
Before the Law?

3.1 Introduction

The classical theory of democracy revolves around the assumption that legal and governmental institutions acquire legitimacy to the extent that they are willed by the people. This assumption is supported by two primary presuppositions.

Most obviously, as discussed, classical democratic theory presupposes that, in a legitimate political system, persons expected to abide by laws must be fully and equally implicated, by electoral means, in the making of these laws, and they must recognize these laws as having some claim to represent interests in which, either materially or rationally, they have a share. To this degree, the persons who originally give authority and legitimacy to laws are seen as actors who pre-exist the laws, and who have pre-legal capacities and certain pre-legal motivations that dictate the substance of the laws. Central to this idea of democratic governance is the principle that the people, centred on the acts of the citizen, is a subject that has some kind of political existence *prior to and outside the laws*, and principles agreed by this subject in its original pre-legal form become the foundation for the laws of the polity as a whole.

This idea was anticipated in the early tradition of social contract theory. Of course, the more refined early theorists of the contractual origins of legitimate government emphasized that, before entering a social contract, the people does not exist as a fully formed, articulate actor. Some theorists of the social contract clearly denied that the people could meaningfully lay claim to any particular rights outside an ordered system of civil law.¹ Yet, the idea that the laws of the legitimate polity must be attributable to pre-legal actions remained pervasive through the tradition of social contract theory. Indicatively, Rousseau argued that people possess no rights

¹ Similar to Rousseau after him, Hobbes argued that, under the social contract, people must 'lay down certaine Rights of Nature' and that all persons are required to renounce 'such Rights, as being retained, hinder the peace of Mankind' (1914 [1651]: 74–80).

outside the polity formed by social contract. However, he argued that the contract confers positive force on rights that attach innately to all human beings – indeed, in entering a polity, people are placed in a condition in which their innate rights acquire real and effective form (1966 [1762]: 56). These ideas were later crystallized in revolutionary theories of national sovereignty and constituent power, which were closely related to models of contractual legitimacy. Central to such theories, as discussed, was the claim that the people, as a sovereign presence, exists outside the law, and the law obtains legitimacy to the degree that it is wilfully enacted by the people, in accordance with primary rational interests or agreements articulated by the people prior to their self-submission to the law. In the revolutions of the eighteenth century, such principles were applied in the first instance in early constructions of constitutional legitimacy, and they acted to legitimize new constitutions in France and America. But, by extension, these principles imply that all laws with claim to general validity have to be imputable to particular choices of collectively engaged political subjects (citizens).² As discussed above, the classical concept of democracy has undergone innumerable mutations since the revolutionary *époque*. However, the idea of the *original externality* of the people remains an abiding component of democratic freedom. This is reflected, in essential form, in the works of Habermas, for whom, in its basic conception, the democratic constitutional state is ‘an order which is wanted by the people themselves and legitimated by the free formation of their will and their opinion’ (1998: 100). In fact, for many observers, the doctrine of constituent power is still a precondition of democracy.³

Alongside this, the essential core of democratic theory is supported by the principle that, as an organizational system based on collective decisions, democracy has an indisputably *political* character, and it elevates and dignifies a distinct political domain above other parts of society. In different ways, the concept of democracy as a system of collective political inclusion is deeply interwoven with the emergence of a concept of the political.⁴

On one hand, at a factual-sociological level, the original evolution of democratic ideas occurred in social settings in which centralized monarchies, assuming some state-like attributes, had already assumed a dominant position *vis-à-vis* more private sources of authority. In early modern

² See above p. 37.

³ See p. 36 above.

⁴ See the important historical studies of this phenomenon in Meier (1980: 288–91).

Europe, indicatively, democracy began tentatively to take root in a context in which central legislators had begun to clear away the pluralistic legal residues of feudalism, such that the legal order of society, originally embedded in local legal customs and corporate conventions, was powerfully shaped by monarchical directives. The seventeenth and eighteenth centuries, notably, had seen far-reaching processes of legal codification, in which monarchical decisions increasingly formed the foundation for the enactment of law (see Jansen 2010: 13). In the revolutionary period, then, the powers of sovereignty originally attached to monarchies, expressed in the authority to define the law, were in many respects simply transferred to early democratic institutions (Böckenförde 1991: 95; Beaud 1994: 245). Notably, the first years after 1789 in France were marked by quite vigorous policies of legal codification, in which executive bodies assumed new powers of legal organization.⁵ Early democracy, therefore, was defined by a distinctive presumption that the political system possessed primacy amongst societal institutions, and the core principles and practices of early democracy reflected, above all, a subordination of law to politics.

