

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.¹ 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.

¹ 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.² 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.³ 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

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

³ 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).⁴ 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.⁵

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

⁴ 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).

⁵ 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.⁶

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,⁷ some international norms, especially human rights provisions, have been declared part of the unshakable core of domestic constitutional law.⁸ 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,⁹ 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.¹⁰ 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

⁶ See below p. 277.

⁷ 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.

⁸ 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.

⁹ Colombian Constitutional Court T- 267/11.

¹⁰ 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 1994.¹¹ 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.¹² 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.¹³ 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.¹⁴ Above all, the IACtHR expressly favours the principle that both states and individual persons are subjects of international law, and

¹¹ 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).

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

¹³ 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

¹⁴ *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 precarious¹⁵ 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

¹⁵ 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.¹⁶ 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 amorphously 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,¹⁷ and they struggled to consolidate a position of reliable

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

¹⁷ 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'.¹⁸

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.¹⁹ 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

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

¹⁹ 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.²⁰ 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,

²⁰ 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.²¹ 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.²² 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.²³ 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.²⁴

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,

²¹ 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).

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

²³ IACtHR, *Ana Teresa Yarce et al v Colombia* (2015).

²⁴ 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.²⁵ 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 coordination. 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.

²⁵ 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.²⁶ 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).

²⁶ 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).²⁷ 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.²⁸ 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.²⁹

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

²⁷ The dictatorship established in 1976 followed fascist models in replacing free union representatives with appointed trustees (Munck 1998: 77).

²⁸ 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.

²⁹ 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.³⁰

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

³⁰ 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.³¹ 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,

³¹ 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.³² 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

³² 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.³³ 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

³³ 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.³⁴ 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.

³⁴ 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.³⁵ 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,

³⁵ 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.³⁶ 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.³⁷

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.³⁸ Overall, the partial separation of state and

³⁶ 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.

³⁷ 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* s/ ("Fallo ATE") (11.11.2008).

³⁸ 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.³⁹ 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

³⁹ 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.⁴⁰ 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

⁴⁰ 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.⁴¹

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,⁴² 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

⁴¹ On the consolidation of developmentalism under Vargas, see Wirth (1970: 94) and Weinstein (1996: 87). On the later developmentalist policies promoted by Kubitschek, see Sikink (1991: 37).

⁴² 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.⁴³ 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*.⁴⁴ 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.⁴⁵ 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

⁴³ See discussion in Oliveira (2006: 107, 110).

⁴⁴ This point was explained to me by Carina Calabria.

⁴⁵ 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.⁴⁶ 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.⁴⁷ 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

⁴⁶ For an account see Fleischer (1990: 230).

⁴⁷ 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.⁴⁸ In an early important ruling, the Supreme Court opposed the imposition of restrictions on trade-union liberty.⁴⁹ 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.

⁴⁸ On the preservation of pre-1985 labour laws after the transition, see Boito (1994).

⁴⁹ 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.⁵⁰ 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 Oliveira 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

⁵⁰ 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.⁵¹ 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

⁵¹ 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.⁵² However, Aylwin's cautious approach was very significant for the early, most intensely contested period of transition.⁵³ 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.⁵⁴

⁵² See pp. 281, 384 below. ⁵³ For analysis, see Requa (2012: 83–84).

⁵⁴ 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).⁵⁵ Through the 1980s, the court usually performed its designated repressive functions in due and diligent fashion. Most, although certainly not all,⁵⁶ 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.⁵⁷ 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.

⁵⁵ This view was set out in the famous *Almeyda* case in the Chilean Constitutional Court, Rol 46/1987, addressing the prohibition of dissident parties.

⁵⁶ 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.

⁵⁷ 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.⁵⁸ 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.⁵⁹ 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

⁵⁸ 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).

⁵⁹ 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).⁶⁰ 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).⁶¹ 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

⁶⁰ Significantly, Allende denounced the 'economism' of striking workers, which he saw as destabilizing the wider process of structural transformation (Sigmund 1977: 209).

⁶¹ 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.⁶² 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

⁶² 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.⁶³ 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

⁶³ 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.⁶⁴ 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.⁶⁵ 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

⁶⁴ 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.

⁶⁵ 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.⁶⁶

⁶⁶ The classical examples of this are the IACtHR rulings on the right to dignified life in *Sawhoyamaxa 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.⁶⁷ 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;⁶⁸ this has involved interventions in budgetary planning,⁶⁹ use of international human rights treaties to prescribe material obligations to the national government⁷⁰ 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'.

