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.[1]

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

[1] 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.[2] 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.[3] 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.[4]

[2] 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).

[3] On this process in England and France see Atiyah (1979: 399–400).

[4] 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.[5] 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 nineteeenth 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

[5] 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.[6] 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.[7] 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

[6] 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.

[7] 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).[8] 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

[8] 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' (Buchez 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.[9] 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).[10]

[9] In Germany, the power of the guilds was finally removed by the *Reichsgewerbeordnung* of 1869.
[10] 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.[11] 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.[12] 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

[11] For the most advanced cases of this, Britain and the USA, see Steinfeld (1991: 187).
[12] 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.[13] 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

[13] 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.[14] 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

[14] 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 arbitrational 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.[15] 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*

[15] 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.[16]

[16] 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.[17] 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.

[17] 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.[18]

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

[18] 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.[19] 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.[20] 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.

[19] 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).

[20] 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.[21] 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

[21] 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.[22] 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.[23] 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

[22] On the link between low legitimacy and patrimonialism, see Englebert (2000a: 29).
[23] 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.[24] 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.[25] As in other dimensions of the political system, therefore, pressures of inclusion on the state

[24] 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).

[25] 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.[26] However, the fact that state institutions were able to integrate internationally defined norms

[26] 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 overlayered 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.

https://doi.org/10.1017/CBO9781139833905.006 Published online by Cambridge University Press