On the other hand, at a conceptual level, the concept of politics in the contemporary sense of the word evolved in conjunction with constitutional ideas regarding constituent power, national sovereignty and national citizenship, spelled out in the French and American Revolutions. Importantly, to be sure, the epithet *political* had been used to describe institutions with collectively founded authority long before institutions even remotely resembling modern states had developed. In mediaeval Europe, for example, a body was construed as *political* if it was defined by principles of collective accountability, if it was designed to resolve problems having implications for all members of society⁶ and if it could not be seen as the mere extension of a private person or a set of private interests.⁷ Indeed, societies of antiquity had also constructed a distinct category of the political, based on ideas of collective self-determination (Meier 1980: 277).

⁵ This was exemplified in France by the rural code (1791), the penal code (1791), draft civil codes of 1793, 1794 and 1796, and finally the Napoleonic civil code (1804).

⁶ The concept of *Quod omnes tangit ab omnibus approbari debet* was thus applied to define matters of a political nature, requiring broad consensual resolution. On the application of this concept in different medieval societies in Europe, see Najemy (1979: 59); Maddicott (2010: 227–8). Importantly for this study, this maxim began as a principle of procedure in medieval corporations, but it became a constitutional principle of government through the late-medieval expansion of political institutions (see Congar 1958: 213, 243, 258).

⁷ In late medieval England, for instance, Fortescue argued that, as it was partly based on consent, English government had a distinctive and unusual 'political' character (1942 [c. 1470]: 79).

However, the idea of the political as a distinct social domain acquired particular prominence in the eighteenth century, a period in which concepts of antiquity were often reconfigured.⁸ During the revolutionary era, a concept of the political gained broad purchase, which perceived the determinant of politics in the fact that it reflected patterns of will formation that could not simply be reduced to private authority, and which construed one part of the social order as formed by, and in turn promoting, collective motivations, with a certain binding dignity in relation to other social spheres.

This distinction of the political was reflected in core concepts of the revolutionary era.

As discussed, for example, the idea of the citizen played a central role in creating a distinct political domain in society. In France, the figure of the *citoyen* as a focus for collectively structured action, based on *sui generis* affiliations and obligations, and committed to producing a legally defined public order, acquired socially transformative force both before and during the revolutionary period (Gruder 1984: 351). In the American Revolution, the quality of citizenship was construed specifically as a *political tie*, forming a volitionally constructed, categorically political community, creating a distinct authority for the governmental order.⁹ In both settings, the citizen distilled a particular construct of the political, based simultaneously on individual choice and collective action, conferring an unprecedented degree of legitimacy and authority on the political system.¹⁰ In both settings, moreover, actions of citizens served to impute a particular authority to the law, such that the citizen, claiming a position within a politically structured community, formed a higher-order, distinctively public source of authority for legal acts. In this respect, the concept of the political played a key role in elevating the relative authority of legislatures. As discussed, further, the doctrine of constituent power proposed in the French Revolution acquired key importance in the construction of a relatively autonomous category of the political, implying that the law presupposes a categorically political reference for its legitimacy, and that the legitimacy of law cannot be founded on law alone (Böckenförde 1991: 91). On these conceptual foundations, politics was imagined as a higher

⁸ On similarities between Hellenic concepts of the political and the transformative processes in the eighteenth century, see Meier (1980: 278).

⁹ As mentioned, this idea was spelled out in the Supreme Court. See in particular *Talbot v. Janson*, 3 U.S. 133 (1795).

¹⁰ See Schmitt's argument that 'the citizen, the citizen' is the 'specifically democratic, that is, political figure' (1928: 245).

mode of interaction and agreement, which exists before other elements of the polity, and which generates the primary source of legitimacy for law.

In addition to this, in the revolutionary era the constitution of state itself was envisioned as a distinctively political construct. Both revolutions converged around the idea that the constitution stands at the beginning of the polity, marking a radical caesura with previous political institutions, and creating a system of laws to determine subsequent legal and political acts. In this respect, the constitution pre-eminently symbolizes the political origin of law, and the political origin of the legal system. At the centre of classical constitutionalism was the assumption that law must be supported by an original, collectively acceded political act, which separates the political order from pre-political conflicts, and this act is cemented in the constitution. Of course, it has been widely noted that constitutionalism is not necessarily democratic, and it can impose norms on processes of political will formation that do not always have a majoritarian foundation and may easily constrain public deliberation.¹¹ As an element of democracy, however, the constitution forms a political declaration of rights. Its essential function is to define the procedures through which society's political contests and disagreements can be articulated and mediated, ensuring that acts of legislation, and the ongoing production of rights, are supported by a public, political will.¹² Under the political constitution, rights act as instruments for the deepening inclusion of society, and conflict over rights gives solid reality to the will declared in the constitution. For some constitutional theorists, the constitution is the essential fulcrum of society's political domain.¹³

¹¹ Jefferson himself made this point, saying that a constitution falsely stabilizes governmental conditions against the will of the people. He expressed this by arguing that

each generation is as independent as the one preceding, as that was of all which had gone before. It has then, like them, a right to choose for itself the form of government it believes most productive of its own happiness; consequently, to accommodate to the circumstances in which it finds itself, that it received from its predecessors; and it is for the peace and good of mankind, that a solemn opportunity of doing this every 19 or 20 years, should be provided in the constitution, so that it may be handed on, with periodic repairs, from generation to generation (1899: 43).

This claim, in different forms, is widely considered in some more recent theory (see Sunstein 1993: 329, 352; Bellamy 2007: 1–2).

¹² See discussion of these core preconditions of the political constitution in Goldoni (2012: 928, 929, 937).

¹³ See Carl Schmitt's claim that a constitution contains a decision about the historical order of a people, which pertains to the ontological level of the 'concrete political existence' of the people (1928: 23).

In different constructions, in sum, the revolutionary period gave birth to the modern idea of the political, and the passage from feudal society to modern society was surrounded by concepts that emphasized the political as a category of practice. The political emerged as a mode of subjective association, in which people were separated from the private ties ingrained in pre-modern social structure, and they were required to generate collective solutions for contingent, generally troubling problems of social organization (Meier 1980: 194). In fact, it was only through the evolution of an administrative order founded in the generalized concept of the citizen that society began to obtain structures and institutions that we would now recognize, systemically, as *political*, distinct from the private, aristocratic origins of social control.¹⁴ Notably, in France the revolutionary concept of the political led to the accelerated centralization of a state domain, focused on legislation, fully separate from corporate and local conventions, and able to situate law-making power authoritatively within one set of institutions. Similarly, in the USA, state institutions, based on voluntary allegiance, acquired greatly expanded, generalized powers, including the power to eliminate old jurisdictions, to reform fundamental laws, to abolish ancient legal prerogatives and to impose national taxes (Nelson 1975: 90–2; Edling 2003: 225; Bradburn 2009: 47). In both situations, the rise of political citizenship led, immediately and by direct cause, to a growth in the power of the body politic, to the extension of evidently political institutions across society, and to the general suffusion of society with political content. Citizenship produced a concept of the political that imposed a basic national shape on society. In both settings, the rise of political citizenship meant that individual interests and conflicts were, at least incipiently, transferred to a national level, released from local structures, and governments acquired the obligation to project their legitimacy through reference to national society as a whole.

Through the factual institutionalization of democracy, as discussed, these core principles of democracy presented intense and destabilizing challenges to the architects of democratic polities. However, the idea that in a democracy the people, as a group of collectively implicated citizens, is an external political subject, and that a democracy is founded in distinctive external patterns of political association and decision-making remained central to the semantic parameters of democratic thinking. Democratic thinking – both affirmative and critical – was galvanized,

¹⁴ On the general anti-privatistic, and therefore anti-aristocratic, impulse contained in the political as social category *per se*, see Meier (1980: 210, 257).

historically, around the idea that government owes its legitimacy to a will that is located outside the law, and which determines political institutions in accordance with generalized popular prerogatives.

In recent years, the underlying form of democracy has undergone a deep transformation. Through this process, first, it is observable that democracy was not established by the people in their capacity as external actors, and the people do not materially precede the laws that they authorize. On the contrary, the primary laws of the democratic polity, which claim to derive authority from the people, typically pre-exist the people, and they are determined by the global legal system. Similarly, second, democracy did not develop as an eminently political form, in which citizens created the political order through acts of external association, prior to the laws by which they are bound. In fact, the idea of democracy as an intensely and intrinsically *political* system of organization has lost some of its plausibility. Beneath the symbolic level of public debate, democratic rule is now sustained by concepts that are only marginally related to classical principles of democracy, and the political concepts of democratic citizenship no longer act as adequate constructions of the essential substance of democratic organization. What is striking in the transformation of modern democracy is that *the law itself* produces authority for democratic norms, and many ideally political sources of norm construction have been supplanted by concepts that are internal to the law: *the legal system itself, in its globally overarching form, becomes the subject that underlies democracy*, and there is no external political subject to support the law. This is especially striking in the essential political form of the constitution, which, in most societies, simply results from inner-legal acts. Indeed, *the law itself widely internalizes the classical functions of citizenship*, and exchanges between citizens about the form of the polity and the form of the law mainly occur within the law, as a relatively autonomous system. As a result, the essential political substance of democracy has become precarious.

This chapter observes the ways in which the conceptual structure of democracy has been modified in recent years, and it attempts to outline the core concepts and legal constructions around which democratic institutions are now consolidated. In particular, the analyses set out below show that, conceptually, the distinctively pre-legal, *political* origin of law has been eroded, so that law is now mainly formed, in intricately self-referential fashion, by law. Contemporary democracy is built around *functional equivalents* to classical patterns of democratic citizenship, and these equivalents are primarily constructed within the law: law's reference to law emerges as an equivalent to classical concepts of political voluntarism and

subjectivity. These functional equivalents create a distinct line of communication between the political system and society, in which the legal citizen becomes the primary, underlying basis for democratic construction. To be sure, the citizen can still enter the law-making process through normal democratic procedures, but this engagement occurs only at the secondary level of societal norm formation. The primary level of norm construction – that is, the construction of the basic and irreducible residue of legitimacy – occurs within the global legal system, expressed through equivalents to political will formation. Indeed, the basic political figure of the citizen can only appear, in its essential form, as a construction of the law, so that citizenship itself is translated into a series of functional equivalents.

3.2 The New Fabric of Democracy

3.2.1 *Human Rights and Democracy Promotion*

As discussed above, the increasing prevalence of democracy since 1945 has been deeply shaped by the fact that democratic government is implied as an optimal governance form in international human rights instruments. The expectation of democracy is formalized in regional instruments, such as the ECHR or the ACHR. It is also prescribed in the founding documents and subsequent human rights instruments of the UN. Indeed, the basic recognition of a state depends, in part, on its membership in the UN, which necessarily implies some acceptance of democracy as a desirable mode of governance.¹⁵ To some degree, therefore, democratic government is required under general international law.

In considering this, it is essential to repeat the qualifications set out above that, after 1945, most international human rights instruments and conventions did not immediately assume great constitutional influence. Initially, moreover, some international legal orders did not unequivocally promote democracy. The ECHR was designed to consolidate a system of human rights law necessary for democratic society. By contrast, the UN initially endorsed democracy in slightly more reserved fashion. Equally importantly, the formal pronouncement of human rights as core legal-political norms often did little to prevent the growth of harshly anti-democratic governments. To some degree, the privileging of self-determination as a primary political right actually provided legitimacy for authoritarianism, as it often took shape in the form of one-party, presidential or plebiscitary

¹⁵ See an illuminating discussion of this, and of the wider impact of the UN on states ostracized, partly or fully, from the international community in Geldenhuys (1990: 124).

systems (see Miller 2003: 609). Furthermore, the regional system of international law created in Latin America after 1945 placed the greatest emphasis on human rights, including democratic rights.¹⁶ Yet, this system did not obstruct the emergence of extreme authoritarianism in the 1960s and 1970s, usually directly or indirectly supported by the USA. In Latin America, democracy was a rare and precarious phenomenon until the 1980s. It was only through a longer trajectory of international legal consolidation, therefore, that democracy was effectively supported by international law.

Despite these reservations, the global extension of democracy in the decades after 1945 was, at least in part, the result of the solidification of international legal norms, beginning in 1945. In some cases, there was a clearly discernible connection between the rising power of international human rights norms and the growth of democracy. As mentioned, this can be seen in the first democratic transitions of the late 1940s, which were initiated by occupying forces and strongly determined by UN human rights instruments. This connection can also be seen in democratic transitions that began in the 1980s in Latin America and Europe, which were impelled, in part, by the rising salience of international human rights law, including rights linked to democratic government.

The transitions that occurred in some parts of Latin America in the 1980s were marked by the fact that, by the 1970s, organs of the UN had become increasingly critical in their responses to political circumstances in some societies with authoritarian regimes.¹⁷ In parallel, the IACtHR, which began to hear contentious cases in 1987, was founded in the late 1970s. Ultimately, the early period of democratization saw deep domestic penetration of global human rights discourses in different Latin American societies. For example, the move towards democracy in Argentina, commencing in 1983, was strongly linked to the national enforcement of international legal instruments, which were used as points of domestic orientation during democratization.¹⁸

¹⁶ See Articles XX and XXXII of the American Declaration of the Rights and Duties of Man.

¹⁷ The Chilean regime under Pinochet was several times condemned for human rights abuses in the UN General Assembly in the 1970s, which had a direct impact on the policies of the regime (Hawkins 2002: 62, 77). In 1978, the UN adopted Resolution 33/173, recognizing enforced disappearance as a major violation of international human rights. This had implications for Chile, Argentina and other Latin American states. In 1986, the UN adopted Resolution 41/161, which prescribed a series of measures required to restore the rule of law and democratic government in Chile.

¹⁸ This is discussed extensively in Merry (2006: 58); Sikkink (2011: 64).

In Europe, the transitions of the late 1980s were informed by the fact that the authority of human rights law was reinforced by the Helsinki Accords and by the implementation of the ICCPR in the 1970s. These documents did not dictate an unambiguous right to democracy, but they expressed a strong presumption in favour of principles likely to be guaranteed under democratic government. Together, these developments created a wide grammar of legal expectation, in which sitting regimes became vulnerable to internal and external pressure. In the more open Eastern European societies, the subsequent trajectory of democratization was shaped, in part, by the fact that politically engaged groups identified the importance of international human rights law, and they mobilized social and political organizations around such norms.¹⁹ Even in Russia, the Helsinki Accords had a mobilizing effect (see Nahaylo and Swoboda 1990: 196; Snyder 2011: 57; Smith 2013: 229). After the full onset of the democratic transitions in Eastern Europe in 1989/90, ultimately, international human rights norms assumed powerful directive implications. These norms performed a clearly orienting function in defining the path for new democracies, enabling new states to gain legitimacy very quickly, both before their own populations and before the international community.²⁰ Indicatively, the Vienna Declaration and Program of Action was agreed in 1993, and it acquired great importance in the context of the democratic transitions in Eastern Europe. This Declaration stated that there existed a strict link between democratic formation and observation of human rights law. It declared: 'Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing ... The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world.'

Analogously, in the African transitions that began in the 1990s the passing of African Charter on Human and Peoples' Rights, in force from 1986, provided important direction for democratic polity building. This Charter did not establish a categorical right to democracy, but, in Art 13(1), it set out a right to participate freely in government. Moreover, the African Commission on Human and Peoples' Rights proved outspoken in

¹⁹ In Poland, it was widely noted that the Helsinki Accords were important background factors in the political transformation of the 1980s (see Snyder 2011: 230).

²⁰ This motivation is widely addressed, but see, for one exemplary account, Wotipka and Tsutsui (2008: 749–50).

its insistence on the establishment of competitive democracy as political norm.²¹

Very importantly, regional international organizations, such as the African Union, the European Union, and the Organization of American States have either made democracy a condition of membership or they actively promote democracy (Wheatley 2005: 132).²² In some cases, states have converted to democracy as part of an express strategy to gain such membership.²³

During the processes of democratic institution building in recent decades, therefore, the basic form in which national populations were first able to insist on, exercise and realize their democratic agency was, to some degree, pre-defined by a system of international human rights. The diction of rights created a normative order, identifiable across the globe, in which political demands within national societies still subject to authoritarian governments could be articulated and globally recognized. Indeed, in voicing political demands as claims to rights, populations were able to draw attention to their demands amongst organizations in the international domain, for example NGOs, advocacy groups and UN bodies, who were able to attract additional support outside national societies. This was especially widespread in the democratization processes in Latin America, where international human rights organizations played an important role in generating support for democracy. In some Latin American transitions, in fact, international human rights law was ultimately enforced as a proxy for political agency, and the alignment of governmental conditions to international law replaced constituent action as the focus of democratic re-orientation.²⁴ However, this is also visible in Africa. Even in more recent cases of institutional re-orientation, for example in the uprisings in North Africa in 2011, appeals to international human rights law assumed striking constituent force.²⁵

Once established, then, new democratic systems in national societies have usually immediately constructed their populations as rights holders.

²¹ See ACHPR/Res.10(XVI)94: Resolution on the Military (1994).

²² See Protocol of Amendments to the Charter of the Organisation of American States ('Protocol of Washington'); African Union Declaration on the Principles Governing Democratic Elections in Africa, AHG/Decl.1 (XXXVIII), 2002

²³ Notable is the case of Spain in the 1970s, where democratic reform was advocated in large part because it provided a path towards EU membership (see Thomas 2007: 58).

²⁴ In Chile, for example, Pinochet's 1980 Constitution was amended before the transition to accommodate human rights, and the revised constitution recognized the authority of international law.

²⁵ See discussion of this in El-Ghobashy (2008); Odeh (2011: 996).

Indeed, where democracy has proved enduring, political actors have typically created constitutions which acknowledged persons as holders of rights defined, either directly or indirectly, under international law.²⁶ In some cases, transitional constitutions have been partly fleshed out through the rulings of judicial actors, who based their decisions on international norms.²⁷ In most democratic transitions, states have accepted the jurisdiction of international courts during the process of democratic restructuring, and they have signalled compliance with international law, or at least with regional human rights conventions, as a precondition of their legitimacy. As a result, new democratic states have founded substantial parts of their domestic public law on international law, such that international law has acted as an autonomous constituent element in the domestic legal order.²⁸ In extreme cases, international courts have taken pains to ensure that their jurisprudence is assimilated in the public law and the legal procedures of the states over which they have jurisdiction.²⁹ As discussed, in some settings, this incorporation occurs at a pre-judicial level, as legislative processes are covered by advisory bodies that prevent conflict between new laws and international norms.³⁰ In each respect, in short, democratic formation is barely distinguishable from the implementation of international legal norms.

The role of international human rights in promoting democracy has had a series of consequences for the global reality of democracy in modern society.

First, the significance of international human rights has meant that, in most processes of post-authoritarian democratization, the basic subject of

²⁶ Of course, not all states with new constitutions have emerged as stable democracies. But no states have emerged as stable democracies without constitutions, and few constitutions have failed to give some recognition for human rights law. The diffusion model of constitutionalization used by Elkins (2010: 996) to explain constitution making in Europe can be applied globally. I agree with Elkins that it is 'nearly unthinkable' that a 'state could achieve full democracy without a constitution' (2010: 972). On my account, this is deeply linked to the fact that new constitutions cannot easily be separated from international human rights law.

²⁷ Before the final establishment of democratic rule, judges engaged in important acts of law making *inter alia* in transitional Poland, South Africa and Hungary, in each instance using international human rights law as the basis for judgement.

²⁸ See discussion of the block of constitutionality in some Latin American courts below at p. 245.

²⁹ See as an important example IACtHR, Case of *Ticona Estrada et al. v. Bolivia*. Judgment of 27 November 2008, endorsing the block of constitutionality in Bolivia.

³⁰ A key example of such a body is the Departamento Internacional da Procuradoria Geral da União in Brazil.

national democracy was, at key stages in its expression, constructed not as a factual volitional agent, but in externally projected and defined legal categories. In most new democracies, the fundamental design of constitutional law was originally proportioned to a *pre-formed legal subject*, whose political expectations, which determined the substance of democracy, were first constructed through principles of international law, within an existing external legal corpus. For this reason, in many cases of democratic transition, the democratic people emerged in a form that was clearly separated from more embedded traditions of popular will formation, and the democratic institutions that were created to satisfy the people were produced in a generalized form, partly defined by human rights norms. This was reflected, most obviously, in the high degree of convergence between newly created constitutions.³¹

Second, the role of international human rights in the formation of new democratic polities has had the result that political actors in national societies often had only limited freedom to define the content of their laws. In some cases, of course, conflicts have occurred between models of political subjectivity proposed in international law and models of political subjectivity existing in domestic society. Examples of this are most obvious in societies with large indigenous populations, for example in Latin America; in societies with religious legal cultures, notably in North Africa; and in societies with deeply ingrained paternalist traditions, such as Russia. But, in most cases, the construction of democracy has been driven by an international model of citizenship. The content of laws generally acknowledged as democratic is now widely determined not by the degree to which laws represent interests of a national political subject, but by the degree to which they protect the interests of a subject defined in international law. On this basis, although rights-based democracy has become the standard model of popular governance, it is clear that human rights and democracy can easily be in tension.³²

Through these processes, most particularly, the basic source of democratic legitimacy has been profoundly transformed. The basic source of

³¹ Most constitutions now have uniform features. Very few democratic constitutions do not contain a catalogue of rights, possessing some degree of entrenchment. Very few establish fully sovereign legislatures. Very few do not create courts without at least some powers of constitutional judicial review.

³² For this claim see Donnelly (1999: 619). Susan Marks's analysis of democracies arising from global normative presumptions has similarities to the more critical elements of my analysis here (see Marks 2000: 96). As discussed below, however, my eventual conclusions are very different.

legitimacy no longer resides in the national constituent power. Instead, it resides in a threefold relation between actors at different points in the global legal system. That is, it resides in a relation between first, persons in national society; second, governmental institutions in national society and third, norm providers in international society. This relation has replaced the national constituent power as the essential political axis or mainspring of democracy. In many cases of objective democratization, the basic constitutional structure of the democratic order has been produced not through the primary voluntary or political acts of a people, but through a moderated interaction between these three points in the global legal system.³³

In more classical concepts of democracy, as mentioned, the normative force of democracy resided in the idea that there exists a chain of legitimation, which connects the people as an original constituent actor with the particular acts of government. Of course, historically, the actual institutionalization of this chain was subject to deeply polarized debate, but the presumption that the exercise of governmental power must be directly linked to the sovereign acts of the people remained an inalienable core of democratic thinking. However, in recent democratic transitions, the classical concept of democracy has been supplanted by a *cyclical, three-point model* of democratic formation. In the current model of democratic formation, first, the people typically formalize their will against the existing government by demanding human rights, largely based on and recognized under international law. Second, governments react to such demands by acknowledging the existence of the people, in their capacity as claimants to rights, in accordance with international norms. Third, international human rights organizations and judicial bodies then provide constructions of legitimacy for the state in question, based on acknowledgement of persons as holders of rights. Through this process, the original chain of legitimation in more classical ideas of democracy is broken, and the presence of the people as a real aggregate of citizens is symbolically translated into an idea of the people as a holder of rights, internalized and cyclically reproduced within the law. The chain of legitimation becomes a chain that connects not real people to the organs of government, but different elements of the global legal system, each of which converges around human rights norms.

The articulation of this democratic model, with variations, is common to most recent democratic transitions, especially in Latin America and Eastern Europe. In this model, the eminently *political* matrix of democratic

³³ On the internationalization of constituent power see Wheatley (2010: 245).

legitimization is constrained, and the extent to which the people are able to appear, before the law, as an active political subject is limited.

3.2.2 *Persons Not People*

In classical conceptions of democracy, the people, the nation or the citizen was posited as the primary subject of public law, and democracy was typically explained as a system in which the nation forms a corporate body, creating laws claiming political primacy over the interests of single individuals and other associations. Indeed, at the core of early democratic theory was the claim that democracy acquires legitimacy as a form of *political association*, whose political content reflects the essentially associational fabric of human societies.³⁴ Of course, in the very early period of liberal-democratic thinking, the ideal form of government was sometimes imagined as a system for protecting the inalienable natural rights of single human subjects.³⁵ Some more recent theorists have still retained this view (Nozick 1974: 26–7). Yet, from the Enlightenment to World War II, the development of democracy both as doctrine and as institutional practice was driven by the idea that democracy institutionalizes a mode of political will formation, in which collective interests are articulated that are not reducible *a priori* to the simple single interests of individual persons, and in which citizens engage in collective political practices and collective demands to create law. As mentioned, it is fundamental to the idea of the citizen that it translates private interests into collective patterns of contestation and recognition, and it forms a deep cycle of communication around the political system. In recent decades, however, the focus of democratic legitimation and organization has shifted paradigmatically *from the people to the person* as the primary source of legitimacy for legislation. Accordingly, the legitimacy of legislation is increasingly constructed not as a result of its authorization by a collective actor, but as the consequence of its adequacy to, and its recognition of, certain rights ascribed, within the law itself, to *single persons*.

This redirection of democratic legitimacy was promoted, originally, in the aftermath of World War II, as the instruments that underpinned the

³⁴ This connection between democracy and political association is of Aristotelian origin. But it also runs through early precursors of democratic theory. See for salient examples Althusius (1614: 169); Rousseau (1966 [1762]: 67).

³⁵ See Locke's claim that government is created to protect and preserve already existing rights (1999 [1690]: 48).

emerging global legal system crystallized individual human rights as the normative premise of democratic governance. Through this period, first, it was implied in the major documents of international law that the defining measure of a government's legitimacy is that it does not violate the protected human rights of its particular subjects, and that it passes laws showing recognition of persons subject to laws as singular holders of rights.³⁶ As discussed, in the post-1945 corpus of international human rights law, the right to democratic participation was rather tentatively protected, whereas the separate individual rights acquired increased exponentially in importance. On this basis, it was increasingly assumed that international organizations could monitor levels of democratic legitimacy in different societies, and that such monitoring should focus, primarily, on evaluating degrees of human rights abuse and on ensuring the integrity of single persons, *qua* rights holders, within national states. Indeed, even in cases where international organizations addressed the situation of large population groups, they tended to focus on these groups as collective holders of singular rights.³⁷ As a result of this, the single person as a holder of rights, separated from its embodied corporate location in the nation, became a pivotal point in the global legal order. Initially, as mentioned, this was offset by the focus on self-determination in early UN norms concerning decolonization. To a large degree, however, the basic legal order which sustained the growth of democracy after 1945 was condensed around the legal concept of the single person as a formally isolated citizen, and the global system that evolved after 1945 increasingly produced laws in order to safeguard the rights of single persons, in relative isolation from other members of their national populations. Of course, rights were accorded to persons universally, such that all persons were construed as members of a large human collective. However, the allocation of rights depended on recognition of each person as a separate rights-holding agent, with separate legal claims.

The singularization of the citizen throughout this period was reflected, tellingly, in the fact that international law attached rights and liberties to

³⁶ Alongside the UN Charter and the UDHR, the Convention on the Prevention and Punishment of the Crime of Genocide (1948) clearly spelled out the principle that individual subjects have rights under international law.

³⁷ For example, the provisions for trusteeship of former colonies in the UN Charter focus on non-self-governing populations as rights holders, stating, in Art 76(c), that former colonial powers with duties under the trusteeship system are expected 'to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world.'

persons constructed in highly generic fashion. In particular, international law detached the rights-holding subject from the objective political personalities – that is, from the concrete associational structures and collective groupings – manifest in real societies, and early post-1945 instruments of international law were muted in the recognition of rights of factually existing collective actors. Notably, for example, post-1945 international law gave relatively weak recognition to the rights of minority population groups, the protection of which was usually subsumed under general human rights law (law giving rights to all individual persons). In fact, it was not until the 1990s that international human rights law was widely extended to cover sub-national social groups.³⁸ Equally importantly, post-1945 international law was reticent in establishing rights of economic or industrial collectives, such as trade unions or syndicates. Although the main international-legal instruments after 1945 recognized certain basic labour rights, the interests of persons in their corporate capacity as workers or employees were not strongly prioritized. Similarly, in early national constitutions created after 1945, emphasis was placed on the protection of single human rights, partly at the expense of rights contested and constructed by collective associations. In the first wave of democratization after 1945, newly founded states usually applied rights to persons in society that strictly separated these persons from the collectives in which their claims were constructed, and they generally perceived rights as singular institutions, attaching to singular persons as invariable subjective

³⁸ Historically, the International Labour Organization (ILO) was a pioneer in promoting international standards to address the claims of indigenous and tribal peoples. In 1957, the ILO adopted Convention 107, which concerned the protection of indigenous and other tribal or semi-tribal populations in independent countries. ILO 107 received 27 ratifications, and it formed the first endeavour to codify indigenous rights at the level of international law. In 1989, the ILO adopted the Indigenous and Tribal Peoples Convention, 1989 (No. 169) (hereafter, ILO 169), which reflected a vital change in attitude towards indigenous populations in international law, and it promoted a doctrine not of assimilationism, but of solidarity, as the premise for their legal recognition. ILO 169 entered into force in 1991, giving formal international protection to a number of collective rights for indigenous peoples. These rights included rights to cultural integrity, to consultation and participation in relevant decision-making processes, to certain forms of self-government, to land occupancy, to territory and resources, and to non-discrimination in the social and economic spheres. Despite the fact that only 22 states, most of them in Latin America, have actually ratified ILO 169, the norms embodied in the Convention have been developed by other bodies and courts. It has achieved wide-ranging impact beyond the states that have ratified it. In addition, in 2007, the UN Declaration on the Rights of Indigenous Peoples was formally adopted by 143 Member States of the UN. Although only accorded the status of soft law, the Declaration strongly affirms the rights to self-determination of indigenous peoples.

entitlements.³⁹ This tendency was then reinforced in later processes of democratization. From the middle of the 1980s, democracy promotion was often expressly associated with the relativization of collective rights, and possession of rights was construed as an alternative to membership in political organizations based on collective modes of economic organization.⁴⁰ Overall, human rights were initially constructed, both in international law and in domestic constitutions that assimilated international law, as rights that persons possessed independently of the concrete organizations in which their lives were positioned. Throughout the post-1945 period, it was widely assumed that interwar experiments in democracy had failed, not least, because of the insufficient individualization of legal subjects under the corporatist systems created at this time. This had meant that generalized personal rights could easily be deprioritized by momentarily dominant social groups.⁴¹

To some degree, therefore, the process of democratic consolidation after 1945 revolved around an idea of democracy in which the normative form of democratic law making was stripped away from real existing persons, and the concrete agency of democratic citizenship was diminished. As an alternative, a mode of generalized legal subjectivity – formally individuated citizenship – was superimposed across the factual structure of national populations, and democratic laws were projected as laws applied to fictionally universalized individual subjects. Indeed, the essence of democracy was constructed around static apolitical subjects, centred on single human rights claims, originating within the global legal system itself.

This formal reconstruction of the basic subject of democracy necessarily had far-reaching implications for the role of citizenship in contemporary democratic systems. As discussed, central to the construction of the citizen as a legitimational figure for the political system is the fact that citizenship, attached to claims for rights, gives rise to a contestation and renegotiation

³⁹ For example, in the constitutions of newly democratized states in Germany, Italy and Japan earliest collectivist provisions were abandoned, and new democratic constitutions did not promote collective economic rights.

⁴⁰ Argentina is the classic example of this. From the 1940s Argentina had a highly collectivist tradition, which gave extensive recognition for trade-union rights. The 1980s brought a reorientation towards singular rights. Similar processes occurred across Latin America, notably in Bolivia.

⁴¹ For instance, anti-corporatist measures were widely implemented in Western Germany after 1945. This began with decisions of the American occupying forces to reject regional constitutions that contained corporatist elements. It culminated in legislation introduced in 1949 to limit trade union collectivism. In Japan, a series of anti-corporatist laws were implemented after 1945.

of the boundaries of inclusion and legitimation in society. Indeed, citizenship can be defined, paradigmatically, as a condition in which society as a whole is *exposed to politicization by actors claiming rights*, through which transformative processes in society are articulated towards the political system. This process presupposes that the citizen is embedded in concrete life structures, in which common experiences create claims to rights, which are then directed towards the political system. The fixing of the construct of the citizen around an externally defined set of norms, however, means that the rights that can be activated by citizens become more formally determined, externally circumscribed and partly separated from social experience. Indeed, the external construction of the citizen means that, in most settings, citizens acquire the same rights, defined by a uniform model of citizenship, and the rights to which citizens can lay claim formally pre-exist the acts in which they demand them. Above all, in contemporary democracies, the citizