 2015: 69). In fact, the importance of protecting international human rights, including indigenous rights, was a point of common accord in the Bolivian Constituent Assembly that produced the 2009 constitution, such that the constitution-making process was always legitimated by international law. In Bolivia, further, the courts invoked international law to give weight to protection for indigenous rights after the plurinational constitution came into force, and international sources of indigenous rights still remain palpable in domestic law.<sup>81</sup> Bolivian courts have not been uniformly strong in their defence of indigenous rights, especially in political conflicts.<sup>82</sup> Notably, although in 2012 consultative rights were guaranteed for indigenous communities, the guarantees for indigenous

<sup>78</sup> See Bolivian Constitutional Court, Declaration 0003/2013.

<sup>79</sup> Usually, this recognition is formally restricted. Law 073 (2010), the main determination of indigenous judicial authority in Bolivia, places (Art 10,II) strict limits on the scope of indigenous jurisdiction. One account (Herrera Añez 2013: 287) argues that it reduced 'the wealth of indigenous justice' to its 'minimal expression'.

<sup>80</sup> See p. 295 above. <sup>81</sup> Bolivian Constitutional Court, 2003/2010-R.

<sup>82</sup> See, for example, Bolivian Constitutional Court 0300/2012.

autonomy set out in the constitution are still far from reality. However, there are important cases in which ILO Convention 169 and other elements of the block of constitutionality have been invoked to declare laws discriminating against indigenous groups unconstitutional.<sup>83</sup>

Second, the significance of international law for plurinational constitutions is apparent in the fact that these constitutions have not fully abandoned the model of judicial democracy. In fact, although they guarantee protection for local and indigenous law, they have established Constitutional Courts to ensure the domestic authority of international human rights laws. In Bolivia, for example, the move towards increased protection for indigenous rights coincided with a partial reinforcement of judicial power. As mentioned, the power of the courts in Bolivia under Morales is stronger under formal law than in constitutional practice. However, a Constitutional Court was established in Bolivia in 1998, and its position, although never authoritative, was strengthened in later constitutions. Now, the constitution of 2009 (Art 410, II) defines (albeit very ambiguously) international human rights treaties, together with the text of the constitution and the norms and values of the community, as part of the core corpus of constitutional law: the *block of constitutionality*. Art 256 of this constitution ranks international human rights treaties above domestic constitutional law, including customary law, and it clearly states that where international norms give stronger protection for human rights than domestic laws, they shall have primacy. The authority of the doctrine of the block of constitutionality is not as clear in Bolivia as in Colombia, and it has been applied rather pragmatically. In cases of conflict, however, the Bolivian courts have commonly placed internationally defined universal rights above indigenous law, and they have stressed that norms established by the IACtHR must prevail over communal interests and local patterns of justice protected in the constitution.<sup>84</sup> On one hand, in fact, the courts have been willing to use the block of constitutionality to defend the legal equality of indigenous groups.<sup>85</sup> However, the courts have also declared that indigenous law remains constrained by general human rights law. In important cases, the courts have emphasized that indigenous law has authority as ordinary law, but, being bound to respect

<sup>83</sup> Bolivian Constitutional Court 0260/2014.

<sup>84</sup> Bolivian Constitutional Court, 0323 (2014). Use of proportionality in linking indigenous law to human rights law is also evident in Bolivian Constitutional Court, 1624 (2013). In 0778/2014, which restricted indigenous rights, the ACHR was declared part of the domestic block of constitutionality. This hierarchy is also stated in Law 073 Art 10,II(a).

<sup>85</sup> Bolivian Constitutional Court 0260/2014.

common values, it is subject to rules of proportionality where it involves a restriction of internationally prescribed rights.<sup>86</sup> To this degree, particular legal sources, such as indigenous law, ultimately assume a subordinate position in the hierarchy of constitutional norms, and they are in some cases subject to restriction by international norms (Andaluz Vegacenteno 2010: 49–52).<sup>87</sup> In other countries, Constitutional Courts have been willing to acknowledge plural rights in society, but they have also insisted on international human rights as a final baseline for legal recognition and entitlement. For example, the Colombian Constitutional Court has ascribed great importance to indigenous rights.<sup>88</sup> Yet, in so doing, it has remained insistent that customary laws must comply with residual rights standards, and, in cases of conflict, general human rights law has usually prevailed over indigenous rights (Van Cott 2000b: 45).<sup>89</sup> As mentioned, the Colombian Constitutional Court was a pioneer in developing a doctrine of the block of constitutionality.

Third, however, the impact of international norms on plurinational constitutions is manifest in the fact that these constitutions were usually constructed against a background marked by long processes of international economic reform, and, in this respect, too, they were deeply shaped by an international normative conjuncture. Notably, most of the societies in Latin America in which plurinational or *multi-inclusionary* constitutions were drafted had been subject to liberalizing economic reform policies in the 1980s. During this time, uniform monetary rights had been imposed across national boundaries, usually leading to far-reaching processes of domestic economic and institutional reconstruction. These policies, known as Structural Adjustment Programmes (SAPs), were implemented by the World Bank and the IMF, and in some countries they tied international aid and investment to the willingness of national governments to reduce public spending and to balance fiscal budgets, to limit economic interventionism, to restrict public-sector employment and to free domestic markets for global commerce. Overall, clearly, these policies were designed radically to cut back the fabric of the state in debt-laden developing countries, and they had a deep impact on the inclusionary foundations of national states, often depriving these states of the material goods

<sup>86</sup> Bolivian Constitutional Court, 1422/14.

<sup>87</sup> See Bolivian Constitutional Court 0152/2015-S2. In this ruling, acts of indigenous justice were deemed unacceptable because they contravened the ACHR.

<sup>88</sup> See Colombian Constitutional Court, C-608/10.

<sup>89</sup> See Colombian Constitutional Court, T-349/96; Colombian Constitutional Court, T-921/13.

(i.e. welfare, benefits) through which they had previously incentivized national inclusion. In Latin America, notably, these reforms greatly modified the traditional structure of many states, and, as they reduced the monetary resources available to some states, they undermined the corporatist mechanisms that had been previously used to distribute income and promote strategies of class inclusion, nation building and developmentalism.<sup>90</sup> In particular, these reforms had palpable implications for societies with complex ethnic structures. Up to the 1980s, many societies in Latin America had used corporatist constitutional arrangements to integrate sub-national communities, and minority and pre-national populations had often been bound directly to the state through official unions and other corporatist bodies. Indeed, in many societies, corporatist constitutions had played a decisive role in connecting indigenous populations to national institutions, and corporatist channels of interaction between the state and indigenous communities, typically entailing high levels of prebendalism and favouritism, had been assigned quite distinct integrationist, nation-building functions (Postero 2007: 38–9; Lucero 2008: 66; Balenciaga 2012: 147). In some corporatist systems, in fact, indigenous communities had been integrated in peasant unions, without regard for ethnic affiliation, and these unions had been constructed as lines of articulation between the state and peripheral communities. Corporatism, often implemented as a strategy for allocating privilege and material resources to select groups, had thus been utilized to impose homogenous motivations and identities on factually fragmented nations,<sup>91</sup> and it was designed to promote affiliation to the national state over affiliation to other group memberships.

At one level, quite evidently, the structural adjustment policies of the 1980s had immediately damaging implications for indigenous and minority groups in many Latin American societies. To the extent that they imposed reductions in public spending and state intervention, these reforms impacted in very deleterious fashion on poorer sectors in national societies, typically located in rural areas containing large indigenous groups (Brysk and Wise 1997: 82). In the first instance, these reforms led to large-scale economic marginalization and political disenfranchisement. Paradoxically, however, the thinning down of the corporatist system caused by international monetary policies also

<sup>90</sup> See, for example, Burke and Malloy (1974: 50, 64) and García Argañarás (1992: 302).

<sup>91</sup> See discussion of Bolivia in this context in García (1966: 598, 606) and Schavelzon (2012: 92).

meant that, in some Latin American societies, groups which had been tied to the state through corporatist patterns of interest aggregation and nation building began, of necessity, to assert alternative rights claims and demands for inclusion, often focused outside state institutions. In such settings, the erosion of the monetary capacity of national institutions meant that indigenous groups lost material incentives for accepting direct linkage to the central state. This opened domestic societies to the more complex principles of inclusion increasingly declared in the international domain, and models of multiple, sub-national self-determination were able to permeate, and to gain concrete reality in, national legal/political structures and practices.

This is exemplified by the case of Bolivia. In Bolivia, the national revolution of 1952 had originally created a central state, with a very strong, and partly repressive, corporatist emphasis, in which, up to 1956, the executive entered an arrangement of co-governance (*cogobierno*) with the national labour confederation, based mainly around powerful mining unions. At the core of this system was the assumption that trade unions could create a politically integrated nation, and, in acting to secure material rights of the labour force, they could also construct an order of political rights, through which persons in different social spheres and regions would be incorporated in the state: unions were imputed a core role in the 'centralized construction of the nation' (Linera 2014: 204), making the state a common physical presence in the realities of heterogeneous communities. Following the liberation of the peasantry in the agrarian reforms of 1953, then, the government promoted a system of *peasant unionism* as part of a broader policy of corporatist national integration and nation building, to supplant the deep regionalism previously imposed by large landowners. Under this corporatist system, peasant communities, often with large indigenous populations, were linked to the administrative apparatus of the state in organized unions, representing class-based or productive sectors; peasant unions were placed alongside miners' unions and unions representing other single professions. After the military coup of 1964, the link between the peasant unions and the revolutionary government was replaced by a more vertical link between unions and the state (Rodríguez de Ita 1994: 165). Nonetheless, peasant unionism remained an important part of the Bolivian public economy long after the revolutionary corporatist experiment begun in 1952 had collapsed. Indeed, peasant unions remained strong until the 1980s, when monetary reforms, originating in global economic directives,

were introduced. These reforms reduced the resources at the disposal of the state, so that its ability to connect different parts of society through pacted material allocations to unions was undermined.<sup>92</sup>

Notable in the system of peasant unionism, however, is the fact that it was not effective in promoting social and material inclusion for national society. On one hand, peasant unions were placed in a position of relative disadvantage within the corporatist apparatus, and they often had weaker influence than other, far more influential urban industrial organizations, especially mining unions. At the same time, until 2005 many professions remained closed to members of indigenous groups, and even travel to major urban centres was difficult for persons from pre-national communities. Moreover, peasant union leaders at times acted as dispensers of patronage; in so doing, they tied peasant communities to the state through distribution of privileges, but they also consolidated some regions as islands of influence, partly beyond the reach of the central state (see Dandler 1969: 10; Malloy 1970: 213–4; Useem 1980: 466). Peasant unionism was designed to impose unitary class-based identities on ethnic populations, and it linked material integration to their renunciation of distinct ethnic affiliations and customary practices (Lazarte 1989: 188; Haarstad and Andersson 2009: 10). However, the inclusionary structure created by peasant corporatism was always inherently fragile, and it did not provide a foundation for an evenly inclusive political system.

In Bolivia, in consequence, the liberalizing reforms of the 1980s had a number of quite distinct implications and outcomes. Clearly, these reforms underlined the limits of the state's ability to integrate society through socio-material rights, and they weakened the corporate power of the national state and national trade unions. Initially, they also damaged the welfare and healthcare provisions offered by the state (see Pfeiffer and Chapman 2010: 150). Yet, over a longer period, these reforms often had the effect, albeit delayed and inadvertent, that indigenous groups, once their monetary links to the state had been eroded, began to separate themselves from vertically constructed class affiliations and to mobilize around alternative identities, not solely projected and controlled by the state (see Fontana 2014: 305–8). Through this process, peasant unions did not disappear, and they continued to play an important social role. However, indigenous movements, often

<sup>92</sup> Linera (2014: 140) dates the end of the Bolivian corporatist system, reflected in the renegotiation of collective bargains, to 1985.

in fact utilizing structures of representation established by unions, began to mobilize more independently, often around human rights vocabularies, in the social spaces that had traditionally been dominated by unions. As a result, indigenous groups availed themselves of new sources of inclusion, and they distilled ethnic affiliations into rights claims for recognition and equality that transformed and widened society's inclusionary order (Andersson and Haarstad 2009: 11, 23): these groups emerged as 'new social actors', claiming not only economic rights but also hard political rights (Balenciaga 2012: 148). As such, they ultimately assumed important roles in the process of national constitution making. In fact, this eventually meant that indigenous groups became more effective in securing social and material rights. Such rights were strongly protected under the 2009 constitution, and judicial rulings effectuating such rights are often supported by international law.<sup>93</sup>

In Latin America, quite generally, the economic marginalization of sub-national groups through international structural reforms often produced quite new multi-centric models of inclusion and nation building, which superseded the more monolithic pattern of integration through social and material rights fostered by national corporatism. It was often against the background of internationally dictated reform that processes of political decentralization and concepts of multi-centric sovereignty began to develop, commonly giving rise to multi-focal patterns of constitutional government. Tellingly, several commentators have observed how, in different societies, the weakening of the corporatist state in the 1980s engendered new opportunities for pluralist democracy and multiple forms of citizenship (Gustafson 2002: 280; Yashar 2005: 55; Postero 2007: 16). It was in this setting that national governments began to accept and identify pluralistic rights, instead of rights of material incorporation, as institutions of legal inclusion. In some societies that developed multi-centric constitutions, political pluralism was promoted quite consciously as an alternative to corporatistic centralism (Schavelzon 2012: 11, 92), and decentred inclusionary structures were fostered in order to erase traditional sources of patrimonialism, encouraged by corporatist constitutional policies (Gamboa Rocabado 2010: 180). Although often expressly hostile to international law,

<sup>93</sup> See Bolivian Constitutional Court 0778/2014. In this case, focused on questions about the standing of indigenous law, the court declared social and economic rights fully justiciable. The court supported this judgment by citing the ICESCR and declaring the ACHR part of the block of constitutionality. See also the defence of collective indigenous land rights in Bolivian Constitutional Court 139/2013, citing ILO 169.



therefore, the rise of plurinational constitutionalism in some Latin American societies is not easily comprehensible outside the context of developments in international law. Although plurinational constitutionalism accords certain collective rights to different communities, it reduces the integrative functions attached to purely material collective rights, and, instead, it promotes collective rights as rights of political participation. In particular, plurinational constitutionalism allocates collective rights to communities as rights to be exercised outside the state, and it weakens the expectation that socio-material rights should incorporate different concrete sub-national groups directly in the state. Multi-centric national inclusion began to evolve as international legal norms filtered into national societies where traditional governmental structures had been eroded, and these norms formed an alternative to national structure building through corporatist interest mediation: through state-centric distribution of socio-material rights.

Naturally, it remains to be seen whether the experiments in plurinational constitutionalism in Latin America will remedy fragmentational pressures in national political structures. It is at least arguable that these constitutions are simply reformulating older categories of populist authoritarianism. In these new patterns of constitution making, nonetheless, the pervasive influence of international legal norms has at least created new legal formulae for states to incorporate complex populations and to replace traditional patterns of structural formation, which failed to pierce deeply into society.<sup>94</sup> Traditionally, in Latin America, most states had addressed centre-periphery conflicts either, primarily, through coercion, or, secondarily, through palliative techniques of material compensation. Typically, such inclusionary strategies had only limited success, and states lacked sufficiently robust inclusionary structures to imprint an enduring normative unity on society. The domestic filtration of international norms, however, has created new modes of inclusionary structure building for political systems confronted with ethnically complex populations. In some respects, this occurred because internationally defined rights now reduce the tendency in political and material rights to force society into full convergence around political institutions, and they allow new political, or even new constituent, subjects to emerge, in social

<sup>94</sup> See the account of 'institutional reinforcement' caused by new constitutionalism in Balenciaga (2012: 57).

locations formerly monopolized by government bodies. This means that the people can emerge as pluralistic entity, partly located outside state institutions. In fact, in many cases, the growth of a stratum of international rights in national society ultimately became the precondition for the renewed distribution of more classical sets of rights, often establishing distinct political and socio-material rights for pre-national communities. In some respects, this occurred because the interaction between national and international law allowed societies to acknowledge that they could not be easily centred around a simple singular demos or a simple singular constituent power. The penetration of international law into national societies meant that societies began to accept and normatively to accommodate a high degree of variance and multiplicity in claims for legal inclusion amongst different social groups. The domestic inclusion of international norms thus permitted a concurrent, relatively apolitical, inclusion of different populations, and it limited the strain placed by these processes on organs of the central state. In such settings, the assimilation of international law often insulated a society's political system against its historically most unsettling conflicts, and it created new opportunities for societal inclusion and national formation. Above all, international law stabilized the political system against weaknesses caused by its historical compulsion to extract legitimacy from the sovereign national people.

#### CONSTITUTIONALISM AND INCLUSIONARY STRUCTURE IN SUB-SAHARAN AFRICA

With important variations, related patterns of structural formation can be observed in recent processes of systemic transformation in Sub-Saharan Africa, beginning in the early 1990s. Both in societal environment and in institutional results, these processes have reflected tendencies similar to those in Europe and Latin America.

Since 1990, on one hand, an increasing number of states in Southern Africa have acquired reformist constitutions, with provisions for democratic government. Moreover, many of these constitutions established powerful judicial institutions. Indeed, many African states have recently seen a growth in the power of superior courts, armed with extensive powers of review, which are intended to preserve the integrity of constitutional law, including more entrenched bills of rights, as the essential source of political legitimacy. As discussed below, in fact, many new constitutions in Africa ascribe singular importance

to the judiciary as a leading organ of reform (see Prempeh 2006: 1241; 2007: 505). In addition, the constitutions of many African states have been decisively shaped by interaction between national courts and transnational judicial communities, and most accord high status to international law, especially human rights law.<sup>95</sup> This was already manifest in the first reformist constitutions: notably in Art 144 of the 1990 Constitution of Namibia. Most subsequent constitutions, to varying degrees, place emphasis on international law in both domestic legislation and judicial practice.

In these respects, of course, some caution is required. The force of international law in Africa is significantly lower than in the judicial communities in Europe or Latin America (Viljoen 2007: 612). The limited penetration of international law into national society was shockingly reflected in mass atrocities in Rwanda in 1994. On these grounds, it would be absurd to make inflated normative claims for the power of international jurisprudence. Nonetheless, partly because of this, the force of international human rights agreements has discernibly affected recent constitutional processes in African states. International human rights law began to assume increasing importance for domestic polities through the African Charter on Human and Peoples' Rights (ACHPR), which was presented as draft in 1979, adopted in 1981 and took effect in 1986. The African Commission on Human and Peoples' Rights was inaugurated in 1987.

The African Charter (Arts 27–29) has the notable distinction that it includes individual duties in its provisions, thus breaking with the common assumption that states are primary subjects of international law. Further, the Charter accords weight, not only to the rights of individuals, but also to the rights of peoples. In this respect, the Charter has certain ambiguities, and it does not offer express protection for indigenous rights. Clearly, in Africa, the anxiety that the sanctioning of collective rights for pre-national peoples can lead to disaggregation of states remains very potent.<sup>96</sup> Moreover, the categorization of certain minorities as indigenous is deeply problematic, as African societies are not governed by colonial elites, and the label of indigeneity for a particular community might imply primary claims, giving rise to intensified

<sup>95</sup> To quote one observer, in much of Africa 'purely internal norms of constitutional law' are increasingly supplemented by 'principles emanating from the international juridical system' (Kanté 2011: 249).

<sup>96</sup> One important commentary (Kiwuka 1988: 96) suggests that the Charter is, at least implicitly, 'state-centric'.

inter-population rivalry. In fact, in its response to the UN Declaration on Indigenous Rights, the African Commission struck a telling note of caution, stating that it was committed to protecting such rights ‘within the context of a strict respect for the inviolability of borders and of the obligation to preserve the territorial integrity of State Parties’.<sup>97</sup> Nonetheless, the African Charter clearly emphasizes the importance of traditional values as a foundation for human rights, and it proposes a conception of human rights that recognizes that rights can have collective subjects, acknowledging the basic artifice of national statehood in many post-colonial environments (Viljoen 2007: 242). Moreover, the Charter has been used by the African Commission as an instrument to define and defend collective rights for minority population groups.<sup>98</sup>

By the mid-1990s, notably, the African Charter had gained significant domestic purchase; it had been invoked by national courts to declare government action unconstitutional (Benin 1994),<sup>99</sup> and to overturn discriminatory legislation (Botswana 1992). By 2006, seventeen national constitutions made reference to the ACHPR (Heyns and Kaguongo 2006: 680). These tendencies were further reinforced through the creation of the African Union in 2002, which replaced the Organization of African Unity (OAU). Notably, Art 4 of the Constitutive Act of the African Union expressly endorses the right of member states to intervene in other nations in cases where the human rights of single persons are subject to gross violation (Viljoen 1999: 2, 3). Most notably, however, the purchase of the African Charter was eventually extended through the institution of the African Court on Human and Peoples’ Rights, envisaged in a protocol as early as 1998, and concluded in 2006. Through these developments, albeit to greatly varying degrees in different societies, the judicial procedures of African states have become increasingly aligned to international directives, and national courts now form structural intersections between domestic and international law.

This rise in the authority of judicial power and rights jurisprudence has particular significance in the African context, as, owing to the

<sup>97</sup> Advisory Opinion of the African Commission on Human and Peoples’ Rights on the United Nations Declaration on the Rights of Indigenous Peoples, Art. 6.

<sup>98</sup> See 276/03 *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya* (2009). This relies in part on the IACtHR ruling in *Awas Tingni*.

<sup>99</sup> See below p. 336.

history of imperial control and the dynamics of decolonization in the 1950s and 1960s, many African states initially rejected the imposition of external rights-based restrictions on national sovereignty. During decolonization, commitment to unbridled national self-determination often remained a political article of faith.<sup>100</sup> For example, the Charter of the OAU originally accentuated the inviolability of the national jurisdiction of sovereign states,<sup>101</sup> and it provided express justification for non-intervention in sovereign jurisdictions – even in cases of state violence (Okere 1984: 158). The growth of international judicial authority is also notable because, during and after decolonization, national courts of law usually possessed only limited autonomy, and judicial offices were routinely transacted as rewards for political support (Ellett 2013: 31–46). The rise in the authority of human rights is striking, further, because most Anglophone post-colonial states adopted Westminster-style parliamentary constitutions, initially with weak provisions for judicial control of political acts. However, the rise of actionable rights acquires greatest importance in view of the fact that up to the 1990s constitutional law in African states typically possessed something close to a dead-letter status, strong presidencies routinely ignored constitutional provisions, and military overthrow remained by far the most common means of rotating governmental office.<sup>102</sup> The rise of international judicial norms has produced a far-reaching constitutional renewal in Sub-Saharan Africa. By 2004, all fifty-four nations in the region had either thoroughly revised existing constitutions or written entirely new founding documents (Keith and Ogundele 2007: 1066), and in most cases constitutions acquired real purchase in society.

In addition, there are also features in the social background to the processes of constitutional formation in Africa which reflect symmetries with other societies. Notably, most pre-transitional states in Southern Africa were traditionally only partly consolidated, and they were often restricted in their performance of basic functions of statehood. Most African states were haphazardly constructed, lacking organic/inclusionary foundations, and their legal structures were scarcely able to support the penetration of public authority into national society (see Jackson and Rosberg 1982: 2, 9; Jackson 1990: 119;

<sup>100</sup> See analysis in Okoye (1972: 184) and Bekker (2007: 171).

<sup>101</sup> For comment see Baimu and Sturman (2003: 39), Nmehielle (2003: 413, 420) and Viljoen (2007: 163).

<sup>102</sup> See, generally, on the tradition of weak constitutionalism in Africa, Okoth-Ogendo (1993: 67, 74).

Clapham 1996: 50). One observer has described post-colonial states in Africa as 'mere physical mirages of stateness' (Forrest 1998: 47). In most African societies, consequently, constitutional re-direction occurred in settings in which state institutions experienced extreme inclusionary strain, and political systems were marked by acute depletion of inclusionary structure.

The causes of depleted statehood in Africa can be attributed, first, to the fact that post-colonial states were created very rapidly. Often, the construction of African states was driven by external factors (the abrupt weakening of imperial governments owing to World War II and rising international presumptions in favour of national self-determination), and in many societies governmental power was transferred very quickly from (already weak) colonial institutions to almost non-existent post-colonial governing bodies.<sup>103</sup> In addition, the historical origins of weak statehood in Africa can be ascribed to the fact that most post-colonial states grew out of colonial administrations, and they replicated many structural features and contradictions of these administrations (Okafor 2000a: 30, 39; Young 2004: 29). Colonial administrations had usually only been very precariously embedded in society. Naturally, they were defined by remoteness and social indifference between the holders and the subjects of political power, they relied for coercive force on lateral bargains between colonial administrators and selected local elites, and their primary function was to preserve a chord of extraction between the metropolitan government and the annexed society. As a result, these administrations were only able, and in fact only expected, to sustain a very thin stratum of governmental power across society at large (Jackson and Rosberg 1986: 6; Young 1994: 44). In such administrations, notably, state law did not form a separate medium of public inclusion, but was essentially an instrument of imperial prerogative (Ellett 2013: 78). In most cases, different legal systems existed alongside each other; local or customary law was applied in some settings and metropolitan law was reserved for colonizers and appeal courts (see Harvey 1962: 584). Therefore, in legal cases not involving colonizers, full and equal judicial inclusion was not expected. For each reason, colonial administrations did not possess a legal apparatus able to cut deeply into society, and their basic inclusionary structure was limited. This also, initially, became a feature of post-colonial states.

<sup>103</sup> See pp. 121–5 above.

In addition, the roots of fragile statehood in Africa can be ascribed, more generally, to the fact that societies of pre-colonial Africa were ill-suited to the imposition of static models of state sovereignty. Shaped historically by multiple ethnic groups and overlapping lines of obligation, these societies were structurally resistant to the consolidation of centralized political institutions (Smith 1983: 135; Herbst 2000: 55). In fact, in many colonial societies, patterns of authority closely resembling earlier features of European feudalism prevailed outside the narrow jurisdiction of the colonial administration, and much of society was bound by informal, tribal loyalties. This meant, primarily, that lateral affiliations, based on group or ethnic identity, eventually pulled strongly against the administrative order of the independent states created through decolonization. One key observer of post-colonial Africa in the 1980s stated simply that the ‘central thrust of contemporary African reality is attempted state formation’, and this process was typically brought to crisis by ingrained social centrifugality and informal affiliation (Callaghy 1984: 36).<sup>104</sup> In many African societies, consequently, monopolistic state power remains a mere fiction: i.e. in many societies, large geographical areas stand outside effective state jurisdiction, and regions, personalities and organizations vie for power with, or exist alongside, actors attached to conventionally organized state institutions. In some cases, this engenders a multi-centric or *multi-sovereign* political landscape, in which the legally ordered administrative state is counterbalanced by traditional and non-traditional patrimonial networks (Howard 1985: 331). In some cases, this even provokes a reversion to pre-colonial patterns of disaggregated sovereignty, in which rights over land, territory and authority are shared between state institutions and local communities and elites (Herbst 2000: 264).

The condition of weak statehood in Southern Africa is habitually associated with endemic patrimonialism or hybrid *neo-patrimonialism*, in which clear partitions between public and private goods are erased (Zolberg 1966: 141; Médard 1991: 333–4). Analyses of African statehood have repeatedly observed the diffuse convergence of the state with actors and organizations in society, and they have emphasized the susceptibility of post-colonial states to at times highly accentuated privatization of state power (Clapham 1998: 154,

<sup>104</sup> On the survival of semi-feudal systems of obligation and motivation in Africa, see Hyden (1987: 117) and Englebort (2000b: 98).



157).<sup>105</sup> In different ways, this phenomenon can also be traced to the legacy of European imperialism. For example, as mentioned, the weak states created by European Empires were simply transferred to African rulers after they had acquired independent sovereignty (Callaghy 1984: 108), and these rulers, often lacking deep societal support among relevant social groups, distributed administrative offices and goods to secure acceptance and compliance for their rule. The tendency to patrimonialism was then commonly exacerbated by the outward orientation of most post-independence political elites, for whom rents and privileges obtained through export arrangements or aid agreements often formed a key source of revenue, and who used goods obtained from external sources to purchase support through domestic society. The dependence on patrimonialism as a societal foundation reinforced the similarities between the post-colonial state and its imperial antecedents, as it concentrated power in a weakly legitimized administrative apparatus, sustained through the distribution of privilege through society, and often reliant on access to external organizations (i.e. foreign investors) for material support. Eventual results of this were that the political system was forced to act as the principal source and distributor of wealth for society, that conflicts in society necessarily converged around competition for state-mediated goods and that the stability of the political system was subject to variation in accordance with its ability to distribute benefices (Berman 1974: 19). Further consequences of this were that state accountability towards society remained low, normal channels for generating public revenue were often weak and the state confronted constant problems in raising taxes to fund public offices and functions (Sandbrook 1993: 23). In these respects, in fact, post-colonial Sub-Saharan states have closely resembled states of early modern Europe, whose patrimonial structures and low general support also exposed them to chronic loss of legitimacy and deep fiscal crisis (see North and Weingast 1989: 805).

Alongside this, the at times extreme patrimonialism of African states can be attributed to their exposure to deep-lying ethnic conflicts, and to their inability functionally to withstand such exposure. The fact that central states were imposed on societies with complex and unmediated ethnic structures often meant that primary elite actors, located at the political centre, were obliged to purchase support by distributing goods

<sup>105</sup> Erdmann (2003: 268, 275) argues that roughly three quarters of Sub-Saharan African states do not really exist as concrete sociological phenomena.

and privileges to select populations, often located in regional peripheries, such that states constructed their societal foundations through intrinsically privatized lines of societal articulation. The politicization of ethnicity always remained a deep threat to the integrity of African state institutions (Osaghae 2005: 83), and selective patrimonialism was often a means either to obviate, or to accommodate, extreme ethnic fragmentation.<sup>106</sup> Furthermore, patrimonialism in African societies can also be attributed to the state's internal exposure to class conflicts. In many African societies, the post-independence state had a very strong corporatist bias, and most African states used corporatist methods to promote economic co-ordination and development (Diamond 1987: 572, 587). To be sure, in this context, corporatism needs to be distinguished from corporatism in more industrialized societies; in Africa, corporatism cannot typically be used to describe a deep interpenetration between the state and an existing industrial economy. However, if corporatism is construed, in broader terms, as a model of political economy shaped by integrated, and often relatively informal, articulations between state and society through organized sectoral delegations, this term can be applied to many post-independence African states (Nyang'oro 1987: 31). In the longer aftermath of decolonization, in fact, most African states assumed far-reaching regulatory responsibility for the industrial economy and for internal mediation of economic conflicts. As in other settings, moreover, corporatism and patrimonialism were often closely conjoined in the emergence of African statehood, as states integrated corporatist organizations in their administrative order on a favour-and-reward basis, allocating influence and resources to leading delegates of organized interest bodies in return for effective and sustained co-option of their memberships.<sup>107</sup> As in Latin America, then, many African states vacillated between inclusionary and exclusionary corporatist arrangements, filtering access to public goods in accordance with the position of the state in the international conjuncture and with the quantity of monetary resources at its disposal (Shaw 1982: 256; Branch and Cheeseman 2006: 15).<sup>108</sup> In consequence, many African states, like their counterparts in South

<sup>106</sup> See examples below p. 341.

<sup>107</sup> For expert analysis of the relation between patrimonial state privatization and corporate integration of society in the state, see Lemarchand (1988: 155–6), Callaghy (1988: 82) and de Walle (1994: 133).

<sup>108</sup> On similarities between Africa and Latin America in this respect, see Sangpam (1993: 92).

America, were easily overburdened by the allocative functions which they assumed. In tying their legitimacy to the distribution of office and influence and the promotion of growth, they often triggered inflationary expectations and became susceptible to hyper-politicization and external colonization (Zolberg 1968: 73). Overall, most African states sustained their position in society by acting as primary points of turnover for status, benefits and sinecures, distributed through an enlarged public economy. At the same time, however, the ability of different states to sustain this role was usually only weakly secured; the bloated construction of the state was often merely a superficial mask which obscured a highly fragmented political system, unable to secure cohesive motivations for compliance across society, and it often acted as a veneer for a factual condition of endemic state diffusion.

In summary, depleted statehood, reduced state autonomy and only partially effective inclusionary structure can be observed as general features of statehood in much of post-colonial Southern Africa. In many parts of Africa, national state institutions still remain only precariously settled above society, often existing alongside alternative modes of governance, alternative sources of authority and alternative conceptions of legality, many of which are coloured by lateral ethnic loyalties (Jackson and Rosberg 1986: 1, 11; Clapham 1998: 154, 157; Herbst 2000: 55). In many cases, government is conducted in *concentric* manner, through widening circles of private co-option: that is, through informal linkage between central government and private or regional elites, in which traditional authorities and local centres of power act both to control particular areas and to mediate, via clientelistic relations, between localities and the central state (Callaghy 1984: 96, 336–7; von Trotha 2000: 266, 271). In such settings, the fact that imperialism left societies shaped by a deep disjuncture between state and society stimulated extreme dependence on clientelism and patrimonialism as the substructure of government. Often, this was exacerbated by experiments in industrial corporatism, tied to national developmentalist policies. In each respect, weak institutional autonomy, and in fact endemic crisis of inclusionary structure, can be identified as a core feature of many African political systems.