⁶⁷ See Chilean Supreme Court Rol 5.727–2012.

⁶⁸ 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).

⁶⁹ See Colombian Constitutional Court SU-995/99.

⁷⁰ 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*.⁷¹ 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

⁷¹ 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,⁷² 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).⁷³

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.⁷⁴ For

⁷² See Colombian Constitutional Court, T-426/92.

⁷³ 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).

⁷⁴ 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 1994.⁷⁵ 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

⁷⁵ 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.⁷⁶

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;⁷⁷ in some cases, this constituent power is associated with the will of the sitting government, and judges have tailored rulings citing this

⁷⁶ 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.

⁷⁷ 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.⁷⁸ In some cases, additionally, plurinational constitutions recognize indigenous law, in some spheres, as a source of legality,⁷⁹ 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 identifiable 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.⁸⁰ 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.⁸¹ Bolivian courts have not been uniformly strong in their defence of indigenous rights, especially in political conflicts.⁸² Notably, although in 2012 consultative rights were guaranteed for indigenous communities, the guarantees for indigenous

⁷⁸ See Bolivian Constitutional Court, Declaration 0003/2013.

⁷⁹ 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'.

⁸⁰ See p. 295 above. ⁸¹ Bolivian Constitutional Court, 2003/2010-R.

⁸² 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.⁸³

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.⁸⁴ On one hand, in fact, the courts have been willing to use the block of constitutionality to defend the legal equality of indigenous groups.⁸⁵ 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

⁸³ Bolivian Constitutional Court 0260/2014.

⁸⁴ 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).

⁸⁵ Bolivian Constitutional Court 0260/2014.

common values, it is subject to rules of proportionality where it involves a restriction of internationally prescribed rights.⁸⁶ 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).⁸⁷ 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.⁸⁸ 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).⁸⁹ 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

⁸⁶ Bolivian Constitutional Court, 1422/14.

⁸⁷ See Bolivian Constitutional Court 0152/2015-S2. In this ruling, acts of indigenous justice were deemed unacceptable because they contravened the ACHR.

⁸⁸ See Colombian Constitutional Court, C-608/10.

⁸⁹ 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.⁹⁰ 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,⁹¹ 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

⁹⁰ See, for example, Burke and Malloy (1974: 50, 64) and García Argañarás (1992: 302).

⁹¹ 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.⁹²

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

⁹² 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.⁹³

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,

⁹³ 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.⁹⁴ 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

⁹⁴ 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.⁹⁵ 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 politics 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.⁹⁶ 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

⁹⁵ 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).

⁹⁶ 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’.⁹⁷ 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.⁹⁸

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),⁹⁹ 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

⁹⁷ Advisory Opinion of the African Commission on Human and Peoples’ Rights on the United Nations Declaration on the Rights of Indigenous Peoples, Art. 6.

⁹⁸ 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*.

⁹⁹ 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.¹⁰⁰ For example, the Charter of the OAU originally accentuated the inviolability of the national jurisdiction of sovereign states,¹⁰¹ 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.¹⁰² 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;

¹⁰⁰ See analysis in Okoye (1972: 184) and Bekker (2007: 171).

¹⁰¹ For comment see Baimu and Sturman (2003: 39), Nmeielle (2003: 413, 420) and Viljoen (2007: 163).

¹⁰² 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.¹⁰³ 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.

¹⁰³ 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).¹⁰⁴ 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,

¹⁰⁴ On the survival of semi-feudal systems of obligation and motivation in Africa, see Hyden (1987: 117) and Englebort (2000b: 98).

157).¹⁰⁵ 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

¹⁰⁵ 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.¹⁰⁶ 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.¹⁰⁷ 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).¹⁰⁸ In consequence, many African states, like their counterparts in South

¹⁰⁶ See examples below p. 341.

¹⁰⁷ 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).

¹⁰⁸ On similarities between Africa and Latin America in this respect, see Sangmpam (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 (Ihonoré 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.¹⁰⁹ 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

¹⁰⁹ 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.¹¹⁰ 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.

¹¹⁰ 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,¹¹¹

¹¹¹ 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.¹¹² 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.

¹¹² 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.¹¹³ 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

¹¹³ *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.¹¹⁴

¹¹⁴ 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).¹¹⁵ 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.¹¹⁶ 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

¹¹⁵ For discussion of the power exercised by chiefs within the state structure, see Ray (1996: 191).

¹¹⁶ 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; Sangpam 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;¹¹⁷ direct use of international law is infrequent. However, the constitution clearly marked a break with purely dualist, purely parliamentary models of governance.¹¹⁸ 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.¹¹⁹ 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.¹²⁰ 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.¹²¹ 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.¹²² 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

¹¹⁷ 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.

¹¹⁸ Bimpong-Buta (2005: 112, 131) claims that the Ghanaian Supreme Court has greater powers of judicial review than those allocated under *Marbury v Madison*.

¹¹⁹ 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.

¹²⁰ Ghana Supreme Court, *New Patriotic Party v Inspector-General of Police* para 26.

¹²¹ See Date-Bah’s use of comparative law in Ghana Supreme Court, *Asare v Attorney-General* [2003–4] SCGLR 823.

¹²² 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.¹²³

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

¹²³ 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.¹²⁴ 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

¹²⁴ 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.¹²⁵ 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.

¹²⁵ 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.¹²⁶ 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

¹²⁶ 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.¹²⁷ 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).

¹²⁷ 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.¹²⁸ 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).¹²⁹

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

¹²⁸ 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).

¹²⁹ 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.¹³⁰ 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

¹³⁰ 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.¹³¹ 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

¹³¹ 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.¹³² 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

¹³² 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 *Nyoja* 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’.¹³³ 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.¹³⁴ The judiciary was thus assigned a key role in

¹³³ *Kenya Law Reports* [2004] 1 KLR 239.

¹³⁴ 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.¹³⁵ 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,¹³⁶ 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.

¹³⁵ 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.

¹³⁶ 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.¹³⁷ 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.¹³⁸ 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.¹³⁹ 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.¹⁴⁰ 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

¹³⁷ 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.

¹³⁸ *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.

¹³⁹ One account (Kangu 2015: 419) defines devolution as the ‘centre-piece and most transformative aspect of the Constitution’.

¹⁴⁰ 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.¹⁴¹ 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.¹⁴² 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.¹⁴³ But public interest litigation also became a general instrument for the assertion of minority rights against dominant groups, and such claims were often

¹⁴¹ See a range of criticisms on different counts in Berman, Cottrell and Ghai (2009: 495–6) and Wabwire (2013: 181).

¹⁴² Rules on standing were liberalized in the Environmental Management and Co-ordination Act of 1999.

¹⁴³ 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.¹⁴⁴ 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

¹⁴⁴ 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 *Onyangó & 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.¹⁴⁵ 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.¹⁴⁶ 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.

¹⁴⁵ See note 97 above. ¹⁴⁶ 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.¹⁴⁷ 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.¹⁴⁸ In addition, some of most activist African courts have taken a strong line in promoting socio-material rights.¹⁴⁹ 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

¹⁴⁷ As background see Herbst (1990: 954–57), Shaw (1993: 165). Note observation of this connection in Adjami (2002: 104).

¹⁴⁸ See, for example, *SERAC & CESR v Nigeria* Communication No. 155/96 (2001); *Purohit and Moore v The Gambia*, Communication No. 241/2001 (2003).

¹⁴⁹ 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).¹⁵⁰ At different historical junctures, the Chinese government has in fact been fervent in rejecting international law for its encroachment on national sovereignty, which means

¹⁵⁰ 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.¹⁵¹ 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.¹⁵²

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

¹⁵¹ 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).

¹⁵² 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.¹⁵³

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

¹⁵³ 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.¹⁵⁴ 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*.¹⁵⁵ 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

¹⁵⁴ On the interdependence between application of international law and rising professionalism in the judicial and quality of judicial performance, see Krumboltz (2010: 323).

¹⁵⁵ 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.¹⁵⁶ 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

¹⁵⁶ 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.¹⁵⁷ 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,

¹⁵⁷ 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.¹⁵⁸ 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

¹⁵⁸ 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.¹⁵⁹ 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

¹⁵⁹ 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.¹⁶⁰ 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.¹⁶¹ Moreover, superior courts

¹⁶⁰ In March 2015, the Supreme Constitutional Court ruled an electoral law unconstitutional on the grounds that it violated principles of fair representation.

¹⁶¹ 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.¹⁶²

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.¹⁶³

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

¹⁶² 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.

¹⁶³ 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.