On each of these grounds, however, the tentative rise of transnational judicial constitutionalism, beginning in the late 1980s and early 1990s, enabled some African societies to construct remedies for these historically embedded crises. In some cases, the rise of international

human rights norms helped to create a normative setting in which national political systems were able – to some degree – to compensate for their traditional structural problems. The rise of international law, especially international human rights law, promoted alternative modes of legal inclusion in national societies that were challenged both by expectations regarding class conflict mediation and by strong centre/periphery cleavages. In some respects, this enabled societies tentatively to move beyond the fragile condition of post-colonial statehood and to develop structures of political inclusion, which softened the legacy of imperial domination.

To be sure, in addressing these points, two primary qualifications are required.

First, in assessing patterns of judicial inclusion in Africa, it is important to note that inclusivity is a phenomenon to be defined in relative terms. Even in more elaborated African states, public institutions exist in parallel to other sources of obligation, and customary and informal institutions both supplement and rival more formal structures of inclusion. Moreover, there are exceptions to the presumption that recent years have seen a heightening of inclusionary capacity across Africa. Some of the most important states in Africa cannot be easily captured in this analysis. For example, Nigeria is a society in which attempts at constitutional re-foundation have at times miscarried rather disastrously, and in which the abstractive functions of constitutional law are less in evidence. The Nigerian Constitution of 1999 was promulgated by military decree, and its drafting was an essentially private process (Ihonvbere 2000: 348, 351). Moreover, this constitution only weakly entrenched supra-positive legal norms, and, in 2000, the Supreme Court rejected the principle that international law had any primacy over domestic law.<sup>109</sup> Both before and after 1999, the Nigerian state functioned in many regions as an edifice for partitioning public assets, and it was undermined by egregious corruption, misuse of office and regionally localized power failures (Joseph 1988: 55–6; Lewis 1994: 338, 340; Eberlein 2006: 574–6). For these reasons, caution is of the essence in suggesting that recent constitutional models have impacted beneficially on African polities.

Second, naturally, it is widely, variably, and often convincingly, argued that the unsustainable state structures in post-independence African societies were, at least in part, immediately caused by the

<sup>109</sup> See Nigerian Supreme Court, *Abacha v Fawehinmi* (2000) SC45/1997.

positivist, sovereigntist principles of classical international law. To make claims for international law as a medium that resolves problems of weak inclusionary structure and ill-constructed statehood might, therefore, seem paradoxical. It is commonly acknowledged that international law originally promoted very homogenous models of statehood, based in residually positivist accounts of sovereign state power as an indivisible centre of legal order (see Okafor 2000b: 504, 526; Keal 2003: 84; Anghie 2004: 8, 32). Clearly, therefore, early international law was singularly ill-adapted to societies with complexly overlapping populations, and it did little to induce refined inclusivity in societies marked by diffuse regionalism or complex inter-population divisions. For these reasons, claims that international law has enhanced state structure in Africa need to be made with circumspection.

Despite these qualifications, however, in recent years the growing intersection between international law and national constitutional law has at times clearly mitigated inherent problems of structural inclusion and formation in Sub-Saharan Africa. In many cases, the reception of international law allowed political systems in national societies to increase their relative autonomy, to diminish their dependence on single persons or groups and to offset their centration around often highly charged, deeply politicized institutions: transnational judicial constitutionalism became a new platform for political-systemic reinforcement and national inclusion.<sup>110</sup> The positivist preconditions of classical international law, and in particular international human rights law, may well initially have exacerbated problems of structure building in post-colonial Africa. However, in recent decades, the changing substance and increasing inherent pluralism of international law have promoted principles by which African societies have been able to devise alternative solutions for their inclusionary pressures. One result of this is that international law, rather than imposing a constructed positivistic model of statehood on all societies, now enables societies to promote legal inclusion in many locations and at many different societal levels, and it counteracts the convergence of inclusionary demands around (already strained) state institutions.

This impact of international law on the inclusionary structure of African states can be observed in different ways in a range of different societies.

<sup>110</sup> One account specifically identifies the 'Constitutional Politics Model' as a technique for state construction in Africa (Agbese and Kieh 2007: 18).

### **i South Africa**

A singularly important African case of inclusionary structure building through international human rights norms can be seen in South Africa in the 1990s, after the end of the apartheid regime. Indeed, in a global perspective, South Africa is one of the most illuminating of all examples of structural formation through active judicial engagement and domestic absorption of international law.

In examining South Africa, most obviously, it is vital to note that the trajectory of decolonization was very different from that in most other African states. This is due to the fact that South Africa became independent much earlier than most Sub-Saharan African colonies, but, because independence was attained by white minorities, it retained a partly colonial constitutional order until the early 1990s. As a result, the formation of an independent state in South Africa can be viewed as a protracted, sub-divided sequence of processes, in which many political institutions of colonial rule were removed at an early stage, yet in which patterns of legal discrimination typical of colonialism were only abrogated very slowly. As a result, the democratic polity created during the era of democratic constitutional consolidation from 1989 to 1996 was not a classical post-colonial state. This polity reacted to, and was defined by, pressures very distinct from those that shaped other post-colonial states in earlier processes of decolonization mainly in the 1950s and 1960s.

Nonetheless, in the last years of the apartheid regime, the South African state can in some respects be aligned to the core model of the weak post-colonial state, and the constitutional order created during the constitutional transition was determined by problems of structural debility similar to those evident in other lines of post-colonial state building. Owing to its repeated reliance on emergency legislation and political suppression as a means of social control, notably, the political system of the apartheid regime possessed only very fragile reserves of legitimacy, and its social penetration was restricted and fragile. As a result, the state could only patchily mobilize society, and, albeit in distinctive fashion, it was sustained by selective patterns of ethnic patronage, privileging distinct (i.e. white) ethnic groups for its societal support. Moreover, the apartheid state was beset by economic crisis; this was partly induced by class conflict, partly shaped by racial cleavages and discriminatory non-inclusion of sectors of the workforce,<sup>111</sup>

<sup>111</sup> See below at pp. 322–3.

and partly intensified by international sanctions. Despite the difference between the South Africa polity and the more standard model of post-colonial statehood, therefore, the transition in post-apartheid South Africa distinctively illuminates the impact of constitution making on political systems defined by low inclusionary structure.

Similarities between the transition in South Africa and those in other post-colonial settings are also visible in the fact that in South Africa, international human rights norms, mediated through domestic jurisprudence, played a distinct structure-building role throughout the transition. Under the apartheid system, the authority of the white-minority parliament had, in the style of Westminster constitutionalism, been placed above customary international law. The South African government had opposed the introduction of a Bill of Rights in 1983 (Dugard 1987: 249), and prior to 1993, South Africa was party to only one human rights instrument (the UN Charter), which was not incorporated (Dugard 2000: 263). Before the process of constitution writing had even begun, however, the African National Congress (ANC) drafted a Bill of Rights (promulgated in 1990), which was strongly influenced by international law, especially the ICESCR (Roux 2013: 286). At this time, although some of its more radical provisions were later attenuated, this Bill of Rights established a set of normative guidelines that were recognized throughout the entire transitional process (Steenkamp 1995: 106, 113). On this basis, the actual constitution-writing process then took place in two separate stages, in both of which international human rights law and judicial institutions had salient structure-building significance.

In the first stage of transition in South Africa, an interim constitution was drafted by appointed legal experts and representatives of different parties, and it entered force in 1994. The interim constitution had a number of notable distinguishing features. For example, it moved the South African polity away from the post-Westminster parliamentary model. It included a Bill of Rights with very high normative prominence, and it created a strong Constitutional Court (operative from early 1995), armed with extensive powers of constitutional review. Before the transition had fully commenced, one member of the Secretariat of the ANC Constitution Committee announced that the 'power of judicial review' would assume an 'especially important' role during the 'initial stages of democracy,' and judicial actors were accorded responsibility for securing basic rights and freedoms against the polarized interests of varying stakeholders in the drafting process



(Maduna 1989: 76; O'Malley 1996: 181; Roux 2013: 156). The powers of the Constitutional Court were bolstered by the high standing that was given to the Bill of Rights, which effectively represented supreme or supra-constitutional law throughout the transition. The powers of the court were also reinforced by the creation of a Human Rights Commission (Section 115), designed to ensure that rights norms filtered into day-to-day legal and political practice. In addition, the Constitutional Court drew strength from the status accorded to international law through the early transition (Dugard 2000: 265), and international law was used as a body of objective principles to assess new legislation. In the interim constitution (Section 231(4)), it was decided that 'rules of customary international law', with some restrictions, were to 'form part of the law of the Republic'. Furthermore, the judiciary was instructed to take international law into consideration in its rulings: to 'have regard to public international law' applicable to the protection of rights (Section 35(1)).

In the second stage of the South African transition, the content of the interim constitution was opened for broader public debate and subject to revision by an elected Constitutional Assembly, also acting as a regular interim parliament. The final constitution (1996) was thus produced and endorsed through more manifestly democratic and broad-based deliberation (Klug 1996: 49–51). During the constitutional interim, however, the Constitutional Court had the task of overseeing the process of constitution writing, and it was expected to ensure that the final constitution did not violate inter-party agreements stipulated in the original interim document. Section 71(2) of the interim constitution declared that the final constitution could only be enforced if the Constitutional Court had certified that all its provisions were in compliance with the founding principles set out in the first document and agreed by the Plenary Session of the Multiparty Negotiating Committee in November 1993 (Steenkamp 1995: 103). The judges on the Constitutional Court were eventually required to approve the final constitution on this basis. Initially, in fact, the Constitutional Court refused to endorse the first completed version of the constitution, which they rejected on the grounds that it breached pre-agreed conditions. The court eventually signed it into force in 1996.

In South Africa, therefore, the entire process of constitution writing was conducted through progressively elaborated compacts, each of which placed binding constraints on subsequent constituent

acts, and together these agreements both insulated and secured a multi-stage passage to democracy. In this process, human rights norms, supported by international law, were articulated to steer and protect the transition as a whole, and judicial bodies, enacting rights norms, assumed some functions more typically allocated to holders of constituent power. In particular, judges were allowed to intervene in the exercise of constituent power by the Constitutional Assembly, or at least to ensure that constituent power, at each stage of its exercise, was asserted in normatively controlled and pre-defined fashion. One commentator concluded, tellingly, that as a result of the judicial provisions of the interim constitution, 'sovereignty now rests with the Constitutional Court' (Dickson 1997: 534). Accordingly, the final constitution of 1996 reinforced many tendencies in the original document. Most obviously, this constitution provided for a powerful Constitutional Court. Moreover, although the standing of international law was lessened in comparison to the interim constitution, the presumption in favour of incorporating international law remained very strong in the final document (Keightley 1996: 410, 418). Notably, judges were instructed to consult international legal sources to inform their rulings (Art 39), and in Art 8(3) they were required constructively to develop laws through application of the Bill of Rights. In its ultimate form, the constitution was applied in very internationalist spirit, especially in its provision for basic rights, and judges borrowed widely from comparative and international sources in fleshing out a rights jurisprudence to give full effect to the constitution (Scott and Alston 2000: 213; George 2010: 331). This meant that courts were accorded a vital quasi-legislative role, and they were expected to use rights to give flesh to constitutional provisions and impose a uniform normative structure across society as a whole.

As mentioned, the process of judicial constitution writing in South Africa did not occur in a setting shaped by problems typical of post-colonial Africa, and it is difficult to describe this transition, in absolute terms, as a process of compensatory structural formation. In certain paradigmatic ways, however, judicial power and international human rights law clearly provided a basis of autonomy and structural inclusivity for the state during its transformation. On one hand, first, the absorption of international law early in the transition, and the resultant proclamation of human rights as core sources of normative direction, established principles of legitimacy which were strong enough to acquire validity across historically hostile social groups, and to sustain

and give authority to the new polity.<sup>112</sup> Later, the creation of a Constitutional Court meant that legal production could be placed on entirely new foundations, and the transition could unfold within a distinct, insulating, normative structure. As it was not bound by *stare decisis*, the Constitutional Court was not besmirched by affiliation with the apartheid establishment. Supported by reference to norms of international law, the court was able to review and in some cases to clear away legislation from the apartheid era, to stimulate trust in the emerging institutions of government, and generally to distil a new inclusionary structure for the emergent political system (Dickson 1997: 566). During the transition, generally, the fact that constitution writing was protected by the Constitutional Court, applying international law, meant that certain binding norms could be separated out from the constituent process, so that not all aspects of the transition needed to be intensely politicized, and most extreme problems of social polarization could be mollified (Gross 2004: 63). In fact, the presence of the court and its ability to project rights norms underwritten by international law meant that the political system, even in the process of its contested re-formation, could – to some degree – be extracted from day-to-day conflicts, and its basic normative structure remained elevated above the factual adversity of its constituents. The fact that, after 1993, the Constitutional Assembly was never fully or conclusively vested with constituent power meant that the political system obtained a certain autonomy at a very early stage in its construction. To this degree, the earlier part of the transition in South Africa, although not conducted against a classical post-colonial background, clearly illuminates ways in which judicial power, supported by international norms, can instil a relatively flexible inclusionary structure in a national political order. It also shows how transnational judicial norms can enable a political system to respond in relative neutrality, or at least at a reduced level of politicality, to otherwise potentially destabilizing societal forces.

The structure-building role of transnational judicial constitutionalism then remained manifest after the initial part of the transition in South Africa. In the longer process of transition, judicial agency continued to exert prominent influence in the South African polity, and international human rights law retained its significance in allowing political institutions to acquire stability, even in the face of politically unsettling pressures of inclusion.

<sup>112</sup> For background, see Berat (1991: 491).

First, the interaction between national jurisprudence and international law in South Africa helped to create a legal/political system endowed with relative inclusionary resilience in confronting forces of ethnic centrifugalism. In this respect, it is notable that, like most countries in Africa, South Africa has not ratified ILO Convention 169, so that legal norms regarding minority populations are not as strongly supported by international instruments as in Latin America. Nonetheless, domestic jurisprudence relating to customary law has been developed though a fusion of national and international norms. On one hand, the transitional South African legal order clearly acknowledged the importance of customary (i.e. tribal) law and of rights of ethnic communities defined under customary law. The Interim Constitution, in particular, gave wide recognition to customary law (Section 181). Indicatively, the landmark ruling on the constitutionality of the death penalty, *S v Makwanyane* (1995), reflected an inclusive approach to the sources of domestic law, and it expressed the presumption that South African constitutional law was based in a plurality of legal values (Himonga and Bosch 2000: 311–12). Accordingly, South African courts were enjoined to develop common law or customary law, and to make sure that customary legal principles were preserved in different regions. At the same time, however, the recognition of customary law was always subject to constraints, and it was limited by general human rights norms. Notably, in the final constitution, courts were expected to ensure that different regions only endorsed customary laws as long as these laws were consonant with the Bill of Rights (Art 39(2)), and regional authorities were required to police conflicts between customary claims and more formal legal rights. Tellingly, in *S v Makwanyane*, the judges on the Constitutional Court, while acknowledging legal pluralism, placed particular accent on the importance of international treaties and human rights instruments for interpreting the constitution, and they subordinated customary norms to international human rights law.<sup>113</sup> A similar argument was pursued in *Bhe* (2004), in which it was argued that the courts were obliged to develop customary law to bring it into line with the Bill of Rights (see Roux 2013: 251).

Overall, therefore, the courts struck a balance between customary particularism and universal jurisprudence in enforcing the constitution. In fact, the recognition of international law as the ultimate source of legitimacy was a primary reason why the state was able to show

<sup>113</sup> *S v Makwanyane and Another* (CCT3/94) [1995] 168.

latitude in according authority to more informal, customary norms. The prominence of international rights meant that all powers had to be exercised within formal normative limitations. However, this meant, in turn, that, as long as they did not contravene basic international norms, the state could accept the validity of customary laws, and it created a framework (Arts 211–12) in which some recognition could be given to customary laws, and even to tribal leadership. As a result, the presumption in favour of international rights meant that the polity was able to incorporate a plurality of legal cultures, and it projected overarching norms within which ethnic diversity became politically sustainable and inter-ethnic legal variations could be accommodated. The post-1993 founding of the state in human rights law was conceived as a radical alternative to the previous founding of the state in the sovereignty of one ethnic sector, and the underlying privileging of rights permitted the polity to de-emphasize ethnicity as a source of political power. At the same time, however, the fact that primary legitimacy for the state was derived from international law meant, to some degree, that the government could moderate the standing of customary law without signifying a hierarchical assertion of particular ethnic interests, and it created a basic structure for the political system that was able to gain recognition amongst all population groups. This structure diminished the intensity of ethnic conflict, and it placed the political system on relatively autonomous inclusionary foundations. Human rights were applied as principles that projected a unified nation around the political system, while allowing this nation also to appear, in some practices, in ethnically pluralistic form.

In addition, second, the transnational judicial bias of the South African constitution created a distinctive framework for the legal incorporation of organized labour, and it established a structure that reduced the state's exposure to inclusionary pressures arising from class conflict. Initially, the extraction of a powerful rights-defined framework for the transition meant that historically disruptive conflicts between classes did not play an overwhelmingly powerful role during the re-direction of the state (Habib 1997: 62). Ultimately, the new constitutional system saw the emergence of a corporatistic public economy, in which traditionally excluded organizations (i.e. black unions) played a more integrated role, and in which economic legislation was agreed between social partners, negotiated within corporatist fora. In this respect, the new South African polity partly mirrored the political systems of other post-colonial polities at an earlier stage of decolonization, and

it strongly promoted the integration of organized labour in the state. In pre-transitional South Africa, notably, labour politics and ethnic politics were closely linked, and union membership had grown rapidly in the 1980s, owing to the intensification of racial hostilities. The transitional state in South Africa, therefore, was required to overcome ethnic conflicts and economic conflicts at the same time, and, to this end, it developed a strong corporatist emphasis. However, the emergent state managed to preserve autonomy in the face of these diverse pressures, and it survived exposure to highly politicized labour conflicts at the same time as highly politicized ethnic conflicts. One reason for the state's ability to withstand such high politicization was that all parties in the transition had agreed on supra-positive human rights norms to guide the transition and direct the constitution, and these norms, stabilized above everyday conflict, provided a distinct and independent basis of legitimacy for the state. The societal conflicts channelled towards the state, consequently, were not the primary source of the state's legitimacy, and the state possessed reserves of internal legitimacy which it was not required to generate for itself, through mediation of ethnic and industrial antagonisms. As it derived legitimacy from relatively stable, internalized norms, in fact, the state was gradually able to moderate conflicts between economic organizations, to resolve some economic disputes at sub-executive level (Maree 1993: 24) and even to locate some more destabilizing conflicts outside the political system. By the mid-1990s, accordingly, the more integrated corporatism of the early transition ceded ground to a more pluralistic system of industrial management. This re-orientation was reflected in the Labour Relations Act (1995), which established a neo-corporatist order. This order, vitally, was based in workplace co-determination, but it was oriented towards sectoral-level dispute resolution and made limited provision for mandatory adjudication of labour disputes by the state (Webster 2007: 53). Indeed, as in other transitional settings, the consolidation of social rights ceased to be the primary preserve of trade unions, and it fell instead, in part, to judicial organs. Notably, the South African Constitutional Court established some of the most important precedents for social rights jurisprudence, in particular establishing housing rights in *Grootboom* (2000) and health-care rights in *Treatment Action Campaign* (2002). At the same time, in fact, the judiciary also used international law to protect and widen trade union rights.<sup>114</sup>

<sup>114</sup> See *South African National Defence Union v Minister of Defence* (CCT27/98) [1999].

The national population became a more integrated part of the political system as the political system learned to extract legitimacy from transnational norms, distinct from the objective will of the national population.

In many respects, in sum, the transnational judicial emphasis of the South African constitution helped to smooth the immediate process of transition. The salience of international human rights norms meant that the political system could produce premises for its legitimacy *internally*, and it was able to legislate a high level of inclusionary autonomy, even in otherwise highly exceptionalist and uncharted contexts. As in other cases, moreover, the emergence of a stratum of international rights in domestic society provided a basic security for other rights, and it eventually allowed the political system to integrate society through political and social or material rights without locking the state into unmanageable cycles of political mobilization and contention. As in other cases, the inclusion of a national society in a national political system presupposed the abandonment of national sovereignty as a dominant norm of inclusion.

## ii Ghana

Ghana has a very distinctive importance in any study of state building, constitution writing and structural formation in Africa. This is in part a result of the fact that Ghana was the first colonized state in Sub-Saharan Africa to gain full, majority-rule independence (1957), after which, under Nkrumah, it became a flagship post-colonial Republic. Then, both prior to and after independence, Ghana exemplified many typical characteristics of weak African statehood. In recent decades, however, Ghana has proven relatively successful in stabilizing democratic government, and the constitutional order of democratic Ghana displays many common features of judicial constitutionalism. In each respect, Ghana permits paradigmatic examination of state-building processes in recent African history.

To illustrate this, first, the initial process of post-colonial state formation in Ghana saw the establishment by Nkrumah of a centralized, yet structurally flimsy, state apparatus, whose institutions only achieved limited penetration into society. The political system of post-independence Ghana was defined, ideologically, by uniform nationalism and unitary statehood, which presupposed that alternative sources of affiliation and obligation, surviving from the colonial and pre-colonial period, would lose importance. This impetus to centralized



sovereignty was consolidated in Art 20(2) of the 1960 Constitution, which created a sovereign parliament, in a mixed parliamentary/presidential order. This was also reflected in a series of laws designed to reduce the free-standing economic and judicial power of chiefs, many of whom fervently opposed the creation of an independent centralized state. The Courts Act (1960) and the Chieftaincy Act (1961) were introduced to reduce legal authority of chiefs and to transform chiefs into public functionaries (Harvey 1966: 102–3; Brempong 2001: 45), so that tribal counterweights to the power of the state were legally effaced. Beneath the surface of centralized national government, however, political institutions in independent Ghana remained only diffusely connected, and the principle that the state was underpinned by a cohesive nation was illusory. Internally, the political order that developed under Nkrumah distinguished only weakly between public and personal power, and Nkrumah's governing party assumed for itself a monopoly of state offices and public goods (Amonoo 1981: 13; Rooney 1988: 265). Distinctively public powers, especially those vested in judicial organs, were often transacted as benefits and privileges (Amissah 1981: 162). Externally, the political administration also sat uneasily alongside informal patterns of rule and political interaction. The national state struggled to exercise dominance in society, and its powers were constrained by an informal economy and an informal political market, which formed a 'parallel system' of exchange and influence, not subject to formal public control (Azarya and Chazan 1987: 123). Despite legislation designed to suppress traditional authority, moreover, local sources of authority, notably chiefs, supported by informal patronage networks, persisted alongside centralized institutions (Chazan 1983: 57, 60, 64, 95).<sup>115</sup> As in most colonial societies, the institution of chieftaincy had been strengthened by colonial authorities, and under the British Empire chiefs had acted as core administrative pillars of colonial states.<sup>116</sup> The power of chiefs remained a potent obstacle to the construction of uniform national statehood after independence.

Directly linked to this, further, was the fact that the plan to promote strong statehood and strong nationhood in post-independence Ghana was flanked by far-reaching designs for state-corporatist integration of the industrial labour force. In fact, the corporatist organization of labour

<sup>115</sup> For discussion of the power exercised by chiefs within the state structure, see Ray (1996: 191).

<sup>116</sup> For general commentary on this phenomenon, see Trotha (1994: 331). For other examples, see Branch (2009: 29).

relations was accorded a central nation-building role in Ghana, and the unification of social classes in a system of material inclusion was perceived as a vital bedrock for national unity. As in other post-colonial societies in Africa, this was rooted in the ideological claim that class fissures were not organic to African society, and African nations were naturally based in material unity (Rooney 1988: 254). The rise of state corporatism began in 1958, as Nkrumah introduced the Industrial Relations Act, which provided for compulsory arbitration in labour disputes, and it created official unions, financed by deductions from employers. Under the resultant New Structure, twenty-four unions, later reduced to sixteen, were established, which had a strong political role but were subordinate to state directives (Trachtman 1962: 185). Amendments to this law in 1959 made unscheduled unions unlawful. Further amendments in 1960 consolidated semi-authoritarian control of the unions and the labour market, linking trade unions directly to the political executive (Rimmer 1961: 215–16, 223; Gerritsen 1972: 237). These laws were generally designed to bed the political system into society by placating unrest in union constituencies, by preventing open industrial conflict and by distributing wealth through the linkage between the state and organized labour. Through such laws, trade unions and the labour movement obtained distinctive importance in Nkrumah's wider project of national developmentalism, and he attempted to utilize unions as mechanisms for spearheading economic growth and social progress (Trachtman 1962: 190). The system of developmental corporatism, however, did not provide a stable inclusionary basis for the political system, and it did not galvanize Ghanaian society into a cohesive national whole. On the contrary, through its opening to economic organizations, the political system gradually approached a condition of high internal *privatization*. Public offices, resources and services were commonly allocated to economic actors in the form of privilege, spoils and guarantees for material security (Frimpong-Ansah 1991: 98; Sangmpam 1993: 92), and state industries and controlled unions were used to dispense sinecures for allies of the government (Bates 1981: 104). Moreover, counter-intentionally, this led to unsettling politicization of industrial conflict. By the early 1970s, the system of controlled unionization was prone to malfunction; the official council of unions was briefly dissolved in 1971 (Jeffries 1978: 134).

Within fifteen years of independence, therefore, the fact that it combined low structural density with extensive but uncertain inclusionary penetration into the economy and other parts of society meant that

the political system in post-colonial Ghana was close to the ideal type of the weak state. One analyst has argued that the Ghanaian state experienced rapid loss of capacity and general ‘power deflation’ in the wake of decolonization (Chazan 1983: 337), and it lacked a deep-lying structure to respond to the inclusionary strains which it both produced and encountered. A different observer has described Ghana in the longer aftermath of independence as a ‘paradigmatic “soft” state’, existing primarily not as a functioning set of governmental organs, but as a rather fictitious category of international law (Herbst 1993: 4). By the 1970s, in consequence, the state was also extremely vulnerable to overthrow. In fact, from the military attack on Nkrumah’s government in 1966 up to 1992 governmental power was normally rotated by military coup.

Ghana eventually underwent a process of constitutional reform in the 1990s, in which the initiative for reform came from a rather unlikely source. In the early 1990s, the incumbent military ruler, Jerry Rawlings, presided (albeit with an ambiguous degree of commitment) over a controlled transition to democracy. After his assumption of power in 1981, Rawlings had shown no sympathy for democratic norms, and his regime had been marked by deep disregard for political liberty, by moderate levels of political repression and by extensive manipulation of the judicial system (Oquaye 2004: 366–72). Most notorious amongst the crimes committed by the Rawlings regime was the murder of three High Court judges in 1982. Ultimately, however, partly owing to international pressure, Rawlings steered his government on a reformist course. In 1991, he convened a Committee of Experts to draft a new constitution, which he put into effect in 1992. This constitution, both in design and background, had strong similarities with other constitutions established during processes of systemic transformation.

The 1992 constitution of Ghana contained a full catalogue of rights, reflecting international principles, and it instituted a national commission to promote education regarding the rights and the obligations expressed in the constitution (Art 233). It established a Supreme Court, which (in Arts 2 and 130) had original and exclusive jurisdiction in questions of constitutional interpretation. It also created a High Court, with responsibility for cases with human rights dimensions (Art 33). Functions of the courts were in part carried over from the earlier post-Westminster constitutional system. Notably, the Ghanaian constitution did not give definitive constitutional status to international law. Art 75(2) reflected a position close to classical dualist attitudes

to international treaties, and, in important cases, the Supreme Court declared that no law, of whatever provenance, could prevail over the express will of the constitution;<sup>117</sup> direct use of international law is infrequent. However, the constitution clearly marked a break with purely dualist, purely parliamentary models of governance.<sup>118</sup> In Art 37(3), it stipulated that international human law should provide guidelines for legislation – most especially in developmental legislation. It also committed the government to ‘promote respect for international law’ (Art 40). Under the constitution, then, the courts opened their jurisprudence to international rights norms and rights-related foreign case law, and they argued strongly for restricted direct enforcement of international human rights instruments.<sup>119</sup> In early cases, in particular, the Supreme Court, whose members were keen to underline their independence from the outgoing regime, placed great weight on international standards.<sup>120</sup> Under Chief Justice Kofi Date-Bah, eventually, the Supreme Court adopted a purposive approach to constitutional interpretation, using comparative law and international law to objectivize implied constitutional values.<sup>121</sup> An important element in this approach was the use of Art 33(5) of the constitution to sustain the use of international human rights law to flesh out existing provisions for human rights in domestic law.<sup>122</sup> Also important in this was the fact that under Art 129(3), the Supreme Court was not categorically bound by *stare decisis*, so it could constructively build a body of purposive law from external sources.

Notably, moreover, the constitution made important changes to the system of labour law. After 1992, the government resumed responsibility for promoting economic development (Art 36), and it accepted an obligation to provide ‘equality of economic opportunity to all citizens’. Moreover, the Labour Act (2003) created a National Labour Commission with powers of compulsory arbitration, and a division of the High Court assumed responsibility for regulating labour disputes. These

<sup>117</sup> For a statement of this position, see Ghana Supreme Court, *New Patriotic Party v Attorney-General* [1997–1998] 1 GLR 378; *Republic v High Court Accra, ex. p. Attorney General*, Civil Motion No. J5/10/2013.

<sup>118</sup> Bimpong-Buta (2005: 112, 131) claims that the Ghanaian Supreme Court has greater powers of judicial review than those allocated under *Marbury v Madison*.

<sup>119</sup> See the position on international instruments being acceptable as far as they fit with Art 33(5) in Ghana Supreme Court, *New Patriotic Party v Inspector-General of Police* [1993–4] 2 GLR 459.

<sup>120</sup> Ghana Supreme Court, *New Patriotic Party v Inspector-General of Police* para 26.

<sup>121</sup> See Date-Bah’s use of comparative law in Ghana Supreme Court, *Asare v Attorney-General* [2003–4] SCGLR 823.

<sup>122</sup> See Ghana Supreme Court, *Adjei-Ampofo v Attorney-General* [2003–2004] 1 SCGLR 411.

provisions, however, did not amount to a full political incorporation of industrial conflicts. In fact, Art 82 of the Labour Act provided that unions could not be subject to direct political control. Arts 21(1)(e) and 24(3) of the constitution sanctioned freedom of trade-union activity, they removed wage conflict from immediate state control, and they generally increased the autonomy of union activity (Panford 2001: 23). This was especially notable in view of labour policies pursued by Rawlings, who had established workers' councils to police the workforce. Art 37(2)(a) of the new constitution also tied development policies to human rights, and it stipulated that all members of society had the right to 'form their own associations free from state interference'. Important court rulings also positioned collective bargaining outside immediate state control.<sup>123</sup>

The provisions of the 1992 Constitution had their most obvious outcome in the fact that powers of government could be more reliably rotated without military intervention, and the constitution helped to depersonalize the basic structure of political office holding. By 2012, the Supreme Court was even required to rule on the validity of election results. The constitution thus created a political system in which rivalry between opposing parties could be softened through recognition of the rule-bound state as distinct from single holders of executive power. As in other settings, further, the constitution created a framework for the emergence of a more active, assertive judiciary, and it raised levels of confidence in judicial agents (Sandbrook and Oelbaum 1997: 635). However, the new constitution had other, less manifest consequences, gradually transforming the inclusionary structure of the political system as a whole. In particular, the constitution raised the state's capacities for addressing societal pressures, especially those resulting from industrial conflict and ethnic complexity, which had historically fragmented its inner structure and undermined its inclusionary force.

To assess the role of the Ghanaian constitution in relation to labour conflicts, first, it is necessary to consider the international economic context in which the 1992 Constitution was written. As in cases in Latin America discussed earlier, the process of constitutional re-orientation in Ghana occurred in a setting deeply affected by a reduction in state funds induced by IMF-ordained structural reforms in the 1980s (Panford 2001: 2–3). As elsewhere, one initial result of these

<sup>123</sup> Ghana Supreme Court, *Volta Aluminium Co Ltd v Akuffo and Others* [2003–2005] 1 GLR 502.

reforms was that they shortened the reach of the state. Most obviously, these reforms depleted the state's monetary and fiscal capacities, and they reduced its ability to integrate different social organizations and to distribute welfare resources. In addition, these reforms meant that governing parties had less money to share around in order to purchase favours, and – necessarily – they undermined the patrimonial basis of state authority (see Shaw 1993: 165). In both respects, these reforms weakened the bargaining position of organized labour.

The judicial model of constitutionalism that developed in the 1990s can be observed against this background. On one hand, the rise of a state based in a judicial constitution can be seen, critically, as a pattern of surrogate, skeletal state building, in which judicial institutions assumed residual inclusionary functions, which could no longer be performed by the monetarily weakened legislatures and executives, which the structural reforms had created. For this reason, it is often observed that the emergence of judicial democracy in Ghana, as in other African countries, had a hollow ring, as the formation of democracy on this design resulted in part from the edicts of the international monetary community, which ostensibly promoted democracy while cutting the public funds required to maintain it (see Gazibo 2005: 34–5). On the other hand, however, as it weakened the nexus between trade unions and the state and raised the force of the courts, the 1992 Constitution also began to establish an inclusionary system, which formed a constructive alternative to the traditional corporatist/patrimonial organization of the state. In fact, in some respects, the 1992 Constitution of Ghana created a quite distinctive inclusionary structure for a society traditionally marked by debilitating corporatist experiments (see Green 1998: 189). In loosening trade unions from state control, it re-defined the conditions of articulation between state and corporate bodies, and it promoted more individuated patterns of inclusion as the basic substructure of the political system. As a result, the state was able to produce industrial legislation without full incorporation of economic antagonisms, and both representatives of the state and representatives of labour were able to negotiate with each other at an elevated level of autonomy. Notably, in fact, after 1992, the participation of trade unions in Ghanaian politics often actually increased, and the trade union council gave strong support to the constitutional reforms (Konings 2002: 333; 2003: 459). The legal allocation of singular rights replaced the corporatist distribution of material rights

as the primary grounds of political inclusion, and, in key respects, this reduced the structural pressures on the state and elevated its basic autonomy.

In its provisions relating to ethnic complexity, second, the 1992 Constitution also assumed important structure-building functions.<sup>124</sup> First, the constitution established a more decentralized system of government. In Art 241, it created district assemblies with highest political authority in distinct regions. It also sanctioned a pluralistic legal order, which gave recognition to the customary law of 'particular communities' (Art 11), and it guaranteed the institution of chieftaincy, providing separate judicial institutions to regulate questions pertaining to chieftaincy. In doing this, however, the 1992 Constitution accentuated the principle that customary laws could only be applied within a formalized, universalist, rights-based framework (Art 39(2)). Traditional communities were allowed to exercise freedoms under customary law, and customary laws were only treated as part of common law to the extent that these were not injurious to common standards of personal dignity. In this respect, the constitution (Art 11(6)) stipulated a clear hierarchy of legal sources, in which the highest norms, represented by the constitution itself, were required to pervade all other practices, such that the exercise of regional power was always subject to scrutiny by superior courts. Manifestly, to be sure, the post-1992 Ghanaian state remained coloured by a mixture of governance structures, some formal, some informal, and customary power certainly did not disappear. However, the abstraction of a rights-based legal order proved relatively effective in cementing formal legal norms as the highest source of obligation. Overall, the judicial and rights-based emphasis of the constitution meant that the traditional sources of customary power and customary law could be preserved within a pluralistic order. Vital to this was that the supreme authority of the constitution was founded, not solely in single expressions of centralized authority, but in a system of abstract rights, partly constructed outside national society.

In Ghanaian society, in sum, in which material nationhood and its institutional correlative, the centralized national state, were not organic phenomena, rights-based constitutionalism ultimately promoted distinct patterns of structure building and national inclusion. To this degree, judicial constitutionalism clearly helped to solidify a

<sup>124</sup> Historically, Ghanaian society was not marked by egregious ethnic conflicts. But it was clearly shaped by tribal multi-centricity.



deepening inclusionary structure for the political system. Firstly, constitutionalism based in singular rights provided an alternative to previous attempts at inclusionary structure building; in particular, it came to supersede corporatistic modes of national integration. Ultimately, as discussed, rights-based constitutionalism supplanted the corporatist endeavour to create material nationhood through objective conflict mediation and material rights distribution, in which rights intensified the nexus between the state and external organizations. Further, the new constitution, establishing certain limited rights for sub-national units, made it easier for the political system to assimilate complex population groups, and it reduced the conflictual centration of society caused by fully unitary proclamations of nationhood. Instead of this, it created preconditions for individualized, multi-centric nationhood under law, able more effectively to accommodate and legally to include the physically pluralistic communities existing within this nation (see Nzouankeu 1994: 224–5). In both respects, the inclusionary capacities of the Ghanaian political system were augmented by its incorporation in a transnational legal order, and the increasing circulation of human rights as a distinct, generalized and relatively autonomous normative stratum across society expanded the inclusionary structure of the state. After 1992, notably, Ghanaian judges constructively assimilated international law to consolidate a body of distinctively Ghanaian law, and to separate this law from colonial precedents.<sup>125</sup> To this degree, the influx of externally constructed norms augmented the available volume of law in society, and citation of international sources allowed the political system to respond more autonomously to rising demands for law. Moreover, the longer wake of the transition brought an increasing caseload for the courts, and it gave rise to a rapidly growing requirement for trained judges. This clearly indicated a growth in social penetration of the legal system, and, across society, it demonstrated a rising reliance on law as a medium of conflict settlement. Overall, the reality of the central state was enhanced by the fact that it was supported, not by a simplified national will, but by externally defined rights. As in other societies, the re-location of the inclusionary focus of the state from simple nationhood to human rights, extracted, in part, from international law, formed a vital inclusionary structure for the national political system, and for national society as a whole.

<sup>125</sup> This view was expressed in my anonymous discussions with leading Ghanaian judges in July 2014.

### c Benin

An alternative but related case of inclusionary structure building by transnational judicial constitutionalism is observable in Benin. Benin has particular importance in any analysis of recent democratic constitutional re-orientation in Africa. This is because, in general, it represents an important case of democratization in Francophone Africa. In addition, this is because, in 1990, Benin established a quite distinct model for democratization, which is specific to Francophone regions: a model of constitutional foundation through National Conference. In this respect, Benin makes it possible to observe the structural implications of a less normatively insulated, more volitional pattern of constitutional re-formation.

In many respects, historically, Benin might have appeared a singularly improbable setting for structural formation through constitution writing. Up to the 1980s, Benin had probably the most unstable political system in Africa, and it had witnessed the highest number of military coups. In addition, pre-1990 Benin displayed all salient characteristics of weak statehood in Africa, often in intensified form. First, under the quasi-Marxist dictatorship of Kérékou (1972–1991), a political system was established, in which support for government was typically obtained by patrimonial means, so that the governance apparatus was marked by a very bloated yet also unproductive, venally remunerated public sector (Allen 1992a: 43, 45; Gazibo 2005: 65). Owing to its reliance on patrimonial support, in fact, the political system in Benin increasingly lacked certain basic qualities of statehood, especially in the fiscal domain. Sometimes, the state did not have sufficient revenue to pay public salaries, and it remained dependent on external donors, whose gifts of aid were translated into rents (Allen 1992a: 49; Bierschenk 2010: 347). Second, the society of Benin as a whole was regionally divided and factionalized between different local groups, each of which pursued direct patrimonial linkage to the state. Moreover, third, close to the prototype of the Afro-Marxist state, pre-1990 Benin possessed a dense system for managing industrial relations, and all trade unions were integrated into Kérékou's governing party (Heilbrunn 1993: 284). Labour relations were thus subsumed under the inflated apparatus of the state and effectively absorbed into the system of patrimonial recruitment and mobilization.

In 1990, however, confronted with a deep crisis of state autonomy, Kérékou summoned a National Conference, in which all 'living forces' of the nation were convened to debate the causes of systemic

instability, and to propose plans to raise state capacity and to ‘rebuild state authority’ (Magnusson 2001: 218). A symbolic antecedent of this process was, of course, the convocation of the Estates-General in Versailles in the summer of 1789. In fact, the transition in Benin was strongly influenced by classical French constitutional models. As in 1789, the convening of a National Conference was designed to rectify problems associated with the endemic re-feudalization of political order (privatization of office, governmental inability to raise tax, resultant fiscal crisis) (Kohnert 1996; Robinson 1994: 594). As in revolutionary France, further, Kérékou was at first only willing to recognize the conference as a consultative body for immediate crisis management (Ebouss 1993: 70; Banegas 1995: 15). However, as in 1789, leading figures in the conference, which lasted nine days, eventually assumed separate sovereign legislative powers, and they set a reform course for the polity as a whole (Gisselquist 2008: 797). The conference in Benin immediately created a *Haut Conseil de la République*, which was given responsibility for guiding the transition and ultimately the drafting of a new democratic constitution; it also acted as an interim Constitutional Court. Consequently, Benin experienced a transition unlike the semi-compacted pattern of democratization in Ghana and South Africa. Following the classical French model, the process of constitutional re-direction in Benin clearly involved the real and meaningful exercise of an original constituent power (Tchapnga 2005: 464), in which delegates of the people activated *ex nihilo* powers of polity building. This became a widely emulated template for subsequent processes of democratic reform in Francophone Africa. A number of states, including those in Gabon, Congo, Mali, Togo, Niger and Zaire, also convened National Conferences, not all successful in promoting democracy, to address structural problems (Robinson 1994: 576).

Despite its self-conscious French lineage, however, the ultimate form of the Benin constitution (1990) created by the National Conference differed significantly from classical French precedents. In particular, the constitution showed little of the resentment of judges and judicial power which resonated through French constitutionalism at the end of the *ancien régime* (see Burrage 2006: 60). Instead, it was based in a close link between national sovereignty and judicial power. In Art 3, the constitution stated: ‘National sovereignty shall belong to the people. No portion of the people, no community, no corporation, no party or political association, no trade union organization nor any individual shall be able to abrogate the exercise of it’. However, the

constitution modified this classical principle by ensuring that the sovereign power of the people was guarded by the judiciary, which was placed above both legislature and President as a source of authoritative law. Accordingly, the transitional National Conference created a new Constitutional Court (active from 1993), which was not bound by previous rulings or conventions, and was authorized to exercise powers of abstract and concrete review.<sup>126</sup> Most importantly, under Arts 120 and 121, the Constitutional Court was assigned special responsibility for ensuring compatibility of new laws with human rights norms enunciated in the constitution, and it was required (in Art 122) directly to respond to single appeals in questions regarding human rights (Rotman 2004: 294; Aivo 2006: 99). In addition to this, the new constitution gave high standing to international law, and in its Preamble it declared a normative commitment to the ‘principles of democracy and human rights’ contained in different international treaties, including the African Charter, to which it accorded standing as ‘an integral part of this present Constitution and of Béninese law’, having ‘a value superior to the internal law’. As a result, international law was widely cited in different courts, and the Constitutional Court accepted the African Charter as a core ‘interpretive tool’ for its rulings (Levitt 2010: 334). In this express commitment to the rule of international human rights law, the constitution also renounced some broad programmatic declarations of previous constitutions. Although it still provided for developmental policies, it accepted free trade-union activity (Art 31), and it foresaw the partial removal of labour conflicts from state jurisdiction (Heilbrunn 1993: 284). Moreover, the constitution addressed the perennial problem of regionalism in Benin. In Art 150, it created freely elected territorial units, assuming high degrees of autonomy, yet bound by the principles of rights-based ‘national solidarity’ spelled out in the constitution.

It would of course be fanciful to imagine that the constitutional transition in Benin miraculously created a fully effective inclusionary structure for the state. It is widely documented that during and after the transition Benin remained a rentier state, in which the political system acted as a clearing house for aid and other external benefices, so that its accountability to society as a whole was limited (Médard 2002: 390; Gazibo 2005: 172, 203). Moreover, both regional

<sup>126</sup> On this and the more generally key role of the Constitutional Court in Benin’s constitutional system see Holo (2009: 102–6).

factionalism and clientelism remained core structural factors in the state (Allen 1992a: 56; Bierschenk 2010: 248, 351). Nonetheless, the state in Benin acquired certain measurable benefits from the new constitution. The Constitutional Court became a widely known and utilized institution. By late 1994, it had successfully intervened in budgetary politics to place limits on use of presidential power. Notably, the limiting of presidential exceptionalism coincided with repeated citation of the Africa Charter.<sup>127</sup> This meant, for the first time, that the military leadership did not act as the ultimate judge of constitutional legitimacy, and that the conditions of legal order were separable from military interests (Magnusson 2001: 225). In addition, the court acted as an arbiter in conflicts between branches of government (Seely 2009: 153). This ultimately meant that the court reinforced other institutions, and it formalized the functions of other governmental bodies (Gazibo 2005: 192–3). To this extent, the court, backed by international law, began, to some degree, to extract the state from the lateral bonds that surrounded it, and to solidify a corpus of strictly public law to support the state's inclusionary functions.

#### d Kenya

A different variant on transnational judicial structure building is visible in Kenya. In this case, in the 1990s, new patterns of constitution writing also acquired very great importance in cementing the social position of the state and alleviating deep-lying inclusionary crises.

Historically, to some degree, the Kenyan polity reflected strains caused by economic inclusion that were generally characteristic of post-colonial Africa. In early independent Kenya, unusually, there was initially only limited corporatist management of the economy, and the first post-independence government, led by Kenyatta, followed a strictly capitalist line of industrial policy making (Arnold 1974: 177). However, from the mid-1960s, Kenyatta began to develop a model of state-led industrial management and developmentalism. This model was based in governmental control of trade unions, semi-corporatist regimentation of industrial conflict through an Industrial Court (Swainson 1980: 185; Cockar 1981: 6, 11) and informal co-option of and allocation of benefits to union leaders, who assumed regimentational functions in the production process (Sandbrook 1970: 180, 184; Cockar 1981: 145).

<sup>127</sup> Benin Constitutional Court DCC 16–94, DCC 10–04, DCC 05–029 all cited the African Charter (Arts 10 and 13). See the account of these cases in Rotman (2004: 284).

In these respects, like many countries in post-independence Africa, the Kenyan government emulated some corporatist legislation introduced in Ghana, establishing state-controlled unionization and industrial arbitration, which limited the autonomy of unions and effectively prohibited independent union action.<sup>128</sup> As a result, industrial disputes were internalized in the political system, and the state became a point of intensified filtration for diverse economic interests. Kenyatta's industrial policies were underpinned by a concept of *African Socialism* (although little of this concept was in any way meaningfully socialist). This concept was centred on the principle that the African nation was organically unified and not naturally subject to division by class conflict; this idea was used by Kenyatta to promote flexible policies of national economic control that were designed – purportedly – to soften inequitable economic distribution, to supervise inflows of foreign capital and to ensure the influence of Kenyans in certain regions and key private enterprises (Rothchild 1973: 262–3, 420–21; Harbeson 1973: 180; Swainson 1980: 233–5).<sup>129</sup>

Political institutions in post-colonial Kenya were originally relatively solid, and corporatistic strategies of economic inclusion did not destabilize the polity to the same degree as in other societies (Branch and Cheeseman 2006: 24). Even in the 1980s, the structural reforms in Kenya did not bite as deeply into the substance of the state as elsewhere, and economic weakness was not a primary cause of state crisis (Ensminger 1992: 101). Despite its relative stability, however, the Kenyan political system was eventually marked by structural problems characterizing other African polities – notably, selective and uneven inclusion of society, privatized foundations and high levels of patrimonialism, patchy legitimational support, conflict over rules of material and political allocation, persistence of multiple economies and informal structures of government (Grindle 1996: 79). In addition, the Kenyan state showed, first under Kenyatta and then under Moi, typical characteristics of weak-state authoritarianism – one-party governance, reliance on privately affiliated coteries of support for the executive, repression of party pluralism, high corruption, weak rule of

<sup>128</sup> An Industrial Court was established in the first Trade Disputes Act of 1964. Its powers were extended in the further Trade Disputes Act of 1965. For comment see Amsden (1971: 122–35), Sandbrook (1975: 44–7) and Ananaba (1979: 142–3).

<sup>129</sup> The ideal of African socialism was enunciated programmatically in the sessional paper 'African Socialism and its Application to Planning in Kenya' (1965). This document promised a brand of developmentalist capitalism, which promised the erosion of class divisions without significant economic expropriation (see Leys 1975: 222).

law (Ross 1992: 44; Himbara 1994: 120; Bannon 2007: 1831). Even notionally reformist administrations struggled to separate the state structure from the entrenched elite interests that coalesced around it, and different plans for constitutional re-orientation were repeatedly blocked by the refusal of elites to relinquish arrangements serving vested prerogatives (Kanyinga and Long 2012: 40).

In Kenya, however, the main source both of privatistic state weakness and authoritarian systemic design was, not mediation of class conflict, but exposure to ethnic rivalry and pressures induced by inter-population hostility. Ethnic division was much the strongest cleavage in the early history of independent Kenya (Harbeson 1973: 103), and weak inclusionary capacity in face of ethnic divergence defined the Kenyan state at key moments in its constitutional evolution. Notably, the first post-colonial constitution (1963) had eschewed unitary nationalism, recognizing regional fault-lines between semi-autonomous public authorities: it established the quasi-federal model of *majimboism* as a compromise pattern of nation building.<sup>130</sup> However, the Kenyatta government soon suppressed the federal order. By 1965, Kenyatta rejected alternatives to unitary statehood, and the initial pluralistic plan for the Kenyan Republic never became a reality (Okoth-Ogendo 1972: 18; Rothchild 1973: 140; Anderson 2005: 562). From that point on, executive power was rooted strongly in one particular, or a number of different, ethnic groups, so that the state was essentially tribalized. For example, Kenyatta drew support from the Kikuyu people. By contrast, Moi later established an alternative, Kalenjin, ethnic bias, even promoting the Kalenjinization of public offices (Juma 2002: 491–2; Ajulu 2010: 263).

The ethnic parcellation of society tended to ossify the Kenyan political system. It meant that society could not be collectively mobilized against sitting elites, and actors in the executive could play off opponents along ethnic lines, thus avoiding sensitivity to general social imperatives (Gĩthĩnji and Holmquist 2012: 57). One consequence of this was that the state remained, in part, founded in partial, semi-private bargains between the executive and ethnic constituencies. As a result, governmental power was secured through allocation of material goods to the population groups most closely connected to the President, and public policy could not easily be directed by distinctively national expressions of interest. Governments were in fact able to avoid

<sup>130</sup> See for comment Ndegwa (1997: 605).



multi-party elections because of the threat that they would release uncontrollable ethnic tensions (Ndegwa 1997: 610). One further consequence of this was that governments could not exercise uniform rule over all parts of society, and amongst those subject to state power alternative patterns of affiliation and obligation existed alongside, and often overrode, loyalty to laws of state (Ndegwa 1997: 612–13). Overall, the state struggled to construct an inclusionary structure adequate to the complex and unmediated ethnic fabric of Kenyan society, and public authority remained to some degree the property of particular ethnic groups allocation of resources to which became the primary source of legitimation for state power.

On the whole, consequently, conditions in pre-transitional Kenya were not propitious for judicial constitution making. Most obviously, judicial institutions operated in an obdurately divided society, in which, in fact, selective distribution of judicial office was a common mode of patronage, so that public confidence in judges was low. Moreover, Kenyan courts conventionally favoured a very strict dualism in the reception of international law. *Okunda v Republic* (1970), in which international law was ruled subordinate to domestic law, long remained a leading case regarding the status of international law. In fact, in *Maina Mbacha v Attorney General* (1989), the High Court weakened its own responsibilities for enforcing the Kenyan Bill of Rights. During the eventual democratic transition, the High Court reiterated the view, in a number of high-profile cases, that international norms could not be directly translated into domestic law.<sup>131</sup> Moreover, Kenya had a series of false starts in constitutional reform, which brought the structural problems of the political system into sharp relief. The first attempt at democratic transition in the early 1990s, driven in part by external pressures, was short-lived. Although multi-party elections were held in 1992 and 1997, Moi's government was returned, partly because the opposition was split along ethnic lines, and the government continued to use repressive measures against political opponents (Ndegwa 1998: 188).

Eventually, the late 1990s saw the beginnings of a long process of constitutional reform. In 1997, parliament introduced the Constitution of Kenya Review Act, and eventually a Constitution of Kenya Review Commission was established, which, led by Yash Pal Ghai, was expected to draw up a bill for constitutional reform. Ultimately, under the

<sup>131</sup> See *Pattni and Another v Republic* (2001), *Mary Rono v Jane and William Rono* (2005). For comment, see Ambani (2010).

presidency of Kibaki, this led to the convention of a National Constitutional Conference in 2003, which was charged, by parliament, with approving a new constitutional document. The draft constitution was rejected in a referendum in late 2005. In fact, ethnic conflicts played a salient role in unsettling the earlier part of the constitution-making process. The writing of the constitution proved incendiary for ethnic rivalries, as it raised historically volatile questions regarding access of ethnic groups to state offices and resources (Juma 2002: 532; Berman 2009: 445, 449). Both the 2005 constitutional referendum and elections in 2007 caused high levels of ethnic violence, in which the government risked losing social control. Whereas other transitional societies had been able to extract certain pre-agreed principles to stabilize democratic procedures against inter-factional rivalry, in Kenya the transition itself became an object of intensified politicization, and the abstraction of solid norms was disrupted by the uneven foundations of the polity.

Despite this, however, the Kenyan transition, once fully in motion, was marked, albeit uncertainly, by the growing prominence of judicial power, and by the growing influence of international law.<sup>132</sup> In fact, it was assumed during the process of constitution making as whole that the constitution would lead to a unifying transformation of society, and judges, applying human rights law, would play a leading role in guaranteeing the transformative effect of constitutional law. On one hand, for example, both judicial power and judicially applied rights were used quite consciously to construct a foundation for national inclusion, to integrate the people directly in the political system and to separate the national people from social variations determined by ethnicity. The first draft constitution (the Bomas draft), tellingly, made extensive provision for direct access to the judiciary, and, in Art 31, it created a framework which opened human rights litigation to a large range of parties. In Art 2(4) it also provided that a 'person, or a group of persons, may bring an action in the High Court for a declaration that any law is inconsistent with, or is in contravention of, this Constitution'. In this respect, the initial draft constitution projected human rights as institutions that could draw members of society into an immediate relation to political institutions, regardless of their social and ethnic position. During the writing of the constitution, then, the courts were called upon to rule on its legitimacy, and the judiciary developed a line of

<sup>132</sup> For a seminal ruling on the status of international law, here the ICCPR, as an effective part of Kenyan law, see the case in the High Court, *Diamond Trust Ltd v Daniel Mwema Mulwa* (2010).

constitutional jurisprudence, which accompanied the whole trajectory of reform. Direct judicial involvement in the transition assumed particular importance, notably, in a renowned public-interest case, *Njoya and Others v Attorney General and Others* (2004), in which the authority of the Constitutional Convention to draft a new constitution was challenged before the court. In this case, the applicants argued that the parliament, acting through the Constitutional Conference, could not claim authority to exercise constituent power, as a fully new constitution could not be authorized by a sitting government. Further, the applicants asserted that the sitting parliament privileged selected ethnic groups, and they protested against the fragmentation of the Kenyan nation into electoral districts during the writing of the constitution, claiming that this was prohibited under international law. Ultimately, the High Court found in favour of the applicants, arguing, on the basis of the UDHR, that a new constitution could only be regarded as legitimate if approved by the sovereign people, acting as an original constituent power. The court determined that a referendum should be held to endorse the constitution; only a referendum would serve to elevate the constitution above the will of a simple parliament, especially one allegedly in thrall to ethnic interests. In so doing, the court, in effect, proposed that Kenyan citizens possessed a right to constituent power, supported by international law.

The *Njoya* case does not enjoy universally high regard. It is widely intimated that the case was heard at the instigation of Kibaki's increasingly authoritarian government. It is thus suggested that it was designed to derail the constitution-making process, which appeared to be producing a strongly democratic first draft constitution (the Bomas draft), drawing on the interventions of numerous stakeholders (see Berman, Cottrell and Ghai 2009: 493). In insisting on constitutional ratification by referendum, the court might easily have assumed that no constitution could be passed that did not ultimately reflect dominant ethnic interests. After this case, a second draft constitution (the Wako draft) was written, which, as mentioned, was rejected in the ensuing referendum. A new democratic constitution was not finally ratified until 2010, following lengthy periods of ethnic violence. In its 2004 ruling, however, the High Court spelled out certain vital principles, which retained influence through the longer process of constitutional formation, and which eventually gave rise to a constitution endorsed by popular vote. First, the court designated *itself* as the organ authorized to allocate political rights, and, through reflections on public interest,

to identify and to circumscribe the locus of national sovereignty. In this respect, the court assumed and established powers which were not yet constitutionally extant, and so, to all intents and purposes, it accorded itself *proprio motu* constitution-writing force (Juma and Okpaluba 2012: 312). Indeed, it spontaneously directed the Kenyan constitution away from the Westminster-based parliamentary model foreseen in the Bomas draft. Second, the court responded to the fragmented ethnic landscape of Kenyan society by insisting on a source of national agency standing above or behind different ethnic sub-groups, and on this basis it prescribed a referendum as the essential source of legitimacy. The court placed such weight on the right to constituent power because of the regionalistic bias which it imputed to the Constitutional Conference, which, it asserted, sought to ‘fragment and Balkanize the Republic of Kenya into ethnic mini-states’.<sup>133</sup> Through this ruling, judicial power effectively *became* the constituent power. It is notable, in fact, that the court’s identification of constituent power occurred in the context of a public-interest case, and the court assumed the authority to activate constituent power as it responded to collective acts of litigation, thus essentially identifying the constituent power in judicially prepared form. After 2008, this mediating semi-constitutional role of the judiciary remained prominent, and a special court was created to resolve disputes resulting from the process of systemic reconstruction (Juma and Okpaluba 2012: 338).

The final constitution agreed in Kenya in 2010 reflected, in part, the judicial emphasis of the earlier part of the transition. The Constitution was centred around a declaration of national values (Art 10), and a Bill of Rights, both of which were designed to bind all State organs and persons (Art 20). In Art 166, the constitution placed weight on the autonomy of the judiciary in relation to the executive. Art 163 (1) created a Supreme Court, and Art 168 gave strict protection to the independence and tenure of judges (Akech 2011: 390). As in Ghana, Art 165(1) created a High Court with jurisdiction for violations of human rights and fundamental freedoms. Art 259 accorded a highly distinctive purposive role to the judiciary, which was subsequently reflected in notable rulings; it directed the judiciary to promote the values and purposes inherent in the constitution, and to develop the law on that basis.<sup>134</sup> The judiciary was thus assigned a key role in

<sup>133</sup> *Kenya Law Reports* [2004] 1 KLR 239.

<sup>134</sup> In this relation, the Supreme Court declared: ‘The Supreme Court must and shall remain the exemplary custodian of the Constitution. [...] The approach is to be purposive, promoting

giving effect to the transformative substance of the constitution, and in transplanting constitutional norms through society.<sup>135</sup> In fact, Art 261 (5, 6, 7) authorized the judiciary to instruct parliament to pass transitional bills implementing constitutional rights and values, imputing powers to the court substantially beyond those usually implied under separation-of-powers arrangements. These provisions were intended, at one level, to consolidate the constitution as a normative substratum for society as a whole. But they were also intended to accentuate the transformative role of the judiciary in society. In some respects, in fact, the judiciary was conceived as a repository of national sovereignty, able to separate persons from ethnic loyalties, and to link them directly to the state. Notably, Art 22 provided that every citizen was entitled to litigate to defend the constitution, thus constructing the relation between the person and the courts as a decisive element in a process of national inclusion. In this respect, judicial practice was clearly seen as a means of constructing a layer of national inclusion, standing above the particular identities defining the factual reality of the people.

After the passing of the constitution, the importance of the judiciary was further reflected in the establishment of a Judicial Service Commission to lead the reforms, and in the implementation of a Judiciary Transformation Framework, to improve judicial performance. This period also saw the introduction of measures for judicial training and vetting and re-education of judges. As in other post-transitional settings, moreover, this period witnessed a rapid increase in litigation. The rise in judicial power was accompanied by the fact that, although Kenya was initially seen as remaining formally dualist,<sup>136</sup> Art 2(5) of the constitution ascribed heightened force to international law, and Art 21(4) committed the state to legislative fulfilment of international human rights

the dreams and aspirations of the Kenyan people, and yet not in such a manner as to stray from the letter of the Constitution.' Kenyan Supreme Court, Advisory Opinion Nr. 2 of 2012, p. 38.

<sup>135</sup> In one case, this was stated in the following terms: 'Transformative constitutions are new social contracts that are committed to fundamental transformations in societies. They provide a legal framework for the fundamental transformation required that expects a solid commitment from the society's ruling classes. The Judiciary becomes pivotal in midwifing transformative constitutionalism and the new rule of law.' Kenyan Supreme Court, *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014], p. 66.

<sup>136</sup> The question whether Kenya is monist or dualist has been debated since 2010. See notes 137 and 138 below for variations. However, note the recent judicial statement: 'Prior to the promulgation of the 2010 Constitution, Kenya was a dualist state. Subsequent to the promulgation of the 2010 Constitution, Kenya is now a monist state as Article 2 (5) of the Constitution stipulates that the general rules of international law shall form part of the law of Kenya'. This view was expressed in *Mukazitoni Josephine v Attorney General Republic Of Kenya* [2015] eKLR. Elizabeth O'Loughlin kindly drew my attention to this.

obligations. The purposive duties of the courts were in part based on their role in fostering domestic assimilation of international law.<sup>137</sup> These objectives were taken very seriously by the Supreme Court, which consciously promoted the incorporation, although not the supremacy, of international law within the domestic legal system (Kabau and Njoroge 2011: 294–5). By 2010, the strict dualist emphasis in earlier jurisprudence had clearly been tempered.<sup>138</sup> In fact, the constitutional reality in transitional Kenya was generally marked by an increasing openness of Kenyan law to international law. The ethnic violence of 2007–08 brought Kenyan law and its deficiencies under scrutiny of the ICC, so that eventually international criminal law was systematically integrated into domestic law, in the International Crimes Act (2009) (Okuta 2009: 1072). As in other settings, moreover, this reception of international law led to a more consolidated promotion of regionalism and decentralization. Chapter 11 of the constitution provided for very substantial devolution of power to county governments, in some of which ethnic monopoly of political power was a strong possibility.<sup>139</sup> Formally, however, in Art 181(b), devolved powers remained subordinate to international law, and decentralization was circumscribed by national legal uniformity. In early case law on devolution, the courts promoted devolution as one strand in a broader process of rights-based social transformation.<sup>140</sup> As in South Africa, therefore, human rights law was promoted both to project a unifying structure for the nation under law, yet also to allow the nation to appear in factually pluralistic form.

It remains uncertain whether the agreed constitution will provide a stabilizing inclusionary structure for the Kenyan state. Some observers

<sup>137</sup> See *In Re The Matter Of Zipporah Wambui Mathara* [2010] eKLR, which used international instruments to overrule parts of domestic civil procedure. See also Kenyan High Court, *Beatrice Wanjiku and another v Attorney General & another* (2012). Note, though, that in this case the supremacy of the constitution over international law was expressly upheld. See further Kenyan High Court, *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another* [2011] eKLR.

<sup>138</sup> *Satrose Ayuma and others v The Registered Trustees of the Kenya Railway Staff Benefits Scheme and others* (2011). One commentary (Mbondenyei and Ambani 2013: 33) argues that Kenyan law retains deep inconsistencies in its relation to international law, yet which nonetheless identifies a harmonization of the two.

<sup>139</sup> One account (Kangu 2015: 419) defines devolution as the ‘centre-piece and most transformative aspect of the Constitution’.

<sup>140</sup> See the claim in the Supreme Court that: ‘Devolution as a required constitutional practice runs in parallel with an attendant set of values, declared in Article 10 of the Constitution: the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, the protection of the marginalized.’ *Speaker of the Senate & another v Attorney-General & 4 others* [2013] eKLR, p. 29.

have claimed that the use of international law has had counter-internationally disruptive effects, even heightening inter-population hostility. Others have seen the interventions of the courts around 2004 as causes of deeply damaging delays in democratization.<sup>141</sup> Notably, moreover, high levels of corruption, including judicial corruption, persisted after the entry into force of the new constitution. However, the emphasis on rights-oriented judicial power early in the transition made it possible for the political system to project an integrated nation as its inclusionary structure, and it meant that national constituent power could be exercised in reasonably controlled fashion. Moreover, the fact that the judiciary was called upon to identify the constituent power meant that a nation, based in rights, could appear and shape the formation of government above the ethnic divisions which had traditionally prevented the construction of a uniformly inclusive political system. In this respect, the judiciary, citing international law, separated the state – to some degree – from ethnically rooted private power, and it placed the state, for the first time, at the centre of a nation. In fact, the judicial activation of constituent power echoed throughout the transition, and it continued to shape the inclusionary structure of the state through the unusual levels, and the great variety, of public interest litigation, which became a distinctive legal feature of Kenyan society. Even under Moi, the restrictive common-law norms regarding public interest litigation were loosened.<sup>142</sup> During the transition, however, access to courts for collective actors was clearly simplified, and, owing in part to the influence of Indian law, public interest litigation was formally protected in the constitution (Arts 22(2)(c) and 258(2)(c)). As a result, public interest cases became an important line of communication between society and government, in some respects forming a distinct channel of socio-political interest articulation, standing beside electoral accountability as a source of popular representation. The courts clearly used public interest hearings to harden their own position in the state and to tighten constraints on private executive discretion.<sup>143</sup> But public interest litigation also became a general instrument for the assertion of minority rights against dominant groups, and such claims were often

<sup>141</sup> See a range of criticisms on different counts in Berman, Cottrell and Ghai (2009: 495–6) and Wabwire (2013: 181).

<sup>142</sup> Rules on standing were liberalized in the Environmental Management and Co-ordination Act of 1999.

<sup>143</sup> For an example of the expansion of judicial power in public interest cases, see the application of a *substantive rationality test* to review executive acts in the High Court case, *Trusted Society of Human Rights Alliance v Attorney General & 2 others* [2012]. eKLR 1.



supported by use of international law, by provisions in the African Charter and rulings in the African Commission.<sup>144</sup> In each respect, the judiciary created an elemental foundation for the political system, and it performed key structure-building and in fact nation-building functions.

In Sub-Saharan Africa, the classical corpus of international law may well originally have pressed societies into unsustainable positivist fictions of nationally centred sovereignty and uniform nationhood. This began in the colonial era, when international law was used as the premise for asserting territorial claims. It then continued during the early period of decolonization, in which most independence constitutions were conceived as instruments for constructing, and gaining international recognition for, simply defined nation states. This meant that most post-independence constitutions defined state legitimacy as expressed through the exercise of sovereign power by homogenous national peoples (Dersso 2008: 526). The concept of national sovereignty as a source of legitimacy thus exposed many post-colonial states to insoluble inclusionary pressures. One important commentary argues that international law originally led to the ‘near erasure’ of more organic forms of statehood in Africa, and it actively perpetuated acute internecine violence between rival groups within society (Okafor 2000b: 504, 526). However, recent innovations in international law have moved the focus of legal authority and legal inclusion away from positivist models of statehood and static constructions of constituent power. On one hand, this is partly because the rise of trans- or supranational judicial communities positions the sovereign state as one tier within a multi-level system of legal norms. As a result, national powers of executive coercion are counterbalanced by extra-national norms, and demands for legal inclusion within national societies can be articulated through reference to many different sources of law. On the other hand, this is partly caused by the increasing force of instruments that promote rights for minority peoples. In Africa, as mentioned, immediate international support for minority-population rights has been far weaker than in Latin America. Notably, before

<sup>144</sup> See *Satrose Ayuma* as a public interest case using the African Charter to protect vulnerable and minority groups. After 2004, the courts accepted standing in cases where ‘great constitutional and public law issues’ are raised. See *Onyango & 12 others v Attorney General & 2 Others* [2008] 3 KLR 175. In addition to constitutional protection in Articles 22(2) and 258(2) of the Constitution, public interest litigation is protected by rights of environmental litigation in Art 70.

2010, no African state had ratified ILO Convention 169. Nonetheless, the African Commission has developed a strong defence of certain rights for non-dominant populations, and rights attached to minority populations have often been concentrated around very specific issues – such as land usage.<sup>145</sup> Moreover, national courts have increasingly fleshed out a body of legal norms to protect inner-national populations, and they have been able to use norms declared in the Charter to establish and protect rights, such as rights to land and rights to water, with particular importance for minority peoples.<sup>146</sup> In recognizing the rights of distinct or sub-national populations as elements within the international legal order, therefore, international norms helped to prise apart the monopolistic force of national states, and they began to promote more localized acentric governance within national territories.

More generally, however, in many states in Africa, the emergence of a transnational judicial emphasis in domestic law has helped to create a more flexible and autonomous legal order, which, in different ways, has refined the inclusionary structure of national political systems. At a practical level, first, historically weak states have utilized internationally extracted human rights norms in domestic law to relocate functions of inclusion, which had traditionally centred on the material integrative force of economic organizations, towards judicial institutions, backed by international legal authority. This, of course, was partly triggered by the diminution of state capacity caused by the liberalization packages of the 1980s. However, the fact that national constitutions are founded, not in single constructions of nationhood, but in systems of rights means that states can construct an inclusionary order for their societies without forcing entire populations into material convergence around organs of state, and without exposing fragile state institutions to deep allocative pressures, often exacerbated by intense ethnic hostilities. In fact, in many African societies, the rising force of international law, transmitted through national courts, brought a shift in emphasis from *corporate/material inclusion* to *judicial/normative inclusion* as the basis of both statehood and nationhood. In many cases, the super-imposition of international human rights norms on classical strata of political and material rights has created institutions that are able to draw legitimacy from multiple sources, without incessant risk of politicization, and rights provide a more sustainable foundation for processes of state construction and nation building.

<sup>145</sup> See note 97 above.

<sup>146</sup> See for one example note 138 above.

Second, the changing emphasis of international law has meant that states have been increasingly able to integrate ethnically diverse communities, through varying media of inclusion. The domestic integration of international norms often stimulated patterns of government adapted to settings where purely territorial/sovereign control of populations had historically been elusive (or impossible) (Clapham 2001: 15). Through the wave of rights-based democratic constitution writing in Africa, the simple assertion of national sovereignty as the sole focus of inclusion gradually ceded ground to the principle that states could draw authority from multi-normative communities. This meant that within broad rights-determined constraints, varying legal forms, customs and loyalties could co-exist, and ultimate authority was not dictated by a simple national sovereign power (Bratton and Chang 2006: 1081). In this respect, too, internationally extracted rights reduced the responsibility of states for mediating between ethnic groups, and they formed a more fluid, complex structure of national inclusion to support the state.

Overall, the incorporation of national states within a multi-tiered legal/political order began to sustain the functions of inclusion which, in the unpropitious environment of post-colonial Africa, states had historically struggled to perform. Inclusion under international human rights law evolved as a plausible structure-building alternative to the contrived integrative edifice of the post-colonial state, legitimated by an indivisible sovereign nation (Okafor 2000b: 520; Pham 2008: 185). In societies in which the nation state did not develop as a sociologically organic phenomenon, international law promoted an inclusionary structure, abstracted at a relatively high level of autonomy, that has allowed new, less acutely centred patterns of nationhood to emerge, and which has alleviated states of pressures caused by their centration on simple national sovereignty. In many cases, in fact, international law has entered national societies as a medium which separates the normative form of the people, based in rights, from the factual form of the people. In deriving legitimacy from an inner construction of the people based in rights, national governments have simplified their inclusion of the people, and often, paradoxically, allowed the people, within overarching rights-based constraints, to appear and to obtain recognition in its factually pluralistic form.

The model of judicial constitutionalism in Africa has often been linked to global policies of neo-liberalism. Clearly, historically, the rise of judicial constitutionalism was connected, either directly or

indirectly, to monetary reform policies introduced in the 1980s.<sup>147</sup> Nonetheless, it is perhaps not wholly accurate to associate the growth of judicial institutions solely with neo-liberal economic policies. Regional international jurisprudence in Africa is not solely focused on liberal rights. To be sure, the African court has generally restricted its involvement in domestic policy questions, and it has accepted that obligations of states in enforcing social rights are resource-dependent (see Yeshanew 2013: 340). However, the African Charter also emphasizes core social rights, including, in Art 22, the right to development. Moreover, the African Commission has not been reticent in finding violations of social rights, notably (with limitations) the right to health.<sup>148</sup> In addition, some of most activist African courts have taken a strong line in promoting socio-material rights.<sup>149</sup> What is notable in the growing impact of international human rights law, however is that, in some societies, this has created a normative structure which severs social rights from highly politicized processes of political and material inclusion and which allows social rights to be circulated, and to include agents in different parts of society, without forcing societal conflicts into full convergence around the institutions of national states. The penetration of international human rights has created a *fourth stratum* of rights in society in which other rights, notably social/material rights or rights of ethnic inclusion, have been not abandoned, but partly *depoliticized*. As in other settings, the domestic reproduction of international law has constructed a transnational tier of rights in national societies, which are derived from a relatively formal legal domain, positioned above national society. The fact that these rights are separated from the processes of social mobilization and regimentation which originally produced rights means that they can be activated without exposing the state to the pressures induced by purely national strata of rights. Internationally constructed rights, at least potentially, form a distinctly resilient inclusionary structure for the political system, and they allow the political system to re-define its autonomy (Osaghae 2005: 102). In some respects, in fact, the fact that many African societies did not experience fully evolved national statehood means that they are

<sup>147</sup> As background see Herbst (1990: 954–57), Shaw (1993: 165). Note observation of this connection in Adjami (2002: 104).

<sup>148</sup> See, for example, *SERAC & CESR v Nigeria* Communication No. 155/96 (2001); *Purohit and Moore v The Gambia*, Communication No. 241/2001 (2003).

<sup>149</sup> See examples above at p. 323.

particularly receptive to transnational judicial structure building, and they interlock rapidly with transnational judicial norms to promote multi-centric, variably rights-based structures of inclusion for their political systems.

## CONSTITUTIONALISM AND STRUCTURE BUILDING IN CURRENT TRANSFORMATIONS

The claims above about the implications of international human rights norms for patterns of national structural formation are not restricted to processes of constitution writing or state reform that are already complete or relatively advanced. On the contrary, this pattern is reproduced and even accentuated across a range of current processes of institutional transformation. At present, very diverse state-building trajectories reflect the integral relation between the growth of transnational law and the rise of effective structures of national political inclusion. Even in societies yet to establish a full democratic constitution, the constituent fusion of national and international law is often a prerequisite for the growth of a political system able autonomously and consistently to legislate and to deploy political power across a national society.

### a China

Recent institutional developments in China present a partial analogy to the tendencies in the cases described earlier. Naturally, to be clear, all processes of constitutional formation in China are marked by quite striking anomalies and unusual features, and many factors militate against the establishment of laws with higher constitutional force. In China, most obviously, there has been no move to establish political democracy. Further, the 1982 constitution of China has a mainly declaratory content, and it does not support the protection of abstracted higher-order norms. Also, Chinese leaders have repeatedly shown an aversion to international law, which they have often derided as an intrusion on national sovereignty (see Ogden 1974: 12, 19; Ahl 2009: 29, 44–5, 64; Krumbein 2010: 311).<sup>150</sup> At different historical junctures, the Chinese government has in fact been fervent in rejecting international law for its encroachment on national sovereignty, which means

<sup>150</sup> Moderately affirmative in its evaluation of China's compliance with international human-rights treaties is Krumbein (2010: 715). Earlier literature was generally much more critical. See, for instance, Kent (1991: 184).

that Western-style concepts of rights have been only marginally recognized (Lubman 1999: 64). Moreover, judicial institutions in China are only partly independent; the Chinese political system lacks strictly divided powers, and courts are subordinate to party organs (Finder 1993: 152; Backer 2010: 594). Evidently, these factors mean that both the direct translation of international norms into national law and the immediate constraining of legislation by international rights norms, or indeed by any constitutional principles, are not firm characteristics of the Chinese political order (see Ahl 2009: 307, 311, 343, 344). Currently, in fact, constitutionalism is only cautiously discussed in China, and the future consolidation of constitutional norms is not assured.

These qualifications notwithstanding, however, the recent history of China is surely marked, in general, both by attempts to improve the consistency of the law, and by the growing quasi-constitutional potency of rights-based legal norms, often of international provenance, which impact formatively on national institution building. Initially, in the first post-Mao years, the Chinese government embarked on a rapid process of legal reform, intended to raise the regularity and basic quality of the legal system. This period saw significantly increasing public investment in the legal profession and a tentatively formalized commitment to legal uniformity (Epstein 1994: 34–5). Since the 1980s, then, China has witnessed a restructuring of the legal system, which at times reached quite radical proportions, and, through a series of far-reaching reforms in the 1990s, the rule of law was substantially reinforced. This transformation is visible in China's international legal position; Chinese law has been progressively altered to reflect international legal expectations. During the reforms of the 1990s, China signed major international human rights treaties notably, in 1998, the ICCPR, which, however, still remains unratified. However, this transformation is far more visible in domestic legal practice in China. The reforms of the 1990s saw important pieces of legislation designed both to impose regularity on judicial procedures, and to protect rights of individuals. Significant amongst such laws were the Law on Judges (1995), the People's Police Law (1995), the revised Law on Criminal Procedure (1996) and the Lawyers Law (1996) (Kent 1991: 351). From the early 1990s onward, further, courts acquired authority to review acts of public authorities (Zhu 2010: 109), and the traditional division of governmental competence between the National People's Congress (NPC) and the Chinese Communist Party (CCP) was partly altered to confer greater autonomy on the judiciary. Gradually, the judiciary assumed the power, to a

limited degree, to apply human rights norms to support legal rulings, and even to extract a formal set of norms for scrutinizing acts of public institutions (Cai 2005: 14). By 2002, the CCP declared simply that: 'No organization of individuals enjoys any privilege above the Constitution and its laws' (Lin 2003: 261). Moreover, by 1999, the Chinese constitution was amended to include a specific recognition of the rule of law. In 2004, most importantly, Art 33 of the constitution was revised to declare that the Chinese state 'respects and protects human rights'.

To be clear, these developments did not create a system of judicial control in which courts could evaluate legislation. However, they had particularly striking consequences for administrative law in China. Indeed, one of the most important pieces of legislation in the reforms of the 1990s was the Administrative Litigation Law (1990), which sets out procedures to promote private litigation against the government. For various reasons, the efficacy of this law is often disputed. For example, the CCP is immune from review under its provisions. Moreover, standards for review are indeterminate, the autonomy of the courts in relation to government agencies is questionable and the power of the judiciary to act against higher echelons of government is very limited (Peerenboom 2001: 214–15, 234, 238). Also, some important areas of government activity are not covered by the law. Nonetheless, this law is of not-negligible importance. Notably, it permits individuals to seek redress against government agencies, stating grounds for successful review of administrative acts, and it generally raises access to law, promoting an awareness of law as a normative medium separate from executive power. Commitment to impartial judicial review of administrative acts was further reinforced in subsequent measures in 2002 (Keith and Lin 2009: 247), and it has also been reinforced in guiding cases.<sup>151</sup> Indeed, the volume of administrative litigation increased by over 100 per cent after the introduction of the Administrative Litigation Law, and a high proportion of litigation led to some relief for applicants.<sup>152</sup>

To some (albeit limited) degree, therefore, the Chinese polity now reflects the widespread global constitutional model, and it is marked by semi-autonomous judicial power and at least patchy compliance

<sup>151</sup> Some of the guiding cases even support a concept of legitimate expectations as basis for redress in administrative litigation. See Guiding Case Nor 3: Pan Yumei and Chen Ning, A Bribe-Accepting Case (Published by Supreme People's Court at <http://en.pkulaw.cn/display.aspx?id=9126&lib=law&SearchKeyword=&SearchCKeyword=>) (last accessed 24.10.2015).

<sup>152</sup> On these points see Pei (1997: 835, 836, 859) and Peerenboom (2001: 234).



with international normative directives. Over recent decades, China has developed a rudimentary legal corpus with some similarities to a classical constitutional model, and it has increasingly distilled normative principles, which are actionable through the courts, and to which the Party itself (at least notionally) is obligated (Lin 2003: 268; Lee 2005: 162; Cai 2005: 15; Kellogg 2009: 225). Indicatively, in late 2014, the Central Committee of the CCP declared that it was committed to strengthening the implementation of the constitution, to promoting administration by law, to safeguarding the administration of justice, to increasing public confidence in the judiciary, and to enhancing a law-based society. It also pledged to raise the standing of human rights in judicial procedures.

As in other transitional or at least reformist societies, it is widely argued that the growth of a judicial constitution in China was first triggered by international pressures (Foot 2000: 2, 13, 18). Moreover, it is claimed that the Chinese polity underwent a turn to legal, even semi-constitutional, uniformity because it entered commitments under global economic law, especially law pertaining to monetary and investment guarantees (Shirk 1993: 48; Peerenboom 2003a: 46). It is often assumed that the various legal/constitutional reforms were an attempt to show symbolic compliance with WTO membership criteria, which prescribe a degree of judicial independence (Biukovic 2008: 818). The rise of the judiciary and the growing domestic force of international law are thus widely attributed to the intersection between Chinese law and a legal order dictated by the global economy, ultimately constraining the formal autonomy of the Chinese state itself. Of course, this external dimension to the legal reforms is of undeniable importance, and it is surely in commercial law that international legal norms have greatest effect in China. At the same time, however, the emergent legal order in China can be observed, not as dictated by international forces, but rather as part of a process of inclusionary structure building, which is partly driven by forces internal to the national political domain. The rise of a semi-constitutional system in China was clearly determined, in part, by inner-societal functional pressures.<sup>153</sup>

As in cases discussed earlier, notably, the transformation of the law in China has occurred against a background of weak statehood. From 1978 on, the formalization of law as an independent medium, partly

<sup>153</sup> For a sociological thesis on these points close to mine, see Balme (2005: 10). See also Zheng (1997: 191).

backed by international standards, was promoted as a strategy of institution building, designed to remedy the acute fragmentation of the political system in the Mao era. In fact, the historical weakness of the Chinese political system was caused, quite distinctively, by deficiencies in the legal system, and by the absence of an autonomous legal structure to support functions of political inclusion. Reforms to the legal system, therefore, have commonly been initiated in order to increase the robustness of the political system as a whole. On one hand, for example, the formation of strong state institutions in modern China was obstructed by the intermittent refusal of the CCP to establish a stable legal system (Zheng 1997: 15). Most obviously, Mao's Cultural Revolution revolved around an assault on all rigid institutions, and it demolished institutional forms that located political competence outside the political party, in a formally recognized state apparatus (Zheng 1997: 135). This had particular implications for the law, for judicial organs and for the general existence of a legal system distinct from the directives of party officials. In fact, Maoist policies came close to obliterating the law as a formal and distinct sphere of society; in the wake of the Cultural Revolution, China was marked by very low quality of law, and by extreme judicial fragmentation. One observer claims simply that, by 1978, there existed 'virtually no lawmaking system' in China (Tanner 1999: 43). Naturally, this depletion of the legal system also weakened the basic structure of the political system, as it restricted the ability of the state to reach consistently across society. In addition, the growth of strong state institutions in China was impeded by factors more generally typical of societies defined by weak abstraction of public authority. One important feature of post-1978 China was that personal/patrimonial control of public (especially judicial) office was rife, and corruption was endemic, especially in geographically remote areas, whose legal ties to the centre were haphazard (Zhang 2003: 75, 91; Lin 2003: 227, 238; Hung 2004: 96). As in other societies, extreme patrimonialism debilitated the institutional order of public life, and it meant that the generalized 'implementation of central government policy' across society was blocked by local power monopolies, by informal structures of co-operation and by a range of embedded private actors (Munro 2012: 171).

On both counts, post-Mao China was a society that displayed acute characteristics of weakly consolidated statehood. The autonomous use of state capacities was extremely curtailed, and the interpenetration between state and society was complex, unstructured and diffusely

mediated. In particular, the state was defined by diminished social inclusion, especially in relation to peripheral regions and actors. Central to this was the fact that legal structures possessed only very limited normative autonomy. The tentative constitutionalization of certain legal norms and procedures in China, has been deeply shaped by this background, and legal reforms have often been promoted as a response to society's low inclusionary structure.

The structure-building function of judicial transformation in China can be seen, first, in the fact that increasing judicial independence, backed by rising domestic translation of international norms, elevated the quality and uniformity of legislation in China, and it extended the reach of the legal and political system into society.<sup>154</sup> Notably, one result of the rise in judicial power was that the higher courts began to establish and publicize sample *guiding cases*, in some instances aligned to international expectations, which are now used to provide instruction for inferior courts and to instil consistency across the legal system as a whole. One consequence of this is that lower courts are required to take sample rulings as the basis for their decisions, or their judgments can be overturned. This means that arbitrariness in lower-court rulings has been curbed, and the link between the judicial centre and the regions has been tightened. As a result of this, general confidence in the law appears to have increased, and law is now more widely used as a medium of inclusion. As in Russia, judicial reform in China stimulated a rapid increase in the number of cases heard by courts, it led (surely not by coincidence) to a growth in the mass of laws produced in and transmitted through society, or even to an *explosion in litigation*.<sup>155</sup> In turn, the spread of litigation activated more centralized appeal procedures, intensifying the connection between the higher and the lower courts, and it brought addressees of law more immediately under national jurisdiction (Liebman 2007: 636; Thornton 2008: 10). By consequence, the increase in litigation extended the inclusionary reach of the state into different spheres of social exchange (Paler 2005: 301; Wan 2007: 728). In some cases, in fact, higher courts and provincial congresses have actively stimulated litigation against lower courts and local government authorities; this is presumably because such litigation raises

<sup>154</sup> On the interdependence between application of international law and rising professionalism in the judicial and quality of judicial performance, see Krumboltz (2010: 323).

<sup>155</sup> One observer states: 'The total number of cases handled by the courts grew dramatically throughout the 1980s and much of the 1990s before levelling off at around 8 million cases a year' (Peerenboom 2010: 756).

the reach and prestige of the central political system, curtailing the autonomy of regions and their elites (O'Brien and Li 2004: 87). In its plenary session in 2014, indicatively, the CCP stated that the Supreme People's Court was planning to create circuit courts and regional courts with broad jurisdiction, and that it would actively encourage public interest litigation. As in Russia, in fact, the opening of the legal system to public interest litigation is a salient feature of recent Chinese history (see Hualing and Cullen 2011: 44). In 2014, very tellingly, the Law on Administrative Litigation was revised, with the clear intention of facilitating litigation against local authorities and increasing the proportion of successful cases.<sup>156</sup> In each of these respects, therefore, rights-based litigation has been widely endorsed as a pattern of structural formation, cementing the relation between state and society and creating a normative basis for geographically extended legal/political inclusion.

The structure-building role of judicial power in China can be seen, second, in the fact that the rising regularity of judicial power altered the standing of patrimonial authority and personal protectionism (both central and local) in Chinese society. Importantly, there is evidence in China that the growth of judicial independence and the increasingly elevated rank of transnationally filtered norms helped to loosen patrimonial control of state (especially judicial) offices (Shirk 1993: 59), to underpin anti-corruption policies, and so more evenly to connect the state with society as a whole (Yang 2004: 248). Within evident constraints, therefore, judicial constitutionalism in China intensified the publicly and inclusively usable power of the political system, and it served to harden the political system against fragmentation, especially as it penetrated into remote regions (Wan 2007: 739, 742). This does not imply that the close fusion of public and private office disappeared through the process of legal reform; some observers in fact argue that the growth of an extensive economy in China after 1978 reinforced already strong structural tendencies towards patrimonialism, so that accentuated legal differentiation and increased clientelism developed as parallel phenomena (Lubman 1999: 114–15). Indeed, some research claims that the processes of economic liberalization, which shaped the background to legal reforms, exacerbated problems of corruption, clientelism and rent-seeking (Peerenboom 2001: 178; Yang 2004: 218–21). Despite this, however, the legal reforms in China at least produced

<sup>156</sup> Wim Muller provided this information.

an overarching normative order for regulating local and peripheral exchanges, for producing ground-rules for use of public power and for formalizing distinctions between public and private activities (Lubman 1999: 116; Balme 2005: 16). This substantially raised the volume and consistency of law in society, and it simplified the application of state power to varied social actors and varied localities and social settings: it allowed the state more effectively and reliably to perform acts of legislation across society (Peerenboom 2003b: 404; Remick 2004: 189, 158). In particular, the growth of litigation led to a strengthening of central power against or at least alongside clientelistic network structures (O'Brien and Li 2004: 86).

In all these respects, most notably, the judicial reconstruction of the constitution in China played a distinctively important role in the context of a society in which the over-concentration of political power in a party executive had generated an extremely decentralized political structure. In this setting, clientelism, corruption and neo-patrimonial patterns of office holding had supplied the basic societal supports for the use of power in remote localities (McCormick 1990: 58). Under these conditions, the extraction of external (global) norms in the political system enabled the state apparatus, despite the prevalence of strong centrifugal impulses, gradually to establish and to preserve a certain degree of internal consistency (Lu 2000: 290; Cabestan 2005: 55), and it diminished the most corrosive and debilitating consequences of patrimonialism (McCormick 1990: 21). As in other cases of state building through interaction between national and international law, therefore, the parallel rise in judicial power and the growing force of global norms helped to differentiate the political system from other actors in society. The establishment of a legal order sustained, at a relatively high level of autonomy, by transnational norms specifically enhanced the basic inclusionary structure of the state, and it brought increased cohesion to national society as a whole.

## **b North Africa**

With greater qualifications, recent constitution-making processes in North Africa, beginning in 2011, can also be seen, in part, as examples of judicial structure building. First, these processes of transformation were strongly marked by a deep and distinctive intersection between national and international law, and judicial actors played a key role prior to and during the course of the political restructuring. Indeed, the

processes of transformation in most of North Africa developed against a background in which prominent political activists had allied themselves to human-rights agencies and human rights lawyers, and the linkage between these actors played an important role throughout the process of systemic re-direction. The overthrow of Mubarak in Egypt, for example, was partly triggered by a rising demand for independent judicial power, and judicial actors were able to mobilize human-rights networks to support demands for institutional autonomy and systemic transformation more widely (Odeh 2011: 996). This meant that the revolution immediately assumed a strong transnational dimension: reference to international law as a basis for national political demands had crucial status both in the background and the conduct of the Egyptian regime change (El-Ghobashy 2008: 1613). In addition, in most cases, these transformations occurred against a history of chronically weakened statehood and depleted inclusionary structure. As in other settings, North African states had first been formed through a process of international recognition brought about by rapid de-colonization, in which formal legal sovereignty was imputed to state institutions, even though in many respects they possessed only bare features of statehood (Jackson and Rosberg 1986: 5, 8, 13–15). Like other cases discussed earlier, most states in North Africa eventually evolved on a highly patrimonialist model, in which public offices were widely transacted as private goods and elite actors maintained semi-private control of functions of state.<sup>157</sup> Ultimately, this personalistic system of governance made it difficult for these states to obtain and preserve a secure hold on their societies, and, typically, they struggled to adapt to rising demands for legislation induced by increasingly complex societal structures (Schwarz 2008: 612). As in other constitutional transitions, therefore, the patterns of transformation in North Africa possessed, in part, a functional origin, and they were impelled by inclusionary crises that afflicted domestic legal and political institutions. As in other cases, the assimilation of international norms had particular relevance for institutional weaknesses.

The case of Egypt has exemplary status in this regard. In Egypt, one key cause of the collapse of Mubarak's dictatorship was that the regime was marked historically by very low state capacity and high institutional fragmentation (Brown 1997: 23; Soliman 2011: 96). As a result of this,

<sup>157</sup> See for different comment Beblawi (1990) and Schwarz (2008: 609–10).

Mubarak placed great emphasis on the judiciary as a source of structural support for the state, and he tried to deploy the courts in order to intensify the state's societal control and penetration. On one hand, Mubarak used the judiciary as a simple instrument of coercion. Following the declaration of a state of emergency in 1981, he devised a complex judicial apparatus to suppress political opponents, to uphold regime security and to alleviate the state's weak monopoly of societal authority. In fact, the Egyptian judiciary was already subject to selective executive control, through legislation of 1972. Given his dependence on the judiciary, however, Mubarak also promoted the law as a relatively neutral system of inclusion, and he partly preserved a long-standing tradition of moderately high judicial autonomy. This was evident in the fact that the Supreme Constitutional Court (SCC) was allowed to operate largely without political control (Moustafa 2003: 884), and, from 1984, the judiciary had a separate self-regulatory organ, the Supreme Judicial Council. Moreover, Mubarak guaranteed a protected social position for leading judges.

Mubarak's reliance on the judiciary had unsettling consequences for his governmental regime. Ultimately, he was required to accept that the judiciary was in a position to build up and exercise not insignificant quantities of independent power, which meant that the basis of the regime was always precarious and subject to internal contestation. To be sure, the regular judiciary in Egypt was supplemented by a mass of courts applying the emergency laws introduced in 1981, and the Egyptian high courts usually differentiated between judicial and political questions, leaving responsibility for strictly political decisions to the executive (Reza 2007: 548). Nonetheless, throughout the Mubarak regime the judiciary, with its pinnacle in the SCC, often blocked the dictates of the executive. In the 1980s, the courts ruled a number of restrictive laws unconstitutional. These rulings included, in 1987, a very notable example of judicial activism, in which an emergency court declared unconstitutional a law restricting trade-union activity; in fact, in this case the court interpreted domestic law in light of the ICESCR and implied the precedence of the latter.<sup>158</sup> In 1987 and 1990, the SCC even ruled election laws unconstitutional (see Moustafa 2008: 97). By the mid-1990s, in fact, the SCC had become a potent obstacle to the regime, imposing increasingly powerful restrictions on executive

<sup>158</sup> Supreme Court of State Security, *Public Prosecution of Egypt v Salah Aldian Mustafa Ismail and Others*, Decision on merit, No 4190/86 Ozbekia (121 Koli Shamal), ILDC 1483 (EG 1987).



decision making, and, under the Chief Justiceship of El-Morr, the court signalled its independence by repeatedly citing from international law in rulings that struck down legislation.<sup>159</sup> In 2005, ultimately, the Judges Club intensified its opposition to the executive by threatening to refuse to perform its functions in monitoring elections because of perceived electoral improprieties. Moreover, as Mona El-Ghobashy (2006: 21, 99), in particular, has explained, litigation in the administrative law courts in the last years of Mubarak's rule produced a broad contentious legal discourse in society. This was marked, amongst other features, by high levels of public-interest litigation and a high degree of collaboration between judges and NGOs, which made it possible both for litigants and for citizens more widely to assert normative principles against government prerogative (Moustafa 2008: 93–5). The executive responded to these challenges, at different levels, by attempting to constrain the power of the courts (Moustafa 2003: 914; Bâli 2009: 52, 74; Soliman 2011: 137). This in fact repeated a familiar cycle in Egyptian history, as Nasser had earlier implemented swinging curbs on judicial autonomy in 1969. Under Mubarak, however, suppression of judicial autonomy induced a powerful backlash. One of the most important causes of ultimate regime collapse in Egypt was that in 2007 Mubarak passed constitutional amendments to reduce judicial influence in electoral politics and to increase presidential authority in judicial functions (Moustafa 2011: 184; Bernard-Maugiron 2012: 380, 384). This in turn invigorated the always latent alliance between leading lawyers and human-rights activists in Egypt (Moustafa 2003: 902; El-Ghobashy 2006: 159), who eventually collaborated in bringing down the regime.

As in other settings, therefore, the beginnings of systemic transformation in Egypt were strongly defined by the rise of transnational judicial norm setters, which attempted to construct an alternative inclusionary structure for the political system. In fact, the historical reliance of the government on the courts to compensate for weak inclusionary structure was a critical factor for the political system, and the courts created normative pressures, which the state, based in personalistic power, was eventually unable to withstand.

The eventual outcomes of the dynamics of transformation in North Africa are of course not yet knowable, and it is by no means clear

<sup>159</sup> See, notably, Egyptian Supreme Constitutional Court cases 23/16 (18.3.95), using comparative and international law to develop a right to private life and choice of spouse, and 25/16 (3.7.95), using international law to relax controls of freedom of opinion.

whether the regime changes will produce more solidly autonomous political structures. In Tunisia, the 2014 Constitution may well eventually align the emergent state to a pattern of judicial constitutionalism. In Egypt, by contrast, judicial institutions currently play a reduced role in the polity. In the earlier stages of political transformation in Egypt, it may well have appeared that the Constitutional Court would guide the transition, assuming protective custody of the interim system of public law (see Mallat, Wagenberg, Mostafa Abdelkarim and Simcock 2011: 198–9). The interim Constitutional Declaration of 2011 assigned a key role to the SCC in supervising political transition. Ultimately, however, the process of regime change deviated from the judicial constitutional model, and judges showed only limited inclination to consolidate their position by passing rulings based in international law. First, in 2012, President Morsi launched an attack on the judiciary, declaring presidential power immune from judicial supervision. By late 2012, leading judges boycotted the approval of the new constitution, owing to encroachments on judicial independence. The constitution of 2012 then (in Articles 168–170) preserved the autonomy of the judiciary and restricted presidential powers of judicial appointment. But it also partly curtailed the powers of the Supreme Constitutional Court, reducing its membership (allegedly on political grounds). After the military coup against Morsi in summer 2013, Mansour, former Chief Justice of the Supreme Court, assumed the national presidency on an interim basis, to be replaced in June 2014 by Sisi. The 2014 constitution, drafted under Sisi, provides for a strong Constitutional Court (Arts 191–2), but it is subject to constraint. Given the unsettling impact of such litigation under Mubarak, administrative litigation has remained surprisingly important through the transformation. Even in times of clampdown, the SCC, which remained operative through the transformation, continued to hear anti-government cases, sometimes in high-profile electoral questions.<sup>160</sup> However, judicial activism has been an increasingly muted force in the course of regime change. Symbolically, in fact, the courts have dampened earlier (in themselves tentative) claims for the domestic authority of international law.<sup>161</sup> Moreover, superior courts

<sup>160</sup> In March 2015, the Supreme Constitutional Court ruled an electoral law unconstitutional on the grounds that it violated principles of fair representation.

<sup>161</sup> See Egyptian Supreme Constitutional Court 120/20 (2015), claiming that labour rights are protected by the constitution, and do not require additional protection under international human rights instruments.

have been prominent in enforcing political decisions against regime opponents.<sup>162</sup>

In their basic historical contours, nonetheless, the patterns of transformation in North Africa initially reflected a model of structure building by normative borrowing from an international judicial domain. In each instance, to some degree, national and international legal orders coalesced to imprint a new pattern of institutional formation on societies in which the inclusionary structure of the state had conventionally been weak and the functional inclusion of society had been very variable. Notably, in most major North African transitions, courts were originally very powerful actors in the process of revolutionary upheaval and subsequent consolidation. They assumed this position, above all, because they prised open the political system by hearing anti-regime litigation prior to the regime change, and then by extracting higher-order norms from the international domain (Belkezi 2012: 45). In so doing, courts designated themselves as centres of *transnational constituent power*, allowing transnational norms to permeate society and to project a relatively autonomous generalized structure to underpin the political system. In this process, however, the relative autonomy of the legal structure appears now to have been radically diminished, although not extinguished, in most settings. Egypt in fact seems to be close to a condition of systemic re-privatization.<sup>163</sup>

## CONCLUSION

Most contemporary states have evolved on a constitutional pattern that accords a high degree of autonomy to international law, and which secures the autonomy of the domestic political system by positioning it within an inclusionary structure based in international norms – especially human rights norms. Of course, this is not a universal trajectory, and there are exceptions to it. Nonetheless, most states now owe both their stability and their powers of inner-societal penetration, in part, to the fact that, through their recognition of international rights, they have acquired constitutions in which some

<sup>162</sup> In August 2014, the Supreme Administrative Court dissolved the Freedom and Justice Party. In March 2015 the Disciplinary Board of Judges dismissed over forty judges for political activity. I am grateful to Jessica Carlisle for this information.

<sup>163</sup> It is increasingly observed that the rigidification of the current regime is flanked both by increased international investment and by re-appearance of elites that historically had close links to Mubarak.

of their legitimacy is pre-formed, so that much law can be produced and authorized, internally, at a diminished level of intensity. In many situations, law now possesses authority, which the political system itself is not expected to generate through external acts of integration: the national political system pre-constructs part of the legitimacy for its legislative acts by extracting norms from a global legal/political system. In particular, in deriving legitimacy from internationally defined rights, national states are able to project an inclusionary legal identity for their complex populations, they can avoid direct internalization of their national constituencies, and they are spared the inflationary expectations created by integrative ideals of national or popular sovereignty. In some settings, this means that, although unified through formal rights, the people can appear in objectively pluralistic form, and its compression into fictions of homogenous sovereignty is reduced. As a result, international human rights have helped to harden the autonomy of national legal systems, and the fact that states can rely on relatively autonomous international normative structures has allowed them to perform basic functions of legislation and inclusion without uncontrolled integration of concrete populations through political and material rights, and without deep absorption of societal conflicts.

The growth of the autonomy of the global legal/political system, in short, has widely formed a constitutional precondition for the reliable stabilization and relative autonomy of national legal/political systems. Indeed, contemporary states which do not recognize the autonomy of international law typically lurch back towards more personalized, patrimonial patterns of governance. In these respects, most notably, constitutions based in international human rights transpose the reality of national inclusion envisioned by classical constitutions onto the circumstances of complex contemporary societies, and they give enduring objective meaning to the idea of national inclusion that was projected, but only imperfectly sustained, under classical constitutional law. Constitutions based in international human rights achieve this because, like classical constitutions, they deploy rights to evade full inclusion of the sovereign nation from which they extract legitimacy. They are able to do this because they deploy rights derived from an abstract legal structure, which is relatively detached from the strata of rights established and activated through inner-societal dynamics of mobilization, and which stabilizes national states against their own sovereign populations, or at least against the organizational forms of their sovereign populations. The addition of a fourth stratum of rights

to the inclusionary structure of national political systems in contemporary society widely helps to fulfil the original inclusionary telos of classical, national constitutionalism. National constitutionalism thus approaches realization through the integration of national states into a global political system and a transnational constitution, which determines both their internal and external processes of inclusion.

## CHAPTER SEVEN

# THE AUTONOMY OF THE POST-NATIONAL LEGAL STRUCTURE: THE AUTO-CONSTITUENT CONSTITUTION

The formation of a global society defined primarily by single sovereign states gave rise, almost of necessity, to an overarching legal structure, possessing a certain degree of autonomy in relation to national states. As national states evolved, they spontaneously displaced some of their inclusionary functions, both internal and external, into an international legal system. Indeed, states widely utilized international law to create a basic inclusionary structure for their actions, and they often relied on international norms, partly assimilated in their own constitutions, to hold this structure at a level of autonomy which had not been possible in societies with exclusively national legal systems. Only by allowing some basic functions of norm production and legitimation to migrate from national politics to global law, and especially global human rights law, have states been able, generally, to secure their own position in national society. The emergence of a global system of transnational constitutional norms, in short, is a process in which the law, quite generally, has become increasingly autonomous, and national states rely on the autonomy of transnational law to support their own autonomy, both domestically and internationally. Overall, contemporary society is marked by an increasing differentiation of the law as system, and the global legal order has now reached a high level of abstraction vis-à-vis actors and institutions in other social domains.

If international human rights norms provided a principle of autonomy for national political systems, however, the proliferation of internationally constructed human rights, often interacting with national legal norms, has instilled a more general logic of autonomy in

the legal and political system of contemporary society. To an increasing degree, global society as a whole now constructs constitutional principles to underwrite legislation in relatively spontaneous fashion, and it often sustains the inclusionary functions that were classically attached to institutionalized political systems through unfounded, internalistic processes of norm construction. In many settings, in fact, basic functions of political inclusion (that is, binding decision making, collective legislation, authoritative regulation) are not supported by obvious political mandates or demands, but derive constitutional support – simply – from the law alone, without reference to more classical sources of authority. Increasingly, the fact that society's legal structure has evolved to a high degree of autonomy means that the law *on its own* provides authority for acts of political inclusion, and the law *on its own* produces an inclusionary foundation for the political system.

On one hand, this is visible in the political system of national societies. In most national societies, law has become, to some degree, *self-originating*, and the authorization of law by classical political bodies and actors (constituent organs, legislators, executives) is no longer a precondition for law's binding force: the law on its own creates preconditions for collective political acts. On the other hand, this is manifest in the legal/political system of global society as a whole. Beyond national societies, law's authority does not necessarily rely on norms produced by sovereign actors, by actors with devolved sovereign powers, or in fact by actors positioned *outside the law* (see Urueña 2015: 133). In this domain, too, law authorizes political functions in highly internalistic fashion. Overall contemporary society is increasingly defined by the emergence of a legal system which is detached from political volition, in the classical sense of the word, and the legal system now produces normative structures to support acts of political inclusion from *within the law itself*. Most decisions with a (classically perceived) political quality are now produced, simply, by the law, and many political acts are little more than inner-legal functions. This is of course not a universal phenomenon, and in some settings classical forms of politics still persist. But the migration of political functions into legal structures, and the rise of a relatively autonomous legal system, capable spontaneously of producing decisions with political authority, is a striking feature of contemporary society.

What underpins these processes, arguably, is the fact that contemporary society has lost, or is losing, the essential distinction between the legal system and the political system, and, through its global



extension, society is in the process of abstracting a general system of inclusion, in which law and politics cannot easily be separated. Through its increasing autonomy, the legal system spontaneously creates the inclusionary structure, or the constitution, for political acts, and the number of political processes that are not pre-determined by global law diminishes rapidly. In this amalgamated legal/political system, in fact, functions of political inclusion are often assumed by the law, and the law produces its own constitution to authorize these functions. In many respects, society's legal structure has simply become its political system, and the global political system now *constitutes itself* in multiple, varied fashion, across national and international arenas, by referring to norms, which it contains within itself, as law. In general, this means that, to an increasing degree, the political system of global society produces itself, at different locations, both within and outside national societies, *ex nihilo*. The autonomy of the global legal structure means that society is able to construct features of a political system in very different domains, in highly contingent fashion: that is, it can produce and legitimate binding laws in institutionally unregulated environments, often beyond the limits of obviously authorized jurisdiction. Indeed, owing to the autonomy of the global legal structure, society is now easily able to generate spaces of regulatory order outside classical political institutions, and the law supports political-systemic formation as a relatively spontaneous process of social construction.

In this transformation of the political system, the role of internationally defined rights has assumed particular significance. Human rights in fact increasingly distil principles to support an *auto-constituent* structure of political inclusion for contemporary society: that is, human rights underpin a legal structure, both nationally and extra-nationally, in which primary laws, classically made by political actors, are formed within the legal system, and in which law making is internally authorized, without recourse to primary political acts. The inclusionary structure of the global political system, both in its national and transnational dimensions, increasingly extracts its substance from transnationally constructed rights. This structure utilizes rights, instead of sovereign acts of national constituent power, as a primary basis for the production and authorization of law. At the centre of the inclusionary structure of the politics of contemporary society, in fact, is a *final severing of legal inclusion from popular inclusion*. Through the constitutional rise of international human rights law, national political systems were partly stabilized against the peoples from whom they claimed to draw

legitimacy for legislation. Now, however, the constituent centration of the political system around a particular population has been widely supplanted by a political system which has become fully autonomous, and which produces legitimacy for law, not from inclusion of external actors, but from inner-legal auto-constructed norms, *usually condensed into basic rights*.

These tendencies towards the *autonomous constitutionalization* of legal/political structures have a range of quite distinct results. In fact, the process of *auto-constitutionalization* has led, broadly, to a deep polarization in contemporary law. On one hand, the growing autonomy of the law has in some contexts established a series of quite static self-contained legal/political regimes, in which legal/political entities and institutions are obdurately hardened against particular demands for inclusion. As a result, it is rightly argued that some auto-constituted regimes merely repress, or at least relativize, basic rights and freedoms guaranteed under more conventionally deliberated constitutional systems.<sup>1</sup> On the other hand, however, the growing autonomy of the law has also allowed society to generate a plurality of legal/political forms and multiple sources of constitutionality. In some instances, the rising autonomy of the law underpins the emergence of highly adaptive patterns of political-systemic formation, in which law can be generated in very spontaneous, contingent manner, and in which decision-making functions classically assigned to political actors are assumed by many different subjects. In some instances, in fact, the rise of transnational rights as a global inclusionary structure has produced openings for the exercise of new modes of political agency and legal subjectivity, and even new modes of constituent power. Quite generally, however, the construction of primary norms to support society's requirements for law and binding decisions now increasingly occurs as an autonomous internal function of the legal system.

## RIGHTS AND SUPRANATIONAL ORDER

There are some very concrete settings in which, in the emergence of contemporary society, rights have established an autonomous constitutional structure, in which classical political functions of inclusion, decision making and binding legislation have been internalized

<sup>1</sup> For different variants on this view see Coppel and O'Neill (1992: 245), Movsesian (1999: 779), McRae (2000: 29), Marceau (2002: 795), Schneiderman (2008), Somek (2008: 157) and Nicol (2010: Chapter 4).

within the law. To some degree, this is evident in the early expansion of the authority of the UN, in which, as discussed, judicial interpretation of human rights obligations played an important role. However, this role of rights is most evident in other legal/political entities, which have acquired legislative and jurisdictional functions of a strictly *supra-national* character, some of which have developed a consolidated legal structure not categorically distinct from that of national states.

One, albeit qualified, example of this is the WTO. On one hand, the WTO has certain constitutional features, and it draws authority from processes of legal formation which have semi-constitutional quality. For example, the WTO is based in a series of treaty norms, claiming higher-law status *vis-à-vis* national statutes, which create the premises for the supra-national authority of WTO laws (Helfer 2003: 202). Moreover, the legal form of the WTO is fleshed out through the functions of high judicial organs, notably of the Appellate Body (Cass 2001: 42–4; Trachtman 2006: 639), which has defined a distinct interpretive function for itself, and at times sustains its rulings through reference to general international law, and even to international human rights (Jackson 2000: 181). In the functional domains under its jurisdiction, the Appellate Body of the WTO reaches into national states to fortify the rights held by individual agents in their economic activities (Petersmann 1998: 31; Charnovitz 2001; Trachtman 2006: 405), some of which, such as intellectual property rights, are protected in the UDHR and the ICESCR (Petersmann 2000: 21). To this extent, the WTO forms a supra-national legal/political system whose legal structure possesses clear autonomy against national laws, and which derives constitutional power from rights. On the other hand, however, the tendencies towards constitutional formation in the WTO are not very elaborated. In essence, the WTO remains a legally self-contained international organization, focused on trade law and deriving authority from a small set of treaties. It is linked to general international law through Art 3.2 of the Dispute Settlement Understanding (see Pauwelyn 2001: 577). Yet, this does not authorize WTO panels to reach beyond underlying inter-state agreements to implement general international norms, or general human rights laws (see Marceau 2002: 789; Andersen 2015: 11).

As a result, the structure-building results of the WTO are limited. It is possible to observe a structurally enhancing role of the WTO in some societies, such as China, in which WTO directives have promoted judicial systematization (Hung 2004: 108). Moreover, the WTO

promotes normative structure building in some societies because, in dictating external conditions for trade, it curtails economic protectionism, decoupling legal institutions from embedded inner-societal interests and rent-seeking actors, and, to some degree, it is able to promote general norms against the will of national executives (Petersmann 1995: 180). More generally, however, the WTO can easily be seen as a legal system distilled from very select monetary rights, necessary for the liberalization of markets. As a result, WTO provisions manifestly contradict some entrenched rights, especially social rights and rights of labour protection, in some established national jurisdictions (Clarkson 2002: 21). However, the WTO does not of itself possess an independent inclusionary structure.

The most striking example of auto-constituent structure building by human rights jurisprudence is the European Union (hereafter, EU, initially European Economic Communities, or EEC). In many respects, the EU began life as a simple international organization (see Ipsen 1972: 201). To be sure, from the outset, the EU had some attributes that distinguished it from more typical international organizations; for example, it contained decision-making organs, especially the Commission and preceding executive bodies, that were independent of national treaties and whose acts were not directly dictated by member-state prerogatives. Yet, in its original construction, the EU did not differ generically from other international organizations. Over time, however, the EU evolved into a supra-national political system, with clear autonomy against institutions authorized by national and international law.<sup>2</sup> Over time, moreover, the EU acquired a legal order with de facto constitutional standing, able to produce and authorize laws on constitutional foundations, and its autonomy was substantiated by a series of founding legal norms (see Hartley 1986: 234). In particular, the judicial enforcement of rights acquired great significance in the construction of the EU as an autonomous legal/political entity, and rights assumed clear auto-constituent structure-building role in this context.

At its inception, the EU must have appeared a somewhat unlikely case for inclusionary structure building by rights. It has been plausibly argued that the original plans behind the founding of the EU imagined the EU as a community with a strong commitment to international

<sup>2</sup> For a very early variant on this perception, see the claim in Badura (1966: 6) that the 'law of the EEC is an autonomous legal order *sui generis*' [*eine selbständige Rechtsordnung eigener Art*]. See also Maduro (2005) and Witte (2012: 42). For reconstruction of the debate about the legal autonomy of the EU see Bogdandy (2000a: 231, 215, 223).

human rights law, and that the first projected treaty of the European Political Community was designed expressly to protect the rights of single citizens, assimilating the ECHR as its constitutional substructure (de Búrca 2011: 674, 676). As the EU took concrete shape, however, human rights norms played a more marginal role in its formation, and its legal system was scarcely defined by strict normative objectives (de Búrca 2011: 665). The original treaties of the EU, in particular the Treaty of Rome, only mentioned rights insofar as these related to equality of remuneration for economic activities, and, at its creation, the purposes of the EU were defined by a narrowly construed economic mandate (de Búrca 2011: 664).<sup>3</sup> This indifference to rights was underlined in early rulings of the European Court of Justice (ECJ); notably, in *Stork* (1959), in which the ECJ stated that its functions were not founded in rights-based concerns and international rights norms could not be invoked to support its rulings, and in *Geitling* (1960), in which it declared that vested rights were not relevant to its jurisprudence (Scheeck 2005a: 849; de Búrca 2011: 667). As discussed below, the ECJ, and the EU as a whole, later underwent a *turn to rights*, which gathered pace in the 1970s. Right up to the 1980s, however, the ECJ restricted the scope of its rights jurisprudence, refusing to assess the compatibility of the laws of member states with the ECHR in matters falling outside EU law.<sup>4</sup> Generally, the relation between the EU and international human rights law has remained ambivalent. In the ECJ, human rights are still subordinate to guarantees for economic liberties (Coppel and O'Neill 1992: 245; Somek 2008; Micklitz 2012: 245), and, in cases of conflict between fundamental rights and core economic freedoms, the ECJ has tended, notoriously, to show preference for the latter (Curzon 2011: 146; Coppola 2011: 203). Historically, fundamental rights mainly infiltrated European law in cases implying questions regarding market freedoms and free movement. Still today, although Art 6 of the Treaty on European Union (TEU) guarantees that it is bound to respect human rights, the EU has no universal human rights jurisdiction, and protection of the rights of persons affected by its acts is not uniformly strong (see Peters 2014: 435). Furthermore, the EU accession to the ECHR is not complete, and the relation between the jurisprudence of the ECJ and the ECtHR, although increasingly

<sup>3</sup> Rights have thus been seen as a 'lacuna' in the original EC Treaty (Bogdandy 2000b: 1338; Beck 2012: 184).

<sup>4</sup> *Cinéthèque SA and others v Fédération nationale des cinémas français*, Joined cases 60 and 61/84 [1985], p. 2627.

overlapping and co-operative, is not without contestation (Van den Berghe 2010: 152; de Búrca 2011: 692–3).

Partly for these reasons, however, the development of the EU demonstrates very distinctively how, in contemporary societies, human rights norms promote the autonomous abstraction of inclusionary structures, providing relatively abstract support for political functions. Moreover, it shows how classical political functions have, in part, been transferred to the legal domain. Above all, in the emergence of the EU, judicial institutions, especially the ECJ, developed a jurisprudence of rights that helped to consolidate the European legal/political system as it experienced rapid and insecurely authorized expansion, in which conventional sources of inclusionary authority could not easily be activated. Through the ECJ, in fact, human rights instilled a normative centre in the EU through which it internally and autonomously constructed a constitution to explain and sustain its political functions.

The initial position of the ECJ in the EU was rather unassuming, and it did little to foreshadow its later impact. First, under Arts 33 and 41 of *The Treaty Establishing the European Coal and Steel Community* (1951), the court was only expected to examine acts of the High Authority of the Community. It was then authorized to interpret secondary European law by Art 177 of the Treaty of Rome, and its powers in referral proceedings were discernibly widened (Basedow 2012: 67). However, it was only through a series of landmark rulings of the ECJ in the early 1960s, in particular *Van Gend en Loos* (1963) and *Costa* (1964), that it began to assume a structurally formative role in the European polity. The ECJ established in these cases that European laws should be applied directly to individual persons within member-state societies (i.e. it was not mediated through national institutions), and it could itself enforce European law as law with precedence over national statutes and national legal practices. Through the resultant presumption that European law had direct effect across all member states, the legal order of the EU was progressively consolidated as a free-standing, sui-generis legal system, whose origins, authority and enforcement were strictly separated from inter-state acts. Indeed, in *Van Gend*, the court formally declared that the Community established by the Treaty formed ‘a new legal order of international law’.<sup>5</sup> In *Costa*, the ECJ stated that Member States had voluntarily ‘limited their sovereign

<sup>5</sup> *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*. Reference for a preliminary ruling: *Tariefcommissie – Netherlands* [1963], p. 12.

rights', creating a 'body of law which binds both their nationals and themselves'.<sup>6</sup>

On this basis, in its designated areas of competence, the ECJ gradually acquired a status analogous to that of a superior national court, able to rule directly in cases regarding single persons within the member states. In fact, it established a legal system in which national courts, insofar as they heard cases relevant to European law, were transformed into subordinate actors within a supranational legal order, answerable to the ECJ in appellate proceedings. National judges were progressively required to provide remedies in accordance with European law, and, in designated spheres, they became judges of European law. This interaction between the ECJ and national judiciaries produced a decentralized institutional apparatus for the EU, in which European law acquired a distinct inclusionary consistency in relation to the law of different member states.<sup>7</sup>

The formative interaction between European legal institutions and the legal institutions of member states occurred in a number of ways. The linkage between the two tiers of the EU was initially often cemented in relatively informal, co-operative fashion, mainly through the preliminary referral of cases from national (usually lower) courts to the ECJ (see Alter 2003: 55).<sup>8</sup> The European legal system was more fully consolidated, however, as its foundations were subject to challenge by national judicial bodies, which were committed to defending the legitimational integrity of their own national legal orders. The principles set out in *Van Gend* and *Costa*, notably, engendered a sharp conflict of competence between the ECJ and some national Constitutional Courts. National courts, especially those with an ideologically immovable commitment to basic rights jurisprudence, such as the Constitutional Courts in Italy and West Germany, began directly to contest the legitimacy of European legislation and judicial rulings and to oppose the immediate incursion of EU law in national societies. This conflict of competence, tellingly, was conducted in the vocabulary of human rights, and it was through inter-judicial contests in the diction of rights that the normative system of EU law, following its first emergence, was firmly solidified.

On one hand, the Constitutional Courts of Italy and West Germany formulated their resistance to the direct effect of ECJ jurisprudence by

<sup>6</sup> *Flaminio Costa v E.N.E.L.* [1964], p. 593. <sup>7</sup> See excellent comment in Fennelly (2013: 63).

<sup>8</sup> The first preliminary referral was in 1961. The practice was slow at first but grew rapidly after 1971. See discussion in Broberg and Fenger (2010: 5, 8).



arguing that ECJ rulings showed insufficient regard for human rights norms, and they lacked legitimacy for that reason. Consequently, these courts claimed that national courts were entitled to apply domestic standards to oversee, and even overrule, ECJ judgments, and so to restrict the transfer of judicial powers to the Community (Defeis 2001: 309).<sup>9</sup> This conflict first became visible in the case law of the Italian Constitution Court in the 1960s, and then it was prominently expressed in *Frontini* (1973).<sup>10</sup> This judgment recognized the primacy of European law, but it reserved to the Italian Constitutional Court the right to review all cases in which a conflict occurred between EU law and domestic constitutional or human rights law. This rivalry between courts culminated, famously, in the first *Solange* ruling of the West German Constitution Court (1974), in which the German court claimed the right to review Community statutes *as long as* the ECJ did not fully reflect human rights thresholds derived from the ECHR.

In this context, therefore, human rights norms were asserted in the judicial politics of the EU, paradoxically, by actors seeking to harden the competence of national states and their courts, and to police the conditions under which jurisdictional sovereignty could be attributed to Community organs (Carmeli 2001: 344). In response to these attacks on its legitimacy, however, the ECJ began to emphasize human rights norms, especially the ECHR, as premises for its rulings, and it utilized human rights, by design, to justify its autonomy and authority towards national courts. This process began in the key early case of *Stauder v City of Ulm* (1969), in which the ECJ, exposed to the rising criticism of national courts, defined human rights norms as ‘general principles’ of European law (Williams 2004: 145; de Waele 2010: 3, 5), implicitly promoting an incorporation of human rights norms in the Union Treaties. Subsequently, in *Internationale Handelsgesellschaft* (1970), the ECJ declared that human rights could be generally observed as part of the constitutional traditions common to the member states, and they could be applied as common law across member states (Metropoulos 1992: 136). After these cases, the ECJ gradually came to define human rights as parts of a moral *lingua franca* for the EU, which needed to be considered in relevant judicial process. This gained momentum in *Nold* (1974), *Rutili* (1975) and *Hauer* (1979), in which the ECJ explained its

<sup>9</sup> For an account of early opposition of the Italian Constitutional Court to the supremacy of EC law, see Vauchez (2010: 19).

<sup>10</sup> For an earlier case expressing reservations about restrictions of constitutional rights under EU law, see Italian Constitutional Court 98/1965.

judgments as drawing legitimacy from international treaties to which member states had been signatories, including the ECHR.<sup>11</sup> Accordingly, this period was defined by a strategic, although only selective, alignment of the ECJ's jurisprudence to that of the ECtHR (Denys 2001: 35–6).

Through these processes, the ECJ was able to assume some functions usually allotted to Constitutional Courts, and it progressively conferred *upon itself* the power to review EU legislation for conformity with human rights norms, thus heightening its purchase within member states.<sup>12</sup> By the late 1970s, the ECJ was increasingly perceived as a European Constitutional Court (Walter 1999: 962; Höreth 2000: 11; Vesterdorf 2006: 607),<sup>13</sup> and it gradually explained its authority as derived from the protection of human rights (Tanasenscu 2013: 217). In some respects, in fact, the ECJ created its own authority through a practice close to a spontaneous declaration of a block of constitutionality. This practice of the ECJ continued into the 1990s and beyond. By 1989, in *Hoechst*, the ECJ accorded particularly elevated status to the ECHR as a source of its jurisprudence. By the late 1990s, it quoted directly from the ECtHR in its rulings, and, after 1998, regular meetings and regular exchanges were held between judges on both courts (di Federico 2011: 33, 35). Although the EU remained outside the ECHR, by the 1990s, the ECJ was able to accept the principle, declared by the ECtHR itself, that the ECHR formed 'a constitutional instrument of European public order',<sup>14</sup> and it endorsed the standing of the Strasbourg court as a source of cohesive legal identity for all Europe (Douglas-Scott 2006: 662). By 2002, in *Roquette Frères*, the ECJ specifically adjusted its rulings to replicate judgments regarding human rights in the ECtHR. In *Pupino* (2005), it directly adopted the case law of the ECtHR (Morano-Foadi and Andreadakis 2011: 1073). By 2010, the ECJ operated in clear co-operation with the ECtHR (see Haratsch 2006: 944).

Over a long period of time, in sum, the ECJ exploited its conflicts with national courts in order retroactively to construct a rights-based constitution for the emergent European polity, and *internally* to

<sup>11</sup> The ECJ declared in *Nold* that 'international treaties for the protection of human rights' (thus including the European Convention) were to be taken as 'guidelines which should be followed within the framework of Community law' (Scheeck 2005a: 850).

<sup>12</sup> See classic comment in Weiler (1986: 1105).

<sup>13</sup> See the recent description of the ECJ as a 'comprehensive Constitutional Court' in Bauer (2008: 174).

<sup>14</sup> This term was used by the ECtHR in *Loizidou v Turkey* (Preliminary Objections) (1995) and in *Bosphorus* (2005).

solidify the EU as an autonomous legal/political system (see Mancini and Keeling 1994: 182). In this process, the ECJ clearly utilized individual rights to extend the reach of the supra-national legal system into spheres traditionally reserved for national bodies, and to give constitutional standing to EU laws and directives within national domains. Indeed, in general, the construction of the EU coincided with an intensification of the standing of rights, and the thickening of rights, including human rights, supported the EU as it progressively inserted its own constitution into member-state societies.

To illustrate this, as early as *Salgoil* (1968), the ECJ had stated that Articles of European law having direct effect in national societies created personal rights in favour of individuals, which national courts were required to protect, regardless of any rule existing in national law. In *Simmenthal II* (1978), it ruled that EU law renders automatically inapplicable any conflicting national law, and that each national court had a duty 'to apply Community law in its entirety and protect rights which the latter confers on individuals'.<sup>15</sup> In *Becker* (1982), the ECJ decided that obligations of Member States under European law created personal rights, which individuals could assert against their national states. In *Wachauf* (1989) and *ERT* (1991), the ECJ expanded the scope of its rights provisions, and it intensified general personal rights secured by European law to apply fundamental rights as a framework for evaluation of state action in member-state societies. In *ERT*, notably, the ECJ claimed authority to review national rules within the scope of community law for computability with the ECHR. The scope of rights in ECJ case law was widened in *Francovich* (1991), which ruled that private parties had rights of action against states under EU law. Very importantly, in *Schmidberger* (2003), the ECJ was asked to consider, on proportionality grounds, whether political rights could be allowed to restrict rights of economic freedom. Notably, in this case, the ECJ gave support to political rights over economic freedoms. In so doing, it elevated the ECHR to a clear constitutional position in the EU, and it expanded its own authority beyond areas of competence stipulated under EU Treaties, so that it could address political questions in member states. In *Küçükdeveci* (2010), the ECJ ruled that an individual could invoke rights against discrimination in litigation against another individual to block national legislation, thus creating an intense constitutional link between the ECJ and individual national citizens.

<sup>15</sup> *Simmenthal* [1978], p. 644.

By 2011, the ECJ decided, in *Ruiz Zambrano*, that ‘the genuine enjoyment’ of rights obtained by persons ‘by virtue of their status as citizens of the Union’ should be taken as a normative ideal for all legal interpretation in the EU, able to prevail over national laws.<sup>16</sup>

Overall, therefore, the intensification of rights jurisprudence in the EU was closely correlated with the formation of an integrated legal order. In establishing human rights as core principles of European law, different national and supra-national courts acted in loose consort to create a physically decentralized but formally ordered European legal system, with primacy over relevant elements of national law (Dougan 2004: 2–3). This legal system was elaborated around the principle that legal rights, and especially fundamental rights, distilled a direct link between supra-national courts and single persons in the member states of the EU, and this link provided constitutional authority for the legal system of the EU as it evolved to a high degree of autonomy against the laws of national states.

The EU was eventually consolidated as a distinct legal/political system through a process of constitutional construction which occurred at two separate, but functionally connected, levels. Latterly, this occurred through quasi-constitutional moments, in which the basic principles of EU law were declared in programmatic political charters. After the initial judicial turn to rights in the 1970s, in fact, the EU was consciously proclaimed, through a series of effectively constitutional declarations, as a legal/political system at least partly founded in human rights. Early examples of this were the 1976 *Report on the Protection of Fundamental Rights as Community Law is Created and Developed*, and the *Joint Declaration on Fundamental Rights* (1977), which accentuated the importance attached to the protection of rights in the member states (Wincott 1994: 254; Schimmelfenig 2006). By the 1990s, the Treaties of Maastricht and Amsterdam, followed later by the Treaty of Lisbon, gave express constitutional standing to human rights. The Treaty of Lisbon accorded legally binding character to the Charter of Fundamental Rights, based largely in the ECHR, after which the ECJ assumed formally expanded duties in human rights adjudication. Art 2 of the Lisbon Treaty defined the EU as a set of institutions based in general respect for human rights. Through these innovations, human rights were transformed into an express constitutional substructure for the exercise of

<sup>16</sup> *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011], p. 1252.

public authority in the EU.<sup>17</sup> However, the initial process of constitutional construction in the EU was conducted, not by politicians, but by court rulings and inter-judicial exchanges, in which the ECJ, originally acting without reference to a written constitution, gradually spelled out a grammar of fundamental rights as a normative/inclusionary fundament for the European legal/political system.<sup>18</sup> Through this process, national courts were bound to consult with the ECJ before ruling in matters of relevance to European law, and they were instructed to disapply national laws in conflict with rights defined under EU law. National courts thus deepened the societal penetration of the European legal order, and rights defined under European law, applied to individual persons by various courts, cut further and further into national states and their legal order, providing a free-standing inclusionary structure for the EU.

In these respects, the ECJ forms a classic example of an institution (a court) holding *constituted powers* that acted, in essence, as a *self-authorized constituent power*, writing a constitution, far beyond the terms of the original treaties of the EU, to fit its own objectives. Through a long process of self-authorized interpretive practice, the ECJ created a higher-law framework and an underlying inclusionary structure for the EU as a whole (Weiler 1986: 1115; Micklitz 2012: 392). The key to this was that the ECJ was able to borrow from international law, and especially from the ECHR, a series of norms possessing sufficiently high normative status to generate legitimacy for single acts of legislation, to placate national institutions and to establish the authority of EU law in national courts. Naturally, this did not put an end to all resistance by national courts. Famously, the German Constitutional Court continued, intermittently, to oppose the ECJ, most strikingly in the *Maastricht Judgment* (1993), in which it argued that, as the EU lacked democratic legitimacy, its laws could not claim primacy over national laws. Nonetheless, the first *Solange* ruling of the German Constitutional Court provided, indirectly, a vital source of validity for the EU, as it impelled the ECJ to expand its commitment to rights norms and to delineate spheres of discretion in which national courts and the ECJ were able to co-operate in applying European law, fused together

<sup>17</sup> See comment in Bogdandy, Kottmann, Antpöhler, Dickshen, Hentrel and Smrkolj (2012: 508).

<sup>18</sup> See classical observations on this general process in Stein (1981), Weiler (1991: 2419, 2430) and Stone Sweet (2004). On the specific role of rights in the formation of European public law, see Stone Sweet and Brunell (1998: 77) and Rosenfeld (2006: 620).

by a joint promotion of human rights.<sup>19</sup> Of course, it barely requires emphasis that the EU and the ECtHR were originally entirely separate jurisdictions; as discussed, in its early rulings the ECJ denied relevance of the ECHR for the EU. Through the incremental assimilation of ECHR norms in the 1970s, however, the ECJ cemented a triadic link between itself, the ECtHR and national courts. This linkage between the courts created, at one level, a unified framework for enforcement of legislation in Europe, and it bound together and integrated, however flexibly, different legislative institutions in the European legal/political order (Scheeck 2005b: 3–4). More fundamentally, however, the fact that courts were linked together in a shared structure of rights meant that EU law was able to isolate individual persons from their national jurisdictions, and it could extract from individual legal subjects the constitutional authority to legislate for all persons, in all member-state societies (see De Búrca 1993: 306; Craig 2012: 285). Rights, in other words, were utilized as two-level sources of structure building, integrating both national legislators and singular persons into the cohesive supra-national constitution of the European political system.

From the original formation of the EEC to the present, the lack of an original *pouvoir constituant* to give authority to the EU as political entity has troubled theorists of European public order.<sup>20</sup> For this

<sup>19</sup> This was formalized most clearly in the *Solange II* ruling of the West German Constitutional Court in 1986, in which European law was allowed to take precedence over German national law as long as it was consonant with the basic human-rights norms enshrined in the West German constitution. Through this ruling, rights became a medium which made it possible for a national state to transfer 'sovereign powers' to inter-state institutions, and they acted generally to distribute concurrent judicial and legislative powers across the EU polity as a whole (Hofmann 1993: 46). The 1986 *Solange* ruling may have been shaped by the preference of the West German judiciary for a solid national legal order, as opposed to one defined by the ECJ (Davies 2012: 136). Yet, this ruling established a system of inter-judicial comity, in which different courts used rights to mark out boundaries of competence, deference and mutual recognition. Through this, rights formed a language of constitutional or in fact *constituent* dialogue between different tiers of a supranational political system. On the *Solange* rulings as a basis for comity, see Lavranos (2008: 312), de Búrca (2010: 43) and Isiksel (2010: 562).

<sup>20</sup> This debate has involved a number of prominent participants, and it can only be sketched here, doubtless in a fashion that omits important interventions. Anxiety about weak constituent power shaped earliest debates about the constitution of the (then) EEC (see Kaiser 1960). This later became central to sceptical reflection on the EU. In the mid-1990s, for example, Schilling (1996: 394) denied that the EU could claim to derive authority from constituent power, and he used this claim to undermine the legitimacy of EU institutions, notably the ECJ. This critique also appeared in the works of Haltern (2005: 302). See comments in Kumm (2005: 275). In parallel, however, alternative accounts were proposed that endeavoured to construct the EU as legitimated by post-traditional expressions of constituent power. For example, Pernice (2000: 11; 2006: 18) attributed a collective constituent power to the EU, based in the devolved

reason, the EU is widely seen as a legal/political system whose constitution has an obviously *sui generis* character. From a sociological standpoint, however, the legal order of the EU can be examined not as a categorically distinctive phenomenon but as a prominent example of a wider process of inclusionary structure building, which reflects tendencies that are increasingly common in most societies. Seen sociologically, the EU appears as a legal/political system, which was able to dispense with the classical (external) source of legitimacy (national constituent power) and instead to utilize a recursive (internal) source of legitimacy (rights) as the basis for its inclusionary structure. The sociological foundation for this process is that the EU evolved as a legal/political system which, during its construction, was forced to perform complex transnational inclusionary functions, and which could not construct its inclusionary foundations around an existing people. It was obliged, therefore, to devise a constitutional basis for its functions on abstracted, contingent grounds. The absorption of international human rights standards assumed great importance in this process, as it allowed the legal/political system of the EU to compensate for its lack of focus on an objectively given sovereign people, and to produce principles of inclusion *ex nihilo*, at a high level of inner, auto-constituent abstraction. While other polities constructed legitimacy by applying rights to integrate a particular national people, the EU evolved as a polity that drew legitimacy from rights *instead of* a national people: rights stood in for constituent power. Far from forming a categorically distinct legal order, however, the logic of internal rights-based self-constitutionalization in the EU illuminates general legal-sociological patterns in modern society. It is now quite widely the case that the legal system assumes constitutive political functions, and inclusionary structures to support collectively binding laws are increasingly produced in highly autonomous, self-authorized legal acts.

powers of all citizens of the member states, resulting in the formation of a European Constitution as an 'association of constitutions'. Walker (2007: 259; 2009: 172) argued that in the EU there is 'no scope for creation *ex nihilo* of a distinctive constituent power', but he accounted for the EU nonetheless as a pluralistically authorized legal system. Peters (2001: 410) echoed this approach, claiming that, in the EU, constituent power and constituted power cannot be fully separated, and the ECJ assumes the role of 'permanent *pouvoir constituant*'. More recently, Fossum and Menéndez (2011: 53) have developed a theory that observes the constituent power of the EU as residing in the synthesis of constitutional arrangements in the member states. Habermas (2012: 22–3) has added to these debates by examining the constituent power of the EU as a 'pouvoir constituant mixte', exercised by European citizens concurrently, both as national citizens and as citizens of the EU.



## RIGHTS AND GLOBAL LEGAL STRUCTURE

The auto-constituent formation of inclusionary structures has, naturally, become most evident in consolidated, supra-national legal orders. However, the increasingly contingent self-production of inclusionary structures to sustain political functions is now inherent in the legal fabric of global society as a whole. This occurs in both dimensions of the global political system, both nationally and beyond national limits. At the centre of the constitutional law of global society, on one hand, is an *eradication of constituent power*. The constitutional law of contemporary society is increasingly formed within the inner corpus of the law, and, at different locations in global society, law is able to generate strong foundations for political inclusion without recourse to any primary or external constituent act. In some cases, for example the WTO (largely) or the EU (to some degree), this self-constitution of the law might be seen simply to impose a legal order across society, which is relatively closed to particular demands for inclusion. In some respects, however, the self-constitution of the law involves an opening of the law, and it permits contemporary society to establish a system of legal/political inclusion in improbable, spontaneous fashion, in ways that were not conceivable in classically centred societies. Also at the centre of the constitutional law of global society, in fact, is a *splitting, or a multiplication, of constituent power*, which, in some circumstances, can have acutely liberating implications for persons at different locations across global society. Whereas national states created a foundation for their inclusionary functions by claiming to integrate a national population and by devising a multi-layered system of rights to accomplish this, contemporary society increasingly attaches its legitimational support to a relatively free-standing set of rights, which are not tied to the inclusion of any given people, and which can sustain legislation on highly contingent, pluralistic, inner-legal premises. In this process, rights produce different structures in different parts of society. In national societies, this loss of emphasis on national sovereignty can mean that national constitutional laws are simply produced through inter-judicial exchanges, similar to legal formation in supra-national entities, so that classical procedures for authorizing public law become more marginal. However, this loss of emphasis on national sovereignty also means, both within and beyond national societies, that constitutional law can now be produced at many social locations. In some contexts, both national and transnational, it allows new agents to enter the political

system, even permitting new subjects to assume essentially constituent roles in the creation of primary norms for society, or for parts of society.

To this degree, the inclusionary structure of global society is now increasingly built, in part, through a *fifth tier of rights*. Global society increasingly relies on a contingent stratum of *transnational rights*, which allow it to produce and circulate law spontaneously and acentrically, as pressures for legal inclusion become more decentred and globally diffuse.<sup>21</sup> Pressures for legal inclusion in contemporary society are no longer solely communicated by single populations towards single national states. Instead, these pressures originate in constantly emerging and shifting global domains, and they are not directed towards simply aggregated political institutions: often global society is required to produce and support legislation without possessing clearly mandated institutions to do this. Transnational rights allow society to absorb or *to insulate itself against* the highly acentric demands for legislation which it creates, and they establish an inclusionary structure in which society can preserve the elemental form of a political system and create clearly legitimated laws, even in face of highly unpredictable legislative pressures. In both the national and the transnational dimensions of global society, therefore, political-systemic formation (that is, the preservation of a structure for authorizing collectively binding laws) increasingly occurs on the basis of transnational rights. Transnational rights form a fluid substructure for the political exchanges of society, and, both in its national and in its transnational locations, the global political system spontaneously *constitutes itself* by internalizing such rights as sources of constituent power.

Examples of this spontaneously structure-building role of rights can be seen in the following processes:

### **i Rights, litigation and inner-legal constitution making**

The shift to an *auto-constituent* inclusionary structure in the political system is reflected in some of the quite simple processes of constitutionalization outlined in [Chapter 2](#) – namely in the fact that, after 1945, interactions between courts began to assume constitution-making force. After this time, the rising interlocution between courts meant that, by the 1950s, courts had begun, tentatively, to construct a

<sup>21</sup> On ‘meta-rules’ in global law despite extreme legal fragmentation, see the outstanding analysis in Renner (2011: 220).

separate judicial community, gradually linking judicial bodies located at different junctures in the global political system. As a result, eventually, courts were able to produce authority for legislation on inner-systemic normative grounds without reference to external acts or agreements. The fact that, increasingly, all courts slowly acknowledged an international diction of human rights meant that judicial norms rulings could easily be passed across jurisdictional borders, and norms established by courts often became binding on other courts or on legislatures, beyond national boundaries. Of course, the interaction between national and international courts has not always been without friction, and there are innumerable cases of deep conflict between national and extra-national courts.<sup>22</sup> Nonetheless, in principle, the overlapping of international and national jurisdictions has meant that many basic laws are produced not by political actors or decisions but by inner-judicial communications, and courts now articulate constitutional norms for other actors at a high degree of inner autonomy. At different levels of global society, therefore, courts have been able to extract from human rights a self-authorizing constitution for themselves, and for other bodies. Although formally repositories of constituted power, courts now routinely produce constitutional norms, within which, with other institutions, they exercise legislative authority. Courts thus often act as constituent and constituted power at the same time.

Such inner-legal construction of constitutional law is visible in many spheres of inter-judicial interaction. Most obviously, international courts often produce norms with *national* impact, and international courts have repeatedly established rulings to produce, or at least deeply to influence, national constitutional laws.<sup>23</sup> Cases of this kind are most prominent in states operating within clearly *supra-national* jurisdictions, such as in the states party to the ECHR or the ACHR, where supranational rulings have at times triggered immediate processes of constitutional revision. An obvious example of this is *Dudgeon v UK* (1981), brought before the ECtHR. Following this case, which challenged laws prohibiting homosexual acts in Northern Ireland, the constitutional position of Northern Ireland in the British constitution was revised. A further case is *Smith and Grady v UK* (1999), brought

<sup>22</sup> *Solange I* was discussed above. The *Maastricht* ruling of the German Constitutional Court in 1993 is a further example. Note also the *refoulement* case in the Supreme Court of the USA in the 1990s, *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993) as an extreme example of opposition by national courts to international norms.

<sup>23</sup> See above pp. 93–100.

before the ECtHR. In this case, discrimination against homosexuals in the British military was declared a violation of Art 8 ECHR, and the remedies available for such violations in the UK were deemed to contravene Art 13 ECHR. This led to a revision of the core principles of judicial review in the UK, and it significantly altered the constitutional standing and competences of the judicial branch. Many examples of constitutional reform caused by international court rulings are found in Latin America. One key instance occurred following the 2001 case in the IACtHR, *La última tentación de Cristo v Chile*, in which the Chilean government changed the national constitution in response to an IACtHR ruling on censorship laws. More broadly, in 2011, the Mexican government introduced a raft of constitutional amendments, giving greater protection to human rights, as a result of judicial recommendations for constitutional revision in cases brought against Mexico in the IACtHR.<sup>24</sup>

At a national level, however, the constituent role of courts is often observed in less immediate fashion, as national courts apply general international principles to reconstruct the basic laws of their polities. As discussed, the Colombian constitution has assumed its distinctive characteristics through the evolution of the doctrine of the block of constitutionality, through which judges and advocates, clearly acting as a secondary constituent power, have used international law and the case law of the IACtHR to elevate core norms in the constitution. In some cases in Colombia, judges have even defined international soft law as part of the constitutional block.<sup>25</sup> Less formalized cases of such processes are found in Chile, into whose domestic legal order the *Pinochet* cases in London triggered a deep influx of international norms. In *Urrutia Villa v Ruiz Bunger* (2009), symbolically, the Chilean Supreme Court declared that there could be no statute of limitations for domestic contraventions of international *jus cogens*. In *Vergara Toledo v Ambler Hinojosa* (2010), as mentioned, the Supreme Court overruled the principle of *res judicata* for some cases heard during Pinochet's dictatorship. Although the Chilean courts generally recognize international treaties as having rank below domestic constitutional law, moreover, the Constitutional Court has ruled that international norms pertain to

<sup>24</sup> The cases giving rise to these changes are *Radilla-Pacheco v. Mexico* (2009) and *Rosendo Cantú et al. v. Mexico* (2011).

<sup>25</sup> One example is the Pinheiro principles, the UN principles for treatment of displaced persons, which is widely cited as part of the block of constitutionality. See for one example Colombian Constitutional Court C-280/13.

the highest laws of state and can be used to judge the constitutionality of domestic norms.<sup>26</sup> In one case, despite the notional primacy of the national legislature, the Constitutional Court assumed the power to adapt the content of legislation, as it accused the parliament of taking too long to align domestic laws to international treaties.<sup>27</sup> In these cases, the Chilean higher courts invoked international norms to re-define, in clearly fundamental ways, the normative order of society as a whole. Arguably, in fact, the courts re-defined the constituent power, and they began to interpret a constitution based, not in the will factually constituted in the late 1970s, but in the construction of current Chilean society evidenced through subsequent regime changes and elections, and interpreted by judges themselves.

Equally far-reaching examples are found in New Zealand, a polity notionally committed to Westminster-style parliamentarism.<sup>28</sup> In New Zealand, it was ruled in *Tavita v Minister of Immigration* (1993) that international human rights treaties should be considered by administrative officials, regardless of the standing of these treaties in domestic law (see Waters 2007a: 471, 478). In *Hemmes v Young* (2004), later, the Court of Appeal used human rights treaties as a basis for the constructive reinterpretation and updating of existing, seemingly antiquated, statutes, so that international law became a source of constituent norms in domestic society (Waters 2007b: 663). Even societies that are relatively closed to international human rights law, such as the USA, have seen comparable cases. In *Lawrence et al v Texas* (2003), the Supreme Court determined, partly through reference to the case law of the ECtHR, that state-level prohibition of consensual homosexual acts in private spaces was not constitutional, thus defining new constitutional principles regarding both rights of sexual freedom and the limits of federalism. In this case, the Supreme Court used reference to principles in the ECHR to overturn a previous judgment, *Bowers v Hardwick* (1986), so negating *stare decisis* and effectively declaring primary law.

Similarly, in the UK, legal cases concerning questions of human rights law have provoked deep changes in constitutional principle, and they have contributed, constitutively, to the rise of a distinct

<sup>26</sup> Chilean Constitutional Court, Rol 2493/2014.

<sup>27</sup> Chilean Constitutional Court, Rol 2492/2014.

<sup>28</sup> See the classical account of the parliamentary sovereignty in New Zealand, expressed in *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323: 'Parliament is supreme and the function of the courts is to interpret the law as laid down by Parliament'.

body of constitutional rights. Ultimately, of course, a set of appealable, semi-constitutional rights was formalized by parliament in the Human Rights Act (HRA) in 1998. Before this, however, legal cases with implications for human rights had already assumed clear constitution-making significance. In the 1970s, senior judges began to show responsiveness to the diction of formal rights, and, through the 1980s, and then more fully by the 1990s, judges consciously established human rights as elevated constitutional norms in UK public law. They did this, first, by asserting principles of common law as de facto fundamental rights, imposing normative constraints on governmental power.<sup>29</sup> At the same time, however, in the 1970s and 1980s judges ascribed heightened importance to ECHR norms.<sup>30</sup> Ultimately, in the years prior to 1998, the courts began to assimilate international human rights norms in domestic law, and to flesh out an autonomous body of human rights law, combining rights-based common law and rights derived from the ECHR. Initially, human rights were mainly cemented in the sphere of administrative litigation, notably in cases concerning use of discretionary powers, and the doctrine was developed that administrative acts affecting fundamental rights must be subject to more exacting standards of judicial control (see Hunt 1997: 220, 290, 292).<sup>31</sup> By 1995, in fact, the courts had assimilated ECHR principles to dictate general norms for the use of public authority, and they had established the principle that all public bodies were subject to particularly strict constitutional constraints where fundamental rights were implicated.<sup>32</sup>

In these acts, though, the courts in the UK, as in other common-law jurisdictions, shaped a system of public law which, although it was underpinned neither by a formal constitution nor by a formal catalogue of rights, acknowledged the existence of *constitutional rights*, which the legislature had only limited, exceptional, authority to overrule.<sup>33</sup> It became common ground in English law that, whatever their

<sup>29</sup> *Morris v. Beardmore* [1980] 2 All ER 753 *R v. Secretary of State for Home Department ex p Mohammed Fayed* [1997] 1 All ER 228.

<sup>30</sup> See *R v. Secretary of State for the Home Department, ex parte Phansopkar*; *R v. Secretary of State for the Home Department, ex parte Begum* [1975] 3 All ER 497. But see also the debates in *R v Chief Immigration Officer, Heathrow Airport, ex p Salamat Bibi* [1976] 3 All ER 843, [1976] 1 WLR 979. Here it was made clear that the ECHR was not part of UK law but ought still to be taken into consideration.

<sup>31</sup> *Bugdaycay v. Secretary of State for the Home Department and related appeals* [1987] 1 All ER 940.

<sup>32</sup> *R v. Secretary of State for the Home Department, ex p McQuillan*, Queen's Bench Division [1995] 4 All ER 400.

<sup>33</sup> *R v. Lord Chancellor ex p Witham* [1997] EWHC Admin 237 (7th March, 1997) (Laws J).

constitutional position, legislators were only permitted to act in breach of human rights norms in cases of very pressing need, and only in express terms: the will of parliament was increasingly seen as a will intrinsically proportioned to rights.<sup>34</sup> This then opened the ground for the courts to declare that the UK polity contains an implicit hierarchy of statutes, in which some laws have constitutional standing and are relatively entrenched against repeal, and even to restrict time-honoured assumptions regarding the sovereignty of parliament.<sup>35</sup> Indeed, in *Simms* (1999), one judge went as far as to suggest that the UK courts had acquired powers to assess the constitutionality of statutes not far removed from those exercised in polities with a codified constitution.<sup>36</sup> After the introduction of the HRA, this transformative logic was reinforced, and human rights cases provided further occasions for judges to solidify the normative order of the state. By this stage, judges were able to assert that the public-legal order of UK was located at an ‘intermediate stage between parliamentary supremacy and constitutional supremacy’, thus imputing some degree of spontaneous constituent authority to human rights norms.<sup>37</sup> Moreover, the force of human rights was applied not only to check new legislation for conformity with rights but to read new meanings into older legislation, and to align older laws to standards derived from rights.<sup>38</sup> This reflected the deep constitutional principle that all laws endorsed by the elected legislature should, under normal circumstances, be compatible with international human rights law. In each case, acts of judicial interpretation clearly moved close to acts of constituent power.

Inner-legal construction of constitutional law is also visible in the fact that national courts are now able to direct the constitutional law of other national polities, and the cross-national migration of judicial principles has expansive impact on public law in different societies.<sup>39</sup> Furthermore, in some, albeit infrequent, cases, national courts have been able to pass rulings that create, or at the very least reinforce, international law, such that national courts become formative of norms with constitutional force at an international level, binding on many states.

<sup>34</sup> *Pierson v. Secretary of State for the Home Dept* [1998] 2 LRC 98 (Browne-Wilkinson LJ).

<sup>35</sup> *Thoburn v. Sunderland City Council* [2002] EWHC 195 (Admin) (18 February 2002).

<sup>36</sup> *R v Secretary of State for the Home Department, ex parte Simms and another* – [1999] 3 All ER 400 (Hoffmann LJ).

<sup>37</sup> *International Transport Roth GmbH & Ors v Secretary of State For the Home Department* [2002] EWCA Civ 158 (22nd February, 2002) 71 (Laws LJ).

<sup>38</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30 (21 June 2004) 24.

<sup>39</sup> For a classical study of this, see Jackson (2010).



This can occur in a number of different ways. Sometimes, this simply occurs as national courts clarify interpretation of international norms for other national courts (see Nollkaemper 2012: 10). However, this also occurs in extra-territorial proceedings, in which national courts establish principles of liability, within their own societies, for state institutions, persons and corporations under international law. The ruling of the US circuit court in *Filártiga v. Peña-Irala* (1980) is one classical example of this. In this case, international human rights law was used to promote, as part of American law, a system for facilitating the indictment of individual persons, and then other organizations, for human rights violations committed outside the USA.<sup>40</sup> To some degree, the ability of courts to make international law is also evident in decisions, such as *Kadi* (2008) in the ECJ,<sup>41</sup> and related decisions in national courts,<sup>42</sup> which have ruled that acts and decisions in the international domain can be subject to national constitutional jurisdiction. Very notable in this regard is the judgment of the UK Supreme Court in *Ahmed and others v HM Treasury* (2010). In this case, the court overruled, as *ultra vires*, domestic measures to enforce UN anti-terrorism directives, on the grounds that they were applied without authority under a parent statute and without allowing proper access to courts for affected parties, as stipulated by the ECHR. In this decision, the Supreme Court balanced rival international norms, and it used its own powers to reverse the usual and accepted hierarchy in the relation between the UN and the ECHR, effectively defining international constitutional law.<sup>43</sup>

The most striking examples of national courts creating international law, however, appear in cases regarding immunity of states and immunity of heads of state. This can be seen in some of the rulings handed down by the UK House of Lords (1998–99) regarding Pinochet’s claim to immunity as a former head of state. In these cases, the UN Torture Convention, which, unusually, confers jurisdiction on domestic courts, was interpreted as an instrument to limit the immunity of former heads of state for breaches of international law defined as

<sup>40</sup> For further discussion see below pp. 390–3.

<sup>41</sup> The full title of the case is *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2008].

<sup>42</sup> See the Canadian Supreme Court case *Canada (Justice) v. Khadr*, [2008] 2 S.C.R. 125, 2008 SCC 28.

<sup>43</sup> Conventionally both the UK courts and the ECtHR had accepted Art 103 of the UN Charter as binding and had placed the ECHR below, or at least separately from, UN conventions. See in particular the ECtHR case, *Behrami v France and Saramati v France, Germany and Norway* (2007).

*jus cogens*.<sup>44</sup> In *Ferrini v Germany* (2004), rather differently, the Italian Court of Cassation applied Arts 10 and 24 of the Italian Constitution, providing for domestic protection of human rights, to hold that Germany could not claim sovereign immunity for damages relating to crimes perpetrated during World War II.<sup>45</sup> Eventually, in 2012, these rulings of the Italian court were overturned by the ICJ, which claimed that Germany was immune from civil jurisdiction in Italy. However, in 2014, the Italian Constitutional Court struck down legislation in Italy to give effect to the ICJ's rulings on state immunity, seeking to nullify the ICJ judgments as unconstitutional in Italian law and effectively claiming higher authority to define *jus cogens*.<sup>46</sup>

In these examples, it is observable that legal norms claiming higher-order standing are now often generated inner- or inter-judicially: *within the law*. In particular, cases relating to human rights law increasingly touch on intersections between national law and international law, and courts hearing these cases can easily produce rulings that initiate changes in the structure of constitutional law, both nationally and transnationally, and that re-define basic principles of government. Notable in such cases, above all, is the fact that the powers traditionally allotted to constituent actors can now be assumed, in certain circumstances, by new constituent subjects. In this respect, courts routinely move close to the exercise of constituent power. However, subjects acting as *litigants* also assume a similar position. Indeed, it is an increasingly prominent phenomenon that *single litigants* raise legal claims in a form that circumvents conventional legislative and constitution-making procedures, and rights defined under international law can be activated, through litigation, as a source of de facto constituent power, able, in different settings, to create laws of near-constitutional rank (Ochoa 2007: 181).

This is not an entirely new legal development. Throughout the history of national constitutional law, there are a number of cases in which purely domestic rights-related litigation has created new laws, often with partly constitutional standing, and litigation over rights has even been able to establish new, de facto constitutional rights. As a classical example of this, in the USA, rights regarding free exercise of sexual preference were originally formalized as extensions to the right of

<sup>44</sup> See especially *R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening)* (No 3) – [1999] 2 All ER 97.

<sup>45</sup> My attention was directed to this case by analysis in Roberts (2011).

<sup>46</sup> Italian Constitutional Court 238/14.

privacy, which itself lacked strict constitutional foundation and was first articulated through judicial expansion of other rights.<sup>47</sup> The right to privacy was first identified as a constitutional right by the Supreme Court in *Griswold v Connecticut* in 1965, where it was constructed as implicit in, or rather as a precondition for, rights grouped under the First Amendment. The right to privacy then became the basis, in *Roe v Wade*, for rights regarding reproductive choices (Mann 1992: 87, 89). Ultimately, this right was extended in the District Court case, *Ben-Shalom v Secretary of the Army* (1980), to consolidate employment rights for homosexuals. As an alternative example, the evolution of the right of personality (*Persönlichkeitsrecht*) in the post-1949 FRG has had similar results. Through this concept, the courts of the FRG interpreted existing rights in the *Grundgesetz* to create a sequence of new rights, concerning the inviolability of the individual private sphere. This concept was established in a ruling of the highest civil court in 1954.<sup>48</sup> But it was eventually elaborated by the Constitutional Court to prescribe rights of privacy against media intrusion,<sup>49</sup> and ultimately to determine rights concerning access to private information, including information held in electronic media.<sup>50</sup> The theory of personality rights has been extended still further in some Latin American countries, where it produced rights of identity, rights of access to genetic data<sup>51</sup> and even rights to enjoyment of soft narcotics.<sup>52</sup> Rights-related litigation, therefore, has a long-standing tradition of creating new rights, at a high degree of inner-legal autonomy. Despite such precedents, however, the transnational interlocking of judicial norms means that litigation is now a primary source of constitutional norms, and litigation often contains elements of constituent power.

At one level, the constituent power of litigation is visible in *national* societies. To some degree, in fact, all acts of litigation which link domestic law to international law have a constituent element, and litigants in such cases commonly act as constituent subjects in this role. In some cases, however, the constituent force of litigation is especially pronounced. For example, the exercise of national constituent power through litigation is striking in collective rights-based legal mobilization, in which international human rights norms are asserted within

<sup>47</sup> See the early analysis of this in Warren and Brandeis (1890: 214).

<sup>48</sup> West German Bundesgerichtshof, BGH 25.05.1954 – I ZR 211/53.

<sup>49</sup> West German Constitutional Court, BVerfG 35, 202 – Lebach (1973).

<sup>50</sup> West German Constitutional Court, 1 BvR 370/07 and 1 BvR 595/07.

<sup>51</sup> Chilean Constitutional Court, Rol 834/2008.

<sup>52</sup> Argentine Supreme Court, *Arriola, Sebastián y otros s/ causa* Nr 9080 (25.8.2009).

domestic jurisdictions. In such cases, international human rights norms, themselves weakly enforced, are often given emphasis in national constitutional law by political organizations, which are able to articulate their domestic prerogatives around pre-established principles of international human rights law (Simmons 2009: 199). Examples of this during the longer political transformations in Latin America, Eastern Europe and North Africa have been discussed above.<sup>53</sup> In such instances, collective associations, for example advocacy networks or social movements, have often been able to use national courts to galvanize specific interests around rights claims, and so to construct publicly effective, even constitutional, norms by attaching ground-level claims to internationally recognized principles.<sup>54</sup> In some cases, in fact, courts and advocacy networks have worked together to revise existing legal structures.<sup>55</sup> As discussed, moreover, in some transitional societies, especially those with fragile state institutions, litigation is specifically encouraged as a semi-constituent practice, which binds different parts of society into a direct constitutionally formative relation to the political system.<sup>56</sup> The recent rise of public-interest litigation in many societies is especially exemplary of this. In many societies, sitting governments consciously simplify and facilitate public interest litigation. As discussed, this is partly due to the fact that such litigation eliminates local counterweights to the central government, and it adds uniformity to the law's reach across society. At the same time, however, public interest litigation enables multiple subjects to participate in shaping primary laws, and, in many cases of public interest litigation, international law is commonly asserted as a means to expand the public-law obligations of national states.<sup>57</sup>

<sup>53</sup> For extensive analysis, see Sikkink (2011: 88), arguing that human rights prosecutions directly helped to 'build the rule of law' (155).

<sup>54</sup> See suits in *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), cert. denied, 532 U.S. 941 (2001). See broad discussion in Merry (2005).

<sup>55</sup> The example of pre-2011 Egypt is striking in this regard; see Bernard-Maugiron (2008: 269).

<sup>56</sup> See pp. 226, 352 above.

<sup>57</sup> Particularly important examples, strongly influenced by Indian precedents, are found in Kenya. As discussed in Arts 22(2) and 258(2), the 2010 Constitution of Kenya already endorsed substantially liberalized rules on standing for persons initiating court proceedings. Subsequently, Kenya has seen important public interest cases, at times creating new domestic social rights. See most notably the *Satrose Ayuma* case. In this case, the High Court ruled that it had a duty to develop domestic law, using international law as a guide, to secure new rights for collective litigants (a group threatened with eviction). Also very important are examples of public interest litigation in Colombia, which are constitutionally authorized under Art 88 of the 1991 Constitution, and in which new rights, including rights to health, rights to a healthy environment and even rights to public space, have been strongly consolidated. See discussion of this

However, the constituent role of litigation is most visible not in national states but at the level of *transnational norm construction*. Rights-oriented litigation assumes a particularly intense constituent force for exchanges extending beyond clearly delineated national jurisdictions. In these settings, litigation has begun to produce a defining constitutional grammar for society, and the regulatory structure of global society in its extra-national dimensions is increasingly formed by subjects acting as litigants.

Important examples of this are found in cases of extra-territorial litigation, relating to international tort cases. In the USA, for instance, recent decades have seen a number of cases brought under the Alien Tort Statute, in which individual litigants have sought remedies under tort law for violations of human rights law committed outside the USA, and federal courts have adapted international law to furnish rights for private litigants. Early cases heard under the Alien Tort Statute were filed against individuals acting for governments; state action or closeness to government authority was originally a precondition for liability in such claims.<sup>58</sup> However, liability under the Alien Tort Statute was also imputed to individuals in cases, such as *Kadic v Karadzic* (1995), concerning acts of political figures not necessarily acting under colour of law. Increasingly, in fact, it was recognized that the Alien Tort Statute created a legal framework in which extra-territorial liability could also be imputed to private bodies, and it was used for proceedings against a range of organizations, including multi-national corporations. To be sure, the Alien Tort Statute is not the strongest foundation for constituting the obligations of transnational economic actors. Notably, most early cases brought against larger organizations, especially corporations, were settled or dismissed on preliminary motions. In *Sosa v Alvarez-Machain* (2004), an important basis for subsequent litigation, the Supreme Court stated that the bar to private extra-territorial litigation was to be set high. Moreover, in *Kiobel v Royal Dutch Petroleum* (2013), the Supreme Court decided that the Alien Tort Statute did not contain a presumption of extra-territoriality, thus overruling lower-court precedents, in which the statute had been used to exercise extra-territorial jurisdiction. Nonetheless, by 2012, about sixty cases against corporate defendants had been brought under the Alien Tort Statute (Stephens 2014: 1518). Examples of such cases are cases brought against

in Colombian Constitutional Court, T-1527/00. In fact, in much of Latin American, public interest litigation now acts as an important source of constitutional law.

<sup>58</sup> See most importantly *Filártiga v. Peña-Irala* 630 F.2d 876 (2d Cir. 1980).

Texaco for acts in Ecuador, against Coca-Cola for acts in Colombia, against Unocal for acts – including complicity in promoting use of forced labour – in Burma, and against ExxonMobil for acts in Indonesia. In some of these cases, corporations complicit in governmental violations of international law have been designated as *de facto* public bodies, or as public bodies *by proximity*, and corporations have been assigned liability for breaches of international human rights law on that basis. In some cases, notably *Unocal* (2002), this has meant that corporations operating under governments guilty of gross violations of international law have been subject to proceedings where it could be shown that they had knowledge of these violations or in some way derived benefit from them.<sup>59</sup>

Overall, the Alien Tort Statute acquired a complex constituent role in constitutional structure building. On one hand, it was utilized, without very obvious constitutional mandate, to harden constitutional rights within the domestic politics of American society, where it provided an important opening for the introduction of international human rights law into American jurisprudence. Following a series of Alien Tort cases, notably, 1992 saw the passing of the Torture Victim Protection Act, designed to grant individual US citizens and non-nationals the right to sue an individual for torture committed outside the USA, thus establishing a cause of action for extreme human rights violations in cases in which the Alien Tort Statute could not be used (Stephens 2014: 1488–9). On the other hand, the Alien Tort Statute transposed human rights norms from American society, where their authority was limited, into extra-territorial settings, where they were flagrantly denied. Applied to corporations, most notably, this statute subjected private bodies to international law, and it conferred a distinct legal personality, with attendant duties, on economic organizations. Single acts of litigation thus acquired a double constituent standing, and they imposed *de facto* constitutional norms on a range of different societies, and on a range of different actors, without clear extra-legal mandate. Extra-territorial litigation has also assumed semi-constituent authority in UK courts, notably in *Lubbe v Cape* (2000). In these cases, litigation has quite broadly assumed powerful transnational constituent force.

As a result of such cases, litigation over human rights is now emerging as the premise for a multi-dimensional transnational normative

<sup>59</sup> *Doe v Unocal*, 395 F3d 932 (9th Cir. 2002).

structure, which reaches into spheres of social interaction previously outside the domain of national constitutional law. At the centre of this is an expansion of legal personality, through which many actors in different locations are bound by laws with higher normative force. In the growth of transnational litigation, notably, legal personality has been increasingly constructed through reference to human rights, and relevance for human rights norms is established as a principle for attributing legal personality to a given organization. In particular, this indicates that firms and corporate bodies are constitutionally bound not to violate the rights of singular actors, especially outside their home jurisdiction, and they can be subject to international or extra-territorial proceedings in cases of such violation. To be sure, this is a highly disputed field, and it is widely and justifiably argued that originally private subjects, such as corporations, whose activities impact extensively on large populations in multiple settings, are still very weakly accountable under law (Stephens 2002: 48; Kanalan 2015: 214–15). Nonetheless, in different ways, the centring of global order around singular rights has – however tentatively – begun to produce a normative diction, which brings even non-classical subjects under the sway of transnational constitutional obligations. In this respect, rights-based litigation has clearly acquired a constituent role, and rights expressed through litigation project high-ranking norms, able to traverse previously separate jurisdictions. In particular, such litigation has constructed a normative order which, however tentatively, applies like obligations to public bodies (states and agencies) and to private bodies (corporations).

Rights-based litigation has also begun to perform a constituent role in the regulation of modes of social exchange that are intrinsically and irreducibly transnational, which cannot be subject to public-legal order in any one national society. As, diversely, Moritz Renner (2011: 171), Lars Viellechner (2013: 263) and Ibrahim Kanalan (2015: 277) have explained, one example of this is internet regulation, in which informal codes, applied by dispute settlement bodies, are utilized as the basis for regulating conflicts over internet space. In some examples, international administrative panels have deployed international human rights law to construct law for the internet, thus consolidating basic human rights as transnational norms between private parties.<sup>60</sup> In other examples, litigants have brought cases to national courts regarding

<sup>60</sup> See WIPO Arbitration and Mediation Center, *Fundación Calvin Ayre v. Erik Deutsch*, Case D2007–1947.



interests affected by actions in the internet, perpetrated by actors situated extra-territorially, and national courts have referred to international rights treaties to authorize jurisdiction and judgment. This is exemplified by the Australian High Court ruling in *Dow Jones & Co v Gutnick* (2002), in which human rights agreements were considered as instruments for providing a common standard for transnational disputes regarding the potentially defamatory content of internet sites. Self-evidently, this is still a tentatively emergent area of legal practice. However, in such examples, private litigation seems likely to generate a normative order for extra-national interactions, which have to date been weakly regulated by particular states. The possibility that single acts of litigation will produce constitutional norms for the internet is high, and, in such spheres, litigation often stands in for more classical patterns of constituent agency as a source of binding norm formation.

Across a range of settings, therefore, litigation is increasingly a potential source of constitutional formation, and even a source of constituent power, providing a basic legal structure for society as a whole. The activation of constituent power through litigation mainly occurs through the transplantation of international norms into domestic settings. But it also occurs through the constructive transformation of international norms to regulate transnational phenomena. In each respect, global society increasingly authorizes legislation on autonomous inclusionary foundations, and it gives validity to legal acts, reaching improbably across functions and territories, on highly constructed, inner-legal foundations. In each respect, laws concerning emergent phenomena are primarily distilled from provisions regarding human rights, and the inclusionary structure to support such laws is spontaneously produced within a stratum of transnational rights. In such cases, human rights make it possible for a society to produce political authority for decisions as it is confronted with new, precarious objects for regulation, where reliance on classical sources of public-legal validity is improbable. Transnational rights thus assume a key constitutional role as sources of inclusionary structure for society's political functions.

## ii Proportionality

The emergence of an *auto-constituent* inclusionary structure in contemporary society can also be identified in the recent global rise of *proportionality* as a basis for legal ruling, norm setting and public supervision. Evidently, proportionality is a principle of jurisprudence which judges use to resolve legal disputes in which there occurs a conflict between

two rights claims or two rival interests, and especially in which there occurs a conflict between the rights claim of a single person and a state act or state interest (Harbo 2010: 158). In such cases, proportionality is used to adjudicate whether an individual state action that encroaches on legally protected rights is substantially justified by some proportionately valuable benefit that arises from this action, and, as they use this standard, it allows courts constitutionally to measure and determine the legitimacy of public acts, typically in the executive branch. As a result, proportionality alters the classical separation of powers in favour of courts, and it permits courts substantively to evaluate the content of laws and administrative decisions, and effectively to project constitutional objectives for other departments of government. In applying proportionality, courts flexibly apply rights as shadow legislators, using rights-based criteria to measure the adequacy of single government acts to their particular purpose, and conferring legitimacy on these acts as they take effect, and as their implications become clear, through society as a whole.

Moreover, proportionality is closely linked to the rise of international human rights law, and to the broadening penetration of international norms more generally. In most cases, proportionality became widespread in domestic law as national states were integrated in a supranational legal order, and it has commonly been used to assess acts of national institutions in relation to international instruments. Accordingly, most major international human rights instruments contain provisions, or at least make allowance, for use of proportionality in application of international norms, and they permit national institutions to limit, or even derogate from, supranational norms where a proportionately valuable benefit is obtained. This is exemplified, in particular, by Arts 8–11 ECHR. In applying proportionality, therefore, national courts usually engage in dialogue, either implicit or express, with other courts, both national and supranational, and they produce norms, partly with legislative or even constitutional effect, as part of a transnational conversation about the interpretation and enforcement of transnational rights obligations (Cohen-Eliya and Porat 2013: 135). In this respect, proportionality promotes a constant alignment of national jurisprudence to transnational judicial norms, and it adjusts the acts of national political bodies to norms underlying the global legal system in its entirety. The use of proportionality means that internationally declared rights are consolidated as constantly co-implied elements of the transnational legislative landscape, and all public acts, at all

societal levels, are placed, by courts, in a constitutive relation to transnational rights. This originally became prominent in national societies, whose openness to international law was a point of symbolic legitimational commitment, such as post-1949 West Germany. This became most emphatic in the Canadian case, *Slaight communications incv. Davidson* (1989), where the Supreme Court implied that use of proportionality should be used to harden the standing of international human rights law in domestic law. However, proportionality also brought an influx of international norms in jurisdictions, such as the UK,<sup>61</sup> that were historically closed to international law and hostile to proportionality. This is also the case in societies, such as Russia, in which judicial independence from executive institutions was historically curtailed.<sup>62</sup>

The auto-constituent force of proportionality is most clearly visible within the political systems of national societies. Where a national state absorbs proportionality as a principle for ruling on the legality of public acts, the political system is subject to particularly intense constitutional organization. Where proportionality is applied, each act of government is constitutionally controlled by transnational norms, and judicial actors actively constitute domestic law as part of a transnational constitution. Insofar as they assess the proportionality of laws and administrative acts, moreover, judges acquire a vital *sociological* function as agents that observe and normatively assess the impact of public acts through society, and they assess the constitutional acceptability of laws, not only as they are passed but as they penetrate different spheres of social life. Leading figures in the judicial system thus impose a deep constitutional grammar on the national political system, and they ensure that transnational norms (human rights) reach deep into national society, shaping legislation at all stages of its societal application. In this respect, judges, interpreting transnational rights norms, form a mobile constituent power in the state, projecting inner-legal norms to cover, recursively, all political functions, at all societal levels.

<sup>61</sup> See as leading case *R v Secretary of State for the Home Department, Ex p Daly*, [2001] UKHL 26 (23 May 2001). See also the claim in *Huang v Secretary of State for the Home Department; Kashmiri v Secretary of State for the Home Department* – [2007] 4 All ER 15 that classical British public law had failed to provide ‘adequate protection of convention rights’ (Bingham LJ). In *Wilson v First County Trust* 4 All ER 97 (Rodger LJ), it was stated that international human rights (the ECHR), mediated through HRA (1998), had unique position in UK law, acting as a ‘catalyst across the board’ for all acts of legislation, and so allowing courts to assume unprecedented authority in shaping legislative acts.

<sup>62</sup> Proportionality was used in Russia from the mid-1990s onwards.

The constitutional role of proportionality is usually evident in the fact that it elevates the position of *already constituted* rights in the political system. For instance, in the path-breaking Canadian case, *R v Oakes* (1982), the Supreme Court placed a strict three-step proportionality test on legislative interference with personal rights, ultimately finding Canadian narcotics legislation unconstitutional on proportionality grounds.<sup>63</sup> The court interpreted the commitment to a free and democratic society in the *Charter of Rights and Freedoms* in the *Constitution Act* (1982) as a basic norm for checking public regulation and for restricting legislative power. In this case, the Canadian judiciary was able to apply proportionality to define foundational norms for the entire polity, tying the legitimacy of law to a simple rights-based test, to which all public acts could be subject.

In parallel to such cases, however, proportionality at times assumes quite genuine *constituent* force, creating entirely new rights for a particular polity, and it establishes a fundamentally new structure for the political system. In the UK, for example, the increasing use of proportionality, intensifying classical patterns of judicial review, has been instrumental in re-defining the historically accepted system of political constitutionalism. Until the 1990s, it was openly (although not unanimously) declared that proportionality was likely to upset the classical relation among parliament, executive and judiciary in the UK, and it could have no place in English law.<sup>64</sup> Since then, however, proportionality has been integral to the gradual formation of a constitution in the UK, in which certain primary laws (rights) are hardened against the will of parliamentary majorities, and human rights are defined as binding norms to accompany all public acts, from the high executive down to local planning bodies.<sup>65</sup> In the UK, most notably, proportionality became a strong normative foundation for the courts' powers of judicial review, which had traditionally been exercised, to a large extent, as simple common-law powers. Significant impetus for the recognition of proportionality was provided by the ECtHR, in *Smith and Grady v UK* (1999), stating that the accepted criterion of reasonableness used for review of public acts in the UK was not an effective remedy under

<sup>63</sup> *R v Oakes* [1986] 1 S.C.R. 103.

<sup>64</sup> *Brind and others v Secretary of State for the Home Department* – [1991] 1 All ER 720. In this case, it was stated that there was 'at present no basis upon which the proportionality doctrine applied by the European Court can be followed by the courts of this country' (Ackner LJ).

<sup>65</sup> See, for example, *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

Art 13 ECHR, as it did not allow judges to raise substantial questions about public administration. The ECtHR thus came close to prescribing proportionality as a necessary constitutional norm for the UK.<sup>66</sup> In consequence, in *Alconbury* (2001), it was argued in the House of Lords that access to review on grounds of proportionality was a distinctive precondition for the legitimacy of public functions.<sup>67</sup> Ultimately, although the authority of proportionality reasoning remained contested, the presumption grew in UK public law that judges had a duty to apply proportionality to public acts with implications for human rights. This meant, in effect, that judges were bound by a ‘requirement of proportionality’ in cases in which important rights were affected.<sup>68</sup> Proportionality thus assumed clearly constituent force within the political system, and it moved the entire political system towards a judicial-constitutional model, in which the right to rights-based judicial control of public acts became a primary pillar of law’s authority (see Cane 2011: 99). Indeed, UK judges openly ascribed to themselves the duty to make a ‘sociological assessment’ of the impact of administrative acts and to ensure accordance of such acts with higher rights norms.<sup>69</sup>

This auto-constituent force of proportionality is visible, second, in national societies more widely. In many respects, proportionality imposes a deep, self-constituent order on society as a whole. Where a legal system is centred on proportionality principles, society as a whole becomes subject to human rights adjudication, and rights provide a pervasive normative diction in which social phenomena are legally constructed and regulated. One reason for this is simply that private acts are subject to deeper constitutional control, and their impact is more fully evaluated, often against standards of public interest.<sup>70</sup> Most importantly, however, where proportionality becomes a powerful legal principle, the volume of interactions in society subject to constitutional law expands, and, often, interactions across all society, including those between private parties and private organizations, are subject to a constitutional grammar. As a result, the regulatory power of the political

<sup>66</sup> Subsequently it was accepted ‘that the court’s approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting’: *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* – [2006] UKHL 15 (Bingham LJ).

<sup>67</sup> *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions and other cases* – [2001] All ER (D) 116 (May).

<sup>68</sup> *Pham v Secretary of State for the Home Department* [2015] UKSC 19 (Reed).

<sup>69</sup> *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40 142 (Hobhouse LJ).

<sup>70</sup> See use of public interest criteria in proportionality reasoning in *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22 (Hoffmann LJ).

system reaches more deeply into society, and rights provide a constitutional structure in which phenomena in many parts of society are subject to direct political inclusion.

Famous examples of this are the landmark rulings regarding the third-party effect of human rights in the West German Constitutional Court, in which spheres of exchange classically pertaining to private law were subject to constitutional norms.<sup>71</sup> The growth of proportionality was reflected, among other cases, in the public-law case, the *Apotheken-Urteil* (1958), which dictated that restrictions of professional freedom were bound by principles of proportionality.<sup>72</sup> In the same year, however, the court decided in *Lüth* that all cases with implications for basic rights were subject to constitutional jurisprudence, and the court could apply proportionality to such cases. In the FRG, ultimately, proportionality was widely extended to cover interactions located formally in the sphere of private law, and it established the norm that all legally regulated relations were defined by an obligation to recognize higher-order basic rights. Proportionality thus imprinted a deeply pervasive constitutional grammar on society as a whole.

Similar, de facto constituent applications of proportionality are evident in other states. One striking example is Chile, where judges have used proportionality, quite creatively, to impose higher norms across all parts of society. In *Contra Corbalán Castilla y otros* (2013), the Supreme Court ruled that all persons exercising public functions are bound by international human rights treaties, and, for proportionality reasons, civil law is also subject to international law wherever it raises questions with human rights implications.<sup>73</sup> In 2010, the Constitutional Court ruled that in some matters with implications for public welfare, notably health-care provision, private contracts have a public-legal status, and they are regulated by principles of constitutional law.<sup>74</sup> Accordingly, alterations to contracts between notionally private parties in such areas are subject to principles of proportionality. In essence, arguably, such cases mean that proportionality considerations have been used to transform cases heard under civil law into cases with constitutional dimensions, and proportionality extracts some social exchanges from private law and places them in the domain of public law. Indeed, in Chile,

<sup>71</sup> See comment in Kumm (2006: 346).

<sup>72</sup> West German Constitutional Court, BVerfGE 7, 377 – *Apotheken-Urteil* 442.

<sup>73</sup> My thanks are due to Rodrigo Cespedes for discussion of this point. This interpretation is rather controversial. Usual caveats apply.

<sup>74</sup> Chilean Constitutional Court, Rol 1710/2010.

where many service providers were privatized under Pinochet's dictatorship, proportionality has clearly been applied to regulate private bodies, to offset the general primacy of private law and to impose a rights-based constitution on exchanges removed from state control through privatization. Similar cases have become evident in Russia, notably in reference to insurance companies; this also promotes the judicial re-constitutionalization of a recently privatized society.<sup>75</sup> In each example, proportionality spontaneously imposes a deep constitutional structure on society, and it draws society more consistently into a national system of constitutional inclusion, ordered under principles of public law.

As an extension of this, in many cases, proportionality has also gained importance in relation to emergent regulatory fields, and it often projects an inclusionary structure in which legal phenomena can be regulated, which are not easily controlled through existing patterns of public law. Historically, legal systems began to utilize proportionality as a measure of validity for public acts under circumstances in which public authority was undergoing rapid expansion, where government was required to penetrate more intensely and diffusely into a given society and where the inclusionary burdens directed towards administrative agencies increased accordingly. Typically, this occurred where new regulatory functions were accorded to the political system, and where the political system was forced to encounter single social agents in an increasingly broad range of social settings.<sup>76</sup> In such cases, the principle of proportionality enabled the political system to promote simple, flexible criteria to check and control its functions. This meant that, even where it penetrated new societal terrains, the political system could project a normative code to explain and control its societal interactions and to adapt to new demands for regulation (see Sullivan and Frase 2008: 3).

In contemporary society, this original function of proportionality is often reproduced, as proportionality is now commonly applied in settings where the political system is expected to generate legislation for complex, contingent phenomena, typically those with a transnational

<sup>75</sup> Russian Supreme Court, No. 32-KG14–17 (2015).

<sup>76</sup> The concept of proportionality was first developed, tentatively, in the first Prussian Civil Code (*Allgemeines Landrecht*, 1794), whose enactment was intended to regulate the growing range of functions performed by the Prussian state. This concept then gained wider purchase through the growth of the Prussian administrative state in the later nineteenth century, notably in judgments of the Prussian administrative court (1880 and 1882) regarding limits of police action. In the UK, the first (albeit very basic) test of proportionality – the *Wednesbury* reasonableness test – coincided with the expansion of welfare regulation after 1945.



dimension. In such contexts, proportionality constructs authority for legal acts in uncertain regulatory domains, where there is a lack of systemic experience and authority in law making. One obvious example of this is contemporary employment law. In this field, proportionality provides a normative framework in which new social phenomena, such as the use of the internet at work and resultant questions of privacy and intrusion, can be reliably regulated (see Oliver 2002: 351). Similar examples are observable in disputes regarding intellectual property. In both national and supranational courts, proportionality is applied to regulate disputes over the blocking of internet sites by connectivity providers, which violates copyright and intellectual property laws. In such cases, verdicts have been reached through balancing of considerations regarding freedom of information and concerns regarding protection of intellectual property (see Savola 2014: 128).<sup>77</sup> Similar cases are also found in disputes regarding data protection. In such cases, rights of privacy and rights of freedom of information have been balanced through proportionality to define a basic constitutional grammar for internet regulation.<sup>78</sup> Indeed, in such examples, proportionality has meant that private internet regulators (access providers) are subject to constitutional norms, and it performs constitutional functions for the internet qua transnational function system. Generally, therefore, proportionality translates new social phenomena into an authoritative constitutional coding. It allows the political system (both national and global) to expand its reach into society, often in normatively insecure transnational domains, without reliance on express political decisions. In each respect, proportionality spontaneously creates an underlying structure for the political system, and it greatly simplifies otherwise precarious acts of legal inclusion.

In these different ways, proportionality can be seen as a mode of norm production, in which human rights serve, at a high level of inner-legal abstraction, to construct an inner-legal inclusionary structure for the political exchanges of society. At first glance, of course, the spread of proportionality might appear to restrict the decision-making autonomy of the political system. Indeed, proportionality is often seen as reinforcing general defensive rights against political encroachment (Rivers

<sup>77</sup> See, for example, the ECJ ruling in *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* [2014]. Reference for a preliminary ruling: Oberster Gerichtshof – Austria. See also the UK High Court ruling in *EMI Records Ltd & Ors v. British Sky Broadcasting Ltd & Ors* [2013] EWHC 379 (Ch).

<sup>78</sup> See recent ECJ cases: Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* (9 November 2010).

2006: 176; Kumm 2006: 349). To an increasing degree, however, proportionality expands the basic authority and penetration of the political system through society, both nationally and globally. Indeed, proportionality imprints a deep structure of political inclusion on all society. Through proportionality, overall, society's political system obtains an internal perspective through which it can observe itself and construct an internal standard to calibrate its reactions to new regulatory demands, thus projecting an inner form to orient its actions and authorize extensions of its inclusionary functions. In addition, the rise of proportionality imposes a constitutional order on phenomena at different locations across society, both public and private, and the fact that these phenomena are perceived in terms of their *intrinsic relevance for rights* means that they can be rapidly subject to authoritative regulation. Both in public and in private law, proportionality acts as a medium for society's internal constitutional formation, and it allows society as a whole to presuppose an internal formal rationality, through which it can support complex acts of regulation and legislation, even where the political system is exposed to very unpredictable exchanges. Through proportionality, in effect, principles of public law are imprinted on all social phenomena, and all social phenomena, constructed as having relevance for rights, can be subject to easily extensible legal regulation, on authoritative foundations. As in other cases, this allows the political system (both nationally and globally) recursively to *constitutionalize itself*, as its reach into society is extended, and it plays a core role in thickening an inclusionary structure for the hyper-complex political reality of contemporary society. The fact that proportionality allows all social objects to be observed as *relevant for rights* effectively means that society can easily generate and internally project new inclusionary structures for even the most diverse and unpredictable social phenomena.

### iii Rights and new legislative actors

The rise of an *auto-constituent* inclusionary structure is also evident in the fact, as mentioned above, that in contemporary society many agents and organizations are able to assume some degree of legal personality, and certain rights and obligations, under international law. One account of the transformation of legal personality in fact enumerates, alongside states and individuals, inter-governmental organizations, insurgent groups, corporations, and even businesses as potential subjects of transnational constitutional law, bearing both

legal rights and resultant legal obligations (Clapham 2006: 30, 270). Either formally or de facto, in consequence, many agents are in a position to influence, or even to participate in, transnational law making, and many different actors exercise powers with constitutional implications, both nationally and internationally.

This phenomenon is most manifest in the increasing presumption that the individual person is a subject of international law. As discussed earlier, in most post-1945 societies individual persons have been able to obtain some recourse, however partial and limited, to international judicial fora. With some reasonable hope of remedy, single persons are normally able to appeal political acts of their own states, or private acts of other citizens, on established grounds of international law. More importantly, the domestic judiciaries of national states are responsible for applying rights-based international norms in national courts, and they often enforce singular human rights norms, against executives, to protect individual claimants. On this basis, the singular person, constructed in generic form as a rights holder, has evolved as an effective source of primary norms. The claims of individual applicants and litigants, whether brought to national or to international courts, are able to produce laws which run against the original intentions of national state organs, to subject these organs to constitutional constraint, and, in some cases, to create primary norms for all members of a national society (see Peters 2014: 479).

A similar phenomenon is observable in the case of organizations, especially those that cross the regional boundaries between state jurisdictions, and which operate at uncertain points between the public and the private domain. This applies most obviously to NGOs. NGOs now widely act as important norm providers, at least in matters related to their designated sphere of concern. Although lacking any obvious political mandate, NGOs, normally campaigning on human-rights grounds, widely act as legislative or even constituent actors in given policy areas, and they articulate norms with far-reaching effect for public and private bodies within and across the geographical divisions between national polities.

The emergence of NGOs as bodies with legislative, or even quasi-constituent, force became visible first, after 1945, in the international domain. At this time, NGOs acquired important functions in inter-governmental organizations, especially in the UN General Assembly, in regional human rights bodies and in international courts,

most of which were porous to NGO activities.<sup>79</sup> For example, some post-1945 human rights treaties authorized non-state organizations, to petition international courts, and some accorded them a direct role in international norm setting. Notably, Art 71 of the UN Charter first gave recognition to the role of NGOs, and it assigned to them consultative functions with respect to the Economic and Social Council. A Committee on Non-Governmental Organizations was founded as a standing committee of ECOSOC in 1946, and its terms of reference were formally set out in ECOSOC Resolution 288B(X) (1950). In 1968, ECOSOC Resolution 1296 strengthened the consultative functions of some NGOs in the UN. By 1970, ECOSOC Resolution 1503 was adopted, which authorized the Human Rights Commission of the UN to take complaints from non-governmental sources (Tardu 1980: 568; Rodley 2012: 322). This was more fully formalized in the ECOSOC Statute of 1996 on 'Arrangements for Consultation with Non-Governmental Organisations'.<sup>80</sup> In the Declaration on Human Rights Defenders (1999), the UN then made more comprehensive provisions regarding the role of NGOs in international human rights protection. In Europe, Art 25 ECHR restrictively allowed NGOs to submit applications to the European Commission of Human Rights. Later, revised Art 34 ECHR also ascribed standing and personality to NGOs close to that of entities with primary personalities under international law (states). Moreover, from the outset, NGOs obtained high standing in the Council of Europe, and they played an important role in drafting legal instruments (see Wassenberg 2013). Similarly, under Art 44 of the ACHR, NGOs were entitled to lodge petitions with the Inter-American Commission. Art 45 of ACHPR allows NGOs to file human rights complaints (Hobe 1999: 164; Charnovitz 2006: 353). In addition, in some regional systems, involvement of NGOs in international law-making procedures has been intensified through the practice of allowing NGOs to act as friends-to-the-court. By the 1980s, the ECtHR formally allowed NGOs to submit amicus curiae briefs. The ICJ remains closed to NGO involvement, but it has allowed amicus curiae briefs of NGOs to be made public during trial proceedings (Charnovitz 2006: 353). Extensive amicus curiae practice exists before IACtHR, which can receive amicus curiae briefs submitted *proprio motu* (Shelton

<sup>79</sup> For accounts in agreement see Gunning (1991: 230), Gaer (1995: 402), Koh (1999: 1412), Boyle and Chinkin (2007: 77) and Shany (2009: 79). For details, see Spiro (1995: 48; 2000: 572).

<sup>80</sup> [http://www.un.org/esa/coordination/ngo/Resolution\\_1996\\_31/Part.1.htm](http://www.un.org/esa/coordination/ngo/Resolution_1996_31/Part.1.htm).

2004: 638). The provision of *amicus curiae* briefs is a particularly generalized judicial or even quasi-legislative function of NGOs, and it allows NGOs to sidestep restrictions on the categories of legal person acting as party to cases (Wellens 2002: 112; Shelton 2004: 612).

The standing of NGOs under international law is, of course, contested (see Martens 2003: 19, 23). In some delineated spheres, however, NGOs have attained a position which in some respects mirrors that of primary international organizations and even states, and they routinely participate in a range of legislative acts.<sup>81</sup> NGOs widely provide information for and shape the decisions of UN bodies and other international organizations (Gaer 1995: 402; Spiro 1995: 46), and they impact decisively on law making, both in the form of domestic law and in the form of multi-national treaties (Stephan 2011: 1575). Above all, this position of NGOs is determined by human rights: the fact that many NGOs explain their functions as related to rights has provided the foundation for their integration in the broader political system of global society, and they have been able to use rights as a vocabulary to explain, authorize and even constitutionalize their functions within this system.

Vitally, first, the fact that NGOs often concentrate their functions around human rights questions means that they can be constructed as having legal personality, and they can interact formally with courts situated at different levels in global society – i.e. with national and international courts. This rights-based accountability of NGOs means that they can assume a fluidly integrated, yet legally ordered position in law-making procedures at different junctures in the global political system (Benvenisti and Downs 2009: 69; Scott and Sturm 2006: 576). Moreover, second, the fact that they refer to rights means that they can translate the questions which they address into a constitutional vocabulary, which can be presented to and acquire legislative force through international organizations. This can occur as NGOs supply information to international institutions. However, it can also occur through the activities of NGOs in grass-roots mobilization against public bodies in different states, especially in oppressive regimes, in which domestic organizations interlock with international groups to create (at least) hard normative pressures on government organs (see Sikkink 1993: 423–5). In such cases, NGOs extract from human rights

<sup>81</sup> See the outstanding analysis in Hobe (1999: 162, 171). See also Charnovitz (1997: 270) and Nowrot (1999: 631).

law the authority to set normative standards, which, under some circumstances, can assume near-obligatory status for public actors, both nationally and internationally.<sup>82</sup> In this respect, human rights underpin a process in which NGOs, originally private associations, are literally *transformed* into publicly constituted and even effectively constituent actors. In fact, in some national societies, NGOs are often able to obtain a distinctively public structure-building role. In some contexts, NGOs have been invited to participate directly in constitution-making processes, and they have subsequently exerted powerful influence in constitutional practice.<sup>83</sup> In other contexts, especially where formal governance is weak, NGOs act as bodies able to provide legislative and regulatory functions where governments, for whatever reason, are not structurally equipped to do so. The fact that NGOs assume accountability for human rights protection means that they can easily assume quasi-public functions of governance and legislation, and they legitimize such functions inwardly, in national societies, and outwardly, towards international actors.<sup>84</sup>

The constituent power of NGOs is clearly visible in their ability to promote norms for national states and public authorities in national states. However, this power is especially pronounced in the interactions between NGOs and other actors, such as transnational corporations, whose authority is not easily regulated by national states, and not easily captured under formal international instruments (Joseph 2004: 6). In such interactions, NGOs are able to construct a regulatory order in domains that are beyond the reach of most official norm providers, and they distil constitutional norms for the transnational dimensions of society. For examples, NGOs have played a prominent role in the monitoring of powerful transnational private actors, especially large-scale international firms, and for imposing legal, rights-based constraints on such bodies across national boundaries (Ratner 2001: 533). This has been partly accomplished by the use of pressure tactics – for example, through public shaming. But it has also been partly effected through extra-territorial litigation against companies with transnational operations.<sup>85</sup> An illuminating example is *Khulumani*

<sup>82</sup> For details see Spiro (1995: 48; 2000: 572). On this general point, see Gunning (1991: 230).

<sup>83</sup> In Bolivia, NGOs were involved in the process that created the 2009 Constitution. In Colombia, NGOs shaped the judicial elaboration of a block of constitutionality.

<sup>84</sup> Note in this light the claim that: 'Most NGOs probably exist to influence, to set direction for, or to maintain functions of governance or to operate where government authority does not' (Gordenker and Weiss 1995: 546).

<sup>85</sup> See above p. 392.

v. *Barclay National Bank Ltd* (decided 2007), in which a South African NGO (albeit ultimately without success) sued transnational corporations under the Alien Tort Statute before a Circuit Court in New York for complicity in human rights abuses under the apartheid regime. A still more illuminating example is the case brought before the African Commission, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria* (2001), in which two NGOs successfully filed suit against the Nigerian Government and Shell Corporation.

Alongside NGOs, in fact, similar patterns of auto-constituent legal agency are now commonly assumed by other associational groups. For example, it is widely observed that advocacy networks have particular success in producing solid norms, both for public actors and for private bodies, located both in the national and in the transnational arena.<sup>86</sup> Social movements can also claim a position with a certain analogy to that of a constituent power in the transnational arena, and they widely use international human rights norms to articulate legally formative influence around single national issues.<sup>87</sup> To some degree, moreover, corporations and private companies themselves can assume the role of transnational constituent subjects. Corporations with cross-national functions clearly possess a distinct, albeit sui-generis international legal personality. In some cases, manifestly, corporations have material resources substantially exceeding those of many states. As a result, they are capable, and widely guilty, of violating the primary laws of the societies in which they operate, and even of suspending national laws or enforcing external legal norms, especially regarding trade regulation, in the national societies in which their activities are conducted. Moreover, as formally non-public bodies, corporations can easily evade criminal liability, and they are often beneficiaries of governmental acquiescence in malfeasance, especially in national societies with high levels of public corruption or external dependency.<sup>88</sup> In many cases, therefore, transnational corporations act in negation of international and constitutional law. At the same time, however, corporations are capable, potentially, of solidifying a normative structure to regulate their operations, and they are able to promote potent norms to control

<sup>86</sup> See pp. 352, 390, 392 above.

<sup>87</sup> See the unusual account of this in Bailey and Mattei (2013).

<sup>88</sup> See the cases of extreme violation alleged in the US Supreme Court in *Kiobel* (2013), in which Royal Dutch Shell, it was suggested, aided and abetted the Nigerian military in the 1990s. For comment see Joseph (2004: 2, 18).



the actions both of their own representatives and of other actors within and across the boundaries between national societies – at least in designated functional spheres. There is of course no formal or constitutional system of self-regulation for corporations. UN bodies first began to promote binding standards for transnational corporations in the 1970s, and a UN sub-commission promulgated draft norms in 2003.<sup>89</sup> These norms were not accepted by the UN Human Rights Commission and a softer set of framework principles was later approved in 2011.<sup>90</sup> However, multinational corporations have shown some signs of willingness to signal compliance with, and even to consolidate, international legal standards (see Nowrot 2006: 500, 596). This is perhaps mainly attributable to the fact that such normative compliance brings symbolic capital to the corporations in question. In some cases, however, corporations have agreed regulatory frameworks to shape the decisions of large-scale economic organizations, and even to impose normative pressure on national public actors, including states. One example of this is the decision of the Norwegian Government Pension Fund and Danske Bank, the biggest Danish Bank, which decided in January 2014 to divest from Israeli banks for their involvement in building activities in illegal Israeli settlements.<sup>91</sup> This can be seen as an act of corporate constitutional foundation, reaching well beyond the corporate sphere, placing potential constraints both on state agencies and other corporations.

In each of these dimensions, contemporary society is evolving a political system marked by intensified multi-centricity, in which many actors perform functions of legislation and inclusion, and which, in its different dimensions, is capable of constructing norms and promoting regulatory actions in highly contingent fashion. At the same time, however, the political system of contemporary society is able to resist conclusive fragmentation in its acts of normative inclusion, and it is able to rely on symbolically extracted human rights norms to organize, and preserve

<sup>89</sup> See Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12 (2003). See also Ruggie (2007: 820).

<sup>90</sup> See Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (2011): [www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf](http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf)

<sup>91</sup> The Norwegian decision was made pursuant to a recommendation of the Council on Ethics to the Norwegian Ministry of Finance, 1 November 2013, which analyzed Article 49 of the Fourth Geneva Convention and referred to findings of the ICJ in the Wall Opinion, the UN Security Council and the ICRC, see [www.regjeringen.no/pages/1930865/Africa\\_Israel\\_nov\\_2013.pdf](http://www.regjeringen.no/pages/1930865/Africa_Israel_nov_2013.pdf). A Dutch Pension Firm, PGGM, had divested for similar reasons, in so doing also referring to the ICJ Wall Opinion. I am grateful to Jean d'Aspremont for this information.

uniformity within, its legislative functions. Transnational human rights form a basic inclusionary structure for the political system of contemporary society, especially in those dimensions focused on transnational phenomena. This structure enables many actors to create primary legal norms, and it ensures that authoritative acts of legislation can be established in highly variable, spontaneous fashion. Yet, the fact that this structure is based in generally identifiable rights also means that acts of normative inclusion retain some consistency, and legal norms can be reproduced, with some predictability, across very different settings. Rights, thus, underpin modern law making as an increasingly hyper-contingent auto-constituent process, and they project a basic constitution from within which society can flexibly meet its increasingly decentred demands for legislation.

#### **iv Rights, private parties and the multiplication of constituent power**

The increasing standing of the single person as the normative focus of international law has meant that persons are perceived as holders of strict rights not only in relation to their national states but also with regard to one another. As a result, national states have assumed obligations regarding protection of rights, not only in relations between public authorities and single persons, but in horizontal interactions between persons in society. In numerous cases, international courts have expressed the principle that national states have responsibility to ensure that the rights of persons subject to their jurisdiction do not experience violation of inner-legal by other persons, thus implying that states have a *positive duty* to ensure that all persons are secure in their rights, and that states are bound to recognize and preserve interpersonal, horizontal rights.<sup>92</sup> In this respect, too, the organization of law around rights has changed the constitutional structure of society, and it has established quite new sources of constituent power.

Important early examples of this can be found in rulings of the ECtHR. The ECHR was not first intended to apply directly to private interactions between persons. However, the Strasbourg court gradually developed a body of opinion to the effect that contracting states had clear positive obligations in the private domain. This principle was applied in *Airey v Ireland* (1979) to determine that states are accountable for private violations of rights, and for ensuring that rights between

<sup>92</sup> For analysis of these points, see Reinisch (2005: 79).

private parties are adequately protected. In *Marckx v Belgium* (1979), the ECtHR ruled that the responsibilities of states for protecting private life implied positive obligations: i.e. to legislate in order to protect rights in the private sphere (Cherednychenko (2006: 197–8). In *X and Y v the Netherlands* (1985), the ECtHR again ruled that states have a reasonable obligation to adopt ‘measures designed to secure respect for private life even in the sphere of relations of individuals between themselves’.<sup>93</sup> In this case, the ECtHR held that the Netherlands had failed to respect the private life of a mentally handicapped teenager who had been forced to have sexual intercourse with the son-in-law of the governor of the home in which she was a resident. Non-observance by a state of its duty to protect lateral rights of citizens was again taken to imply that the state had failed in its responsibility in *Costello-Roberts v UK* (1993) (Fredman 2008: 59). Analogous tendencies also appear in rulings given by the Human Rights Committee of the UN. In *Delgado Páez v Colombia* (1990), the Committee found Colombia in violation of the right to personal security (guaranteed in Art 9 ICCPR) because the respondent had not adequately protected the applicant against assault. One of the most notable cases in this category is *Velásquez Rodríguez* (1988), a case treating forced disappearances of political regime opponents in Honduras, which entailed the first exercise of contentious jurisdiction by the IACtHR. As well as emphatically extending the scope of individual rights against the state, the verdict in this case declared that state liability for breaches of human rights could be found for omission on the part of states to guarantee rights of individuals and for failure to take necessary steps, including ensuring appropriate domestic remedies, to reinstate persons in their rights.<sup>94</sup> The implications of this case had an abiding impact on the actions of the IACtHR. By 2006, in *Damião Ximenes Lopes*, the IACtHR, in its first ruling against Brazil, held that a state is in breach of convention rights if it does not provide adequate protection for persons suffering ill treatment, in private institutions, because of mental-health problems. Subsequently, the court monitored compliance with its rulings by seeking to extract data regarding standards of training for mental health professionals.

In these cases, the construction of individual rights as sources of legal authority has clearly positioned states within a vertical *external* constitution, so that they are obligated to international norms both in their

<sup>93</sup> ECtHR, *X and Y v.- The Netherlands* [1985] 7.

<sup>94</sup> IACtHR, *Velásquez Rodríguez v. Honduras* (1988).

actions and in their omissions. Yet, this construction has also established an *internal* normative grammar, gaining effect inside national societies, which has extended constitutional law, both in origin and in application, into the private domain. As a result, the sphere of private exchange, traditionally defined by horizontal legal relations, is increasingly seen as having constitutional relevance, as giving rise to public-legal causes, and as acting as a source of new constitutional norms. In many societies, in fact, where their acts touch on human rights, private bodies are translated into repositories of publicly constituted authority, and relations between private agents become parts of society's constitutional order. In essence, where courts treat violations of human rights norms, courts themselves, acting as public bodies, have an obligation to apply constitutional norms to the subjects before them, and, in consequence, courts increasingly draw these interactions, and implicated bodies, into the constitutional domain. Through the implementation of human rights, therefore, courts have redrawn the boundaries between public and private activities, and they now construct a thickened constitutional structure for society, able to incorporate, and dictate higher-order legislation for, exchanges in all spheres of society.

Some of the most striking national cases of this auto-constituent extension of public power through human rights have occurred in the UK. The constituent role of human rights in the private domain has had particular importance in the UK both because of the UK's historical resistance to international human rights norms, and because the British courts had traditionally rejected clear distinctions between private law and public law.<sup>95</sup> The rising importance of rights as determinants of public law has fashioned new conceptions of public law and established distinctive principles for ascribing public-legal responsibility. In particular, however, the constituent role of rights has assumed significance in the UK because, in classical British public law, courts could only supervise public bodies on *ultra-vires* grounds, which meant that only institutions founded in statutory powers could be subject to judicial review: the construction of a body as public depended on its exercise of a power originally granted by parliament. The opening of the UK's legal order to formal human rights law, however, meant that courts were prepared to see traditionally private acts as impinging on rights protected under public law. In some cases, this led to a broadening of the grounds of judicial review, and it meant that a growing range of bodies, not only those

<sup>95</sup> See *Davy v Spelthorne Borough Council* [1984] AC 262, [1983] 3 All ER 278 (Wilberforce LJ).

exercising authority strictly conferred by parliament, were defined as public and were subject to constitutional constraint by courts.

The role of rights in reformulating the limits of UK constitutional law had already begun before the ECHR became domestically applicable (2000). As early as the mid-1980s, the definition of public-law authorities had widened, and some private agencies, at least insofar as they formed part of a broad governmental framework, were deemed amenable to judicial review, effectively as hybrid private/public bodies (Cane 2011: 16; 103).<sup>96</sup> The presumption was articulated at this time that public powers could be defined as such by virtue of their functions, and that any body or any organ could be subject to judicial review, and so classified as public, if it performed functions with a partially public dimension.<sup>97</sup> This extension of the concept of public authority was furthered through the reception of EU law, which, reflecting the emanation of the state of doctrine applied by the ECJ, created the presumption that rights could be claimed against any person or any organization acting as a provider of public services or discharging obligations of a public nature.<sup>98</sup> Ultimately, under the HRA, the range of actors in the UK that were imputed a public quality increased significantly, and the (never categorically pronounced) distinction between public and private bodies was reconfigured. In some cases, notably, acts with a traditionally private character, such as the termination of tenancies, were deemed to possess a public character insofar as they impacted on formal rights of affected parties.<sup>99</sup> In other cases, courts, under obligation to enact the ECHR, were prepared to observe unusual subjects, for example newspapers, as agencies subject to obligations under human rights law, performing functions with some public qualities and infringing rights which required protection under public law.<sup>100</sup> As a result of this, the concept of 'public' authority – as a category of legal imputation – was modified and extended.<sup>101</sup> In many respects, courts became primary arbiters in this question, and the construction of a body as distinctively *public*

<sup>96</sup> Important precursors of this can be found in Indian law. See especially *Shetty v. The International Airport Authority of India & Ors.*, [1979] 1 S.C.R. 1042.

<sup>97</sup> *R v Panel on Take-overs and Mergers, ex parte Datafin plc and another (Norton Opax plc and another intervening)* – [1987] 1 All ER 564.

<sup>98</sup> See consideration of this doctrine in *National Union of Teachers and others v Governing Body of St Mary's Church of England (Aided) Junior School and others* [1997] IRLR 242 CA.

<sup>99</sup> *R (Weaver) v London & Quadrant Housing Trust* [2009] EWCA Civ 587.

<sup>100</sup> *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22 (Hale LJ).

<sup>101</sup> *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another* – [2001] 3 All ER 393. Note though that this was overturned on appeal.

fell to courts: courts decided which private functions could be transformed into functions with constitutional significance, bound by rights-based constitutional norms (see Bamforth 1999: 160).<sup>102</sup> Overall, the volume of social exchanges subject to binding constitutional inclusion was greatly expanded, and human rights dictated increasingly consistent structures of public law to regulate different social spheres.

Other polities, however, are witnessing a far more fundamental transformation of the public/private distinction through the constitutionalization of the private sphere, dictated by human rights law. Particularly notable recent cases of this can be seen in Chile. Perhaps most importantly, since 2005, Chilean courts have adopted the unusual practice of applying international rights norms to cases falling under private law or tort; through this practice, cases with implications for basic rights have been subject directly to constitutional law, and proportionality has often been used to constitutionalize private relations.<sup>103</sup> In Russia, the Constitutional Court has used international human rights law to extend the range of actors subject to laws of public accountability, declaring that all legal persons, including private organizations, can be imputed public functions insofar as their actions have implications for the rights of parties affected by them.<sup>104</sup> In Colombia, courts have also extended the realm of public law deep into the realm of private law, and the generally decisive role of courts in national state building has been mirrored in constitutional rights guaranteed in the private sphere.<sup>105</sup> In Kenya, courts have reacted to public-interest cases by expanding concepts of public accountability: that is, by widening constructions of state authority,<sup>106</sup> and even, where indigenous rights are concerned, by introducing private claims such as claims over land rights into the category of public law.<sup>107</sup> In Bolivia, indigenous communities have been broadly constructed as constitutional subjects, bound to recognize principles of international law, because of their

<sup>102</sup> In *R (Weaver) v London & Quadrant Housing Trust* (2009), the court proposed a concept of 'hybrid authority' to capture functions, not of a classical public-law character, that are bound by human rights norms. On other occasions, the courts were less flexible in applying public-law remedies to contractual acts. See *YL v Birmingham City Council & Ors* [2007] UKHL 27 (20 June 2007).

<sup>103</sup> See rulings in *Laurie Sáez v San José School* (Appeal Court of Temuco, Rol nr 59/2011) and *González Norambuena v Arellano Stark* (Supreme Court Rol nr 4.723-07, 2008). See comment in Cespedes (2013).

<sup>104</sup> Russian Constitutional Court Decision on merits (*Postanovlenie*) No. 19-P of 18 July 2012.

<sup>105</sup> Colombian Constitutional Court, T-167/15.

<sup>106</sup> See, for example, the *Satrose Ayuma* case discussed above at p. 344.

<sup>107</sup> See *Ledidi Ole Tauta & Others v Attorney General & 2 others* [2015] eKLR.

capacity to dispense justice affecting human rights.<sup>108</sup> In each of these cases, internationally defined rights have greatly intensified the societal reach of national political systems. Mediated through national courts, human rights have, in many polities, constituted a deep structure of public law across all society, and the quantity of actors assuming strict accountability under public law has greatly increased.

In these different examples, a general tendency in the constitutional impact of transnational rights norms is becoming visible. To an increasing degree, the domestic absorption of international human rights law means that the public or constitutional quality of political power is defined, not through any specific inner feature or source of authority, but by the contagious effect of transnational rights. To this degree, the political order of contemporary society is internally constituted by rights, dictated and transmitted by courts, and more and more acts in society are bound by constitutional law produced in this way. Both nationally and outside nation states, society's political system is increasingly defined, or even constituted, as *that mass of exchanges in society which have relevance for rights*. As a result, transnational human rights law imposes a deepening inclusionary structure on society, through which many categorically diverse actors operate, and are held to account, as bodies exercising public, constitutionally defined authority for society as a whole, and the actions and decisions of an increasing quantity of subjects in society are determined and authorized by a strict inclusionary order (rights). This results in a contingent, deeply internalistic auto-constitutionalization of society, through which society's structure of public inclusion is extended to regulate an increasing number of social interactions, across its increasingly hybrid interfaces, beyond classical categories of private and public law. Through the fusion of national law and international human rights law, human rights acquire the power to roll out a system of public law into new spheres of society, whether national or international, and they extend the inclusionary reach of public law, horizontally, from within *the law itself*.<sup>109</sup> All society thus becomes subject to a process of self-constitutionalization. On one hand, this process limits the power of subjects bound by public law, and it

<sup>108</sup> See Bolivian Constitutional Court 0152/2015-S2.

<sup>109</sup> Note the distinction between this view of transnational constitutional law and the account proposed by Gunther Teubner. One of Teubner's claims (2012: 48) is that transnational constitutional law originates, not only from public law, but also from private law. While not disputing the fact that private law can now create constitutional norms, my claim is that we can currently observe a constant extension of the domain of public law, and that an ever-increasing quantity of social exchanges is translated into the grammar of constitutional law.



imposes a strict order of human rights obligations on a growing number of actors. On the other hand, this process dramatically increases society's capacity for producing and authorizing law. It constructs a political order which can produce authoritative law for new phenomena at a high degree, simultaneously, of spontaneity and inner consistency.

## CONCLUSION

Contemporary society is increasingly defined by the fact that its political system, both nationally and transnationally, constitutes itself directly through human rights, which are identified with single persons in society. This reflects a deep convergence between the legal system and the political system of contemporary society. This process of self-constitution can be observed in both dimensions of the global legal/political system, in its national and its extra-national locations. Human rights now form a general transnational inclusionary structure in society, and they are articulated, in many practices and by many actors, as principles to give contingent authority to legislation, and pre-emptively to incorporate new phenomena in the system of legal/political inclusion. Rights instil a deep auto-constituent logic in society and its political system(s), and to an increasing degree, most social exchanges generate a constitutional order for their regulation from within themselves, insofar as they refer to rights norms. As discussed in earlier chapters, the inclusionary structure of the modern political system was built through the inclusion of the people through different strata of rights, so that the people became present in the political system and its legislative acts through the inclusionary medium of rights – first, through private and monetary or economic rights; second, through political rights; third, through socio-material rights. These tiers of rights were ultimately stabilized under a fourth stratum of international human rights. Increasingly, however, contemporary society has severed its inclusionary structure from the people. The capacity of the political system to legitimate legislation, as it is exposed to highly complex demands for legislation, depends on an order of *transnational rights*, which permits the political system of global society to perform acts of legal and political inclusion at a rapidly rising level of abstraction and autonomy. Through this process, the political system of society is no longer easily definable as a distinct set of collectively mandated institutions or organizations. Instead, the political system appears as a contingent construction of the law, which emerges in society wherever

collectively binding regulation is required. In some dimensions, therefore, the political system acquires the capacity to constitute itself *without the people*, and the simple internal reference to transnational rights, constructed through multiple inter-judicial interactions, forms the constitutional basis for society's production and legitimation of political decisions.<sup>110</sup> *Transnational rights* are thus in the process of becoming a *fifth tier* of rights in society's inclusionary structure, and many acts of political inclusion are now based not in rights exercised by particular persons or groups of persons or populations but in rights constructed contingently, *within the law*.

The political functions of society – the legitimation of authority, the legitimation of law, the making of binding decisions – are increasingly distilled into the form of an *auto-constituent transnational legal/political system*. The political system of global society is positioned in different locations, some in the classical domain of national law, and some in the precarious domain of extra-national law. The national and the international parts of the system simply cannot be detached from each other. Overall, however, contemporary society is increasingly marked by a legal/political system that evolves spontaneously, that is exposed to highly contingent pressures for legislation and that, in reacting to these pressures, extracts its own constitution from transnational rights: global society underwrites its most elementary functions of political inclusion through an autonomous order of rights. In principle, contemporary society is capable of creating political-systemic order wherever social exchanges can be legally focused around rights, and it can generate a constitution for political-systemic acts in many locations, and many areas of practice.

<sup>110</sup> I concur with Benedict Kingsbury (2009a: 36, 57) in his claim that, even in the highly fragmented law of global society, we can still distinguish law from non-law. I also agree with Kingsbury's argument that law relies on constructions of publicness to support its lawfulness as traditional sources of authority for law become weaker. But I think that this publicness derives from the fact that law is sustained by reference to human rights. My construction of rights as a source of inner-legal constitutionality relates closely to the theory of 'publicness' – that is, 'the claim made for law that it has been wrought by the whole society, by the public' – proposed by Kingsbury (2009b). I refer here also to the argument by Bogdandy, Dann and Goldmann (2011: 22) that the 'basic principle of public law is human self-determination'. On my account, it is the fact that in global society the law is able to authorize itself through rights that allows it to retain a distinct quality of publicness, even when emanating from obviously private sources.

## CONCLUSION

Through the history of classical sociology, it was widely implied that modern nations developed through processes of legal and political inclusion, and, quite generally, that the nation state evolved as a body of institutions legitimized by the ability actively to legislate over national populations. In some works of classical sociology, notably those of Weber and Durkheim, it was argued that national states possess deep inclusionary powers, which permit them to integrate even dramatically polarized social and economic groups, and the institutions of national societies draw legitimacy from the fact that they establish cohesive structures of inclusion for their populations. To this degree, classical sociology generally accepted the basic construction of nationhood arising from the French Revolution, which proposed the nation and the nation state as alternatives to the pluralistic societal and legal-political order of the *ancien régime*. Furthermore, some classical sociologists developed the view that national society is constructed as a system of integration through the progressive societal sedimentation of *rights*. As indicated above, Durkheim, Marshall and Parsons all assumed that national societies can be stabilized by the production of rights, by means of which they sustain some basic unity, despite their endemically conflictual, pluralistic and functionally differentiated character: on this account, rights allow national societies to resist disintegration, despite their rising functional complexity. Partly for these reasons, most classical sociologists had little interest in international law and internationally defined rights, which they saw as artificial, even

fictitious constructs, with little purchase on socially embedded patterns of interaction, lacking foundations in vitally experienced processes of social formation. Classical sociology, in short, tended to be shaped by a strong belief in the inclusionary force of national societies and national political institutions, and it tended to posit, at least implicitly, a dualist construction of the relation between domestic law and international law.

Of course, it barely requires emphasis that the perspectives and methodologies of classical sociology have been widely revised. Nonetheless, the original conception of national society as a system of legal integration and the resultant claim that international norms, especially norms regarding human rights, have origins external to national societies, have proved remarkably persistent in contemporary sociological analysis of the law. Much of the most influential research in current sociology is focused on global dynamics of social formation, and insofar as it is concerned with law, it accentuates the impact of global forces on legal norms. Yet, such analysis usually persists in separating the global legal domain from the forces underlying the construction of national law. As discussed, even those sociological accounts of international law that view inter- or transnational law sympathetically still observe such law as a set of constructions originating outside national society, so that the underlying linkage between international norm construction and national processes of societal integration do not come into view.

Against this background, this book develops four basic arguments.

*First*, this book argues that both the classical-sociological account of the nation and the classical-sociological account of international law were rather misguided; in fact, they never corresponded to a widely given factual reality. Few nations actually evolved through inner-societal processes of inclusion, and most national states struggled to assume stable inclusive form in face of the pressures which they encountered and were expected to internalize in their own societies. Even in the European heartlands of national statehood, few societies were able enduringly to converge, as nations, around stable state institutions until after 1945, by which time national legal systems were already beginning to be infused by international law.

*Second*, this book argues that, if we alter our historical view of the nation state, observing nation states, until recently, as still inchoate, half-formed entities, we can revise, but also productively extend, classical-sociological accounts of rights as media of social integration. In fact, the conception of rights, evident in some core sociological texts,

as components of a system of societal inclusion, has particular value for the way that it allows us to comprehend the current transformation of national society, and the role of international law in this process.

If we recognize that most national states only (if at all) approached final stage of construction very recently, we can see that, ultimately, international law, and especially international human rights law, played a deep and constitutive role in the formation of nations, centred around national state institutions. International human rights, assimilated in domestic constitutions, created instruments of inclusion, which were intricately implicated in processes of institution building and national consolidation usually seen as characteristic of national societies. The political systems of modern societies have typically evolved inclusionary structures, through which they transmit legislation and integrate actors from different social locations, by building complex systems of rights, initially formalized in national constitutions. In purely national societies, this system of rights usually contained *three* tiers: private rights, political rights and socio-material rights. However, most purely national states, insofar as they relied on solely national legal resources, were brought to crisis through their exposure to acute inclusionary pressures, caused by the fact that they were forced to promote the societal distribution of political and material rights to cement their hold on society. It was only as a *fourth* tier of rights, international human rights, came to sit alongside other tiers of constitutional rights that national states obtained more reliable inclusionary structures.

To be sure, international human rights law was partly constructed as an inter-state constitution, because of external pressures on national states. But it was also constituted, in domestic law, because of inner-societal inclusionary pressures and crises. Most societies only became nations and only established solid national states as they incorporated international law, usually translated into *transnational* law, in their domestic legal systems. Configured in this way, transnational law played a vital role in allowing national states to extend their reach across different social regions and sectors, and generally to build a differentiated inclusionary structure to support acts of law. With few exceptions, it was only to the extent that they established constitutions based, in part, in internationally extracted norms that national political systems established *structures of inclusion*, which were able to withstand and inclusively to absorb acute dynamics of inner-societal polarization, directed towards national state institutions through their role in mediating inter-class and centre-periphery conflicts. Prior to this, national societies had

tended to over-politicize their own processes of inclusion, and even the basic production of institutional legitimacy, and this led to deep experiences of crisis and fragmentation.

Historically, of course, many theorists reflected on ways in which pressures of class inclusion could be resolved. This concern runs through the backbone of classical social theory, from Hegel to Weber, both of whom claimed that the national state was defined by the fact it could reach across class boundaries to soften material antagonism and to integrate diverse sectors of national society. Most famously, of course, Marx argued that pressures in political institutions linked to class relations could only be erased through the end of class distinctions. Ultimately, however, problems of over-politicization in national society were only softened by the fact that national states learned to use international human rights, expressed in their domestic constitutions, to construct their legitimacy and authorize legislation. The construction of most national societies presupposed a stratum of international rights in domestic public law, through which national states dampened the politicization of inclusion caused by their previous allocation of political and socio-material rights, and international rights allowed societies gradually to evolve secure national institutions and secure structures of inclusion. It was only as the politics of class was replaced by the politics of international human rights that most societies developed stable systems of political inclusion. National societies and their political systems usually became national as they became post-national. The growth of transnational constitutional law reflects these two processes.

*Third*, this book argues that pressures on the inclusionary apparatus of national states have had a formative impact on the political system of global society. Increasingly, global society is in the process of acquiring a multi-level, although diffusely configured, political system. This is largely formed as a system of constitutional rights, in which judicial bodies play a hinge role in connecting different layers of legal structure, and it assumes constitutional form at two levels – above and within national societies. Although partly located in the inter-state domain, the global political system has two closely linked constitutional dimensions – outside and inside national legal systems. The global political system is very deeply embedded in national societies, and the fabric of rights around which it is constructed reflects its deep interwovenness with histories of national formation. In particular, the global dimensions of the contemporary political system are partly produced through a process of *functional overspill*, in which national

institutions position themselves within an inter- or transnational system of rights in order to stabilize the strata of rights through which they performed domestic functions of inclusion.

Arguably, the classical idea of sovereign nationhood confronted states with an impossible problem: as nation states, states were required constitutionally to extract their legitimacy from an entity (a sovereign nation), which did not exist, and, in attempting to create this entity, these states were forced into highly politicized cycles of rights-based constitutional integration, which overstrained their inclusionary resources. As a result, national states were exposed to demands for national inclusion which they, as national states, could only rarely perform. This paradox was most visible in the rise of authoritarian corporatist political systems, created in Europe in the interwar era, in post-1945 Latin America and during decolonization in Africa. These polities obtained constitutions that committed them to deep-reaching societal inclusion as a source of legitimacy. However, these polities invariably collapsed in the face of the inclusionary pressures which they confronted. This crippling paradox of national statehood was only weakened as national states were locked into a constitutional system of transnational human rights norms, and as they added a further layer of international rights to their basic constitutional structures. As they developed transnational constitutions, national states stabilized their relation towards the populations and constituencies from which they purported to extract their legitimacy, and they broke the escalatory cycles of inclusion promoted by the original constitutional ideals of national sovereignty and national constituent power. Key to this process was that the stratum of international human rights solidified in transnational constitutional law separated the constituent power of nation states from the organizational forms (typically, economic associations) which this power had assumed through conflicts over labour law, and it allowed states to build an inclusionary structure which was not defined by external material conflicts.

The emergence of a global legal/political system, explaining functions of inclusion through transnational constitutional rights, is sociologically explicable as a reaction to the inherent paradoxical impossibility of the national state. Ultimately, in most cases, the rise of transnational judicial constitutionalism as the primary norm of inclusionary structure building created far more inclusive political systems than the pure models of democracy based in national sovereignty. In some societies, judicial inclusion, based in international human rights, evolved



as an alternative to corporatist inclusion, based in socio-material rights. In other societies, especially those marked by deep ethnic divisions, judicial inclusion evolved as a system, in which the people can assume a normatively unified appearance for the political system, while also preserving a factually pluralistic form. In both settings, the fact that judicial constitutionalism partially separated state legitimacy from the will of the national people eventually made it possible for the state to include this national people in reasonably controlled fashion, distinct from the factual material and ethnic divisions running through the national people. As discussed, constitutional normativity is often seen as attached exclusively to national processes of will formation. In fact, however, constitutionalism did not become sustainable until it severed the link between legal/political inclusion and the exercise of national sovereign power: this was accomplished as international human rights supplanted constituent power as the basic form of legitimacy. As a result, the logic of political inclusion initiated in classical constitutionalism culminated, through necessary overspill, in the formation of transnational constitutional order, in which states acted as parts of a global legal/political system.

On this basis, on one hand, this book sets out a distinctive sociological theory of national statehood, focused on the interaction between national law and international law. It argues that the national domain is largely co-original with the transnational domain: nations only became national societies, based in processes of inclusion that were, to some degree, securely centred around national states, as they were circumscribed by an overarching, international system of constitutional norms. On this basis, moreover, this book sets out a distinctive sociological theory of rights. Most theories of rights, reaching back to the natural-law doctrines of the Enlightenment, assert that rights act as supra-positive norms, projected by the deductive powers of reason and prescribed as limits on the positive power of state authority. As discussed, this notion has been widely expressed in theories of international law, both in the positivist tradition, and in anti-positivist theoretical approaches. The argument proposed here, however, is that rights are not in any way external to processes of societal formation; different layers of rights are produced by societies as they construct centralized institutions, as they abstract free-standing structures of legal and political inclusion, as they bind together the diverse constituencies that they incorporate. To this degree, rights are not limits on the positivization of law. On the contrary, rights are the essential foundation of law's

positivization. Rights allow political institutions to manufacture relatively uniform terrains for the distribution of law and power across society, they support the differentiation of the legal/political system as an inclusionary centre of society, and they maximize the reserves of power possessed by national political institutions. This applies to all the different tiers of rights produced in society: all rights generate an inclusionary structure for the positive distribution of power and law across society. But this applies in particular to international human rights, often seen as supra-positive legal instruments par excellence, obdurately checking the power of national states. As they enter national constitutions, international human rights become vital inner elements of the power of national states, and they are key prerequisites for the effective and reproducible production of law in complex modern societies. In fact, international human rights instil positive force in the law – they create a stratum of inclusion in which law can be produced relatively autonomously, in which recourse to external processes of legitimation is not required to support the societal distribution of law and in which the political system can stabilize itself against external societal organizations. In societies requiring high volumes of positive law, therefore, formally abstracted rights are indispensable elements of societal formation. As society's legal structure is founded in international human rights, society acquires a more autonomous, more differentiated system of legal/political inclusion, which is able to produce law at an increased degree of abstraction and at a heightened level of positive iterability. As a result, international human rights are inseparable from the processes of political institution building and positive legal construction, which generally underpin the historical form of modern society. As mentioned, the constitutional grammar of international human rights usually forms a precondition for the completion of trajectories of institutional formation characterizing the evolution of national societies.

Underlying the formation of modern society, in consequence, we can observe a process in which structures for legal inclusion have become more differentiated, and more autonomous. From the first emergence of modern national societies, the existence of an autonomous structure of legal/political inclusion was a core precondition for the functional stability of society's political system. Modern societies, liberated from their pre-national local form, always relied on extensible legal structures through which they could authorize overarching acts of legislation and preserve authority for legislation across rapidly widening

geographical and temporal spaces. Modern society first constructed its system of inclusion around the notion of the sovereign nation or people, often reflected in the form of a constituent power. Society then began to accord a material form to the sovereign people by generating deep-set layers of rights, embodied in constitutional laws, in which the national people increasingly entered the political system as a real presence. These processes acted to harden the position of the legal system in society, and to extract a structure of inclusion able to penetrate deeply into society. The constitutional distribution of rights was linked, from the outset, to the consolidation of an independent legal structure in society. As discussed, however, few societies were able to survive their rights-mediated centration around the sovereign people, and most societies were forced by their inclusion of the sovereign nation into catastrophic cycles of fragmentation, privatization and de-nationalization. It was only as the essential ground of socio-political inclusion was located from the *national people* to the *people under international human rights law* that societies learned to conduct inclusionary processes effectively, and to stabilize an enduring and relatively autonomous inclusionary structure. In fact, it was only where they began to derive constitutional legitimacy from international human rights that national states were able enduringly to allocate other sets of rights, i.e. private, political and socio-material rights, without fragmentation. Through this process, the political system's extraction of legitimacy from an external constituent power was superseded by the use of internally stored rights as the source of law's authority. This internalization of legitimacy greatly simplified the responsibilities for positive inclusion, regulation and law production by which national states are defined. On this count, again, international law forms an essential foundation for the emergence of an autonomous structure of legal inclusion in national societies.

Finally, *fourth*, this book proposes the argument that the national processes of structural formation that are reflected in the domestic assimilation of international law allow us to examine the formation of a body of distinctively *transnational* constitutional law in recent years. In particular, this book argues that in contemporary society, constitutional norms are formed through a process in which law and politics tend to converge, and the law autonomously produces foundations for acts of political inclusion. On the argument proposed here, the construction of transnational constitutional norms is driven by two processes. On one hand, as stated, the inclusionary structure supporting the political system of modern society is generally defined by an increase in autonomy. Once

the inclusionary structure of society is fully centred on human rights, the political system automatically detaches itself from external sources of authority, and it constructs itself in increasingly free-standing fashion and is able to reproduce itself, at different social locations, without loss of legitimacy. The emergence of a transnational legal domain, able to constitutionalize itself at a high level of autonomy, is thus originally caused by orientation towards legal autonomy inherent in the fabric of national society. On the other hand, the rise of transnational constitutional law is driven by the fact that contemporary society is exposed to hyper-inclusionary demands: it experiences multiple demands for inclusion and multiple demands for legislation, which cannot easily be covered by authority derived from conventional sources of political agreement. As a result, the demand for law in society has to be covered by alternative means, and society is forced to generate law, and in fact to construct patterns of political-systemic formation, through the establishment of increasingly autonomous structures. Contemporary society becomes increasingly reliant on human rights because rights allow society to produce legislation in systemically internalistic fashion, and they make it possible for society to presuppose constitutional authority for acts of law making, in even the most precarious, unsupported environments. Transnational society, in short, increasingly requires highly contingent, easily iterated authority for its laws, and rights norms, remotely originating in international law, provide the most reliable source of authority for such acts. As a result, transnational rights are core elements of modern society's inclusionary structure, solidified to insulate society against unbearable demands for legislation.

Transnational rights are gradually appearing as a *fifth tier* of rights, supplementing private, political, socio-material and international human rights in the emergence of the political-systemic form of today's increasingly global society. Transnational constitutional norms, however, are not entirely separate from inner-societal patterns of inclusion and law production. Transnational constitutional norms are produced as part of a long logic of differentiated legal structure building, which began with the legal formation of domestic societies. In fact, transnational rights can be seen as an inevitable outgrowth of the other tiers of rights through which contemporary societies have ordered their actions. As discussed, modern national political systems presupposed a relatively autonomous legal structure to underpin their functions. Eventually, states produced an inclusionary structure outside themselves, enabling them to operate as states; this structure now shows signs of

becoming *fully autonomous*. The deep impetus towards the autonomy of the law which accompanied the rise of modern, differentiated societies is now in the process of creating a legal/political system that produces and authorizes law *on its own*.

In global society, in sum, we can increasingly identify a number of transnational constitutional configurations. These are visible, first, in the constitution of the inter-state domain; second, in the constitution of national states within the global political system; third, in an emergent auto-constituent constitution, which now fluidly crosses these separate dimensions of global society. In these constitutional domains, to different degrees, the legal system now internalizes many functions that once were characterized as political. In fact, the law is rapidly evolving a capacity to constitute itself, and the construction of constitutional norms to support political acts in society now often simply occurs as an inner function of the legal system. If observed sociologically, however, the growing auto-constituent contingency of the law is not in all respects a new phenomenon. On the contrary, it can be traced back to deep-lying social and constitutional processes; in fact, the transnational constitution that is emerging in different parts of global society still retains deep inner-societal foundations and continuities. As discussed, historically, modern differentiated political systems could only evolve as such because they relied on the law as a more fully and more rapidly differentiated system, which was able, through its own abstracted normative fabric, constitutionally to insulate and stabilize political institutions against their complex constituencies and environments. Throughout recent history, the advanced differentiation of the law was almost always a precondition for the differentiation of a political domain in society, and transnational constitutional law originally evolved as a normative structure in which the political system learned to support its autonomy by integrating the more reliably autonomous forms of the legal system (especially human rights). In recent history, law was always of necessity more autonomous and more differentiated than the political system, and, because of this, in different contexts, it facilitated the constitutional differentiation and stabilization of political institutions. In consequence, the propensity for the law to assume the functions of politics was always ingrained in the structure of modern differentiated societies, and, as political systems became exposed to more complex demands and more extended societal environments, it was always probable that the law would become the leading system in society. The contemporary emergence of transnational constitutional

domains, based primarily in human rights norms, can be seen in essence as the inevitable consequence of law's accelerated differentiation, and the ability of law to assume political functions without reliance on more classical patterns of political agency was in some ways always determined by more classical processes of institutional formation. Indeed, it is possible that highly complex global societies can no longer construct simple political systems, and some of the functions typical of a political system must inevitably be transferred to law. In complex global societies, arguably, even the basic distinction of politics as a social or systemic category must become questionable. The most recent tendencies in constitutional norm formation, reflecting an internalization of political functions in the law, can be observed as part of this broad sociological constellation, whose origins lie at the core of modern national societies.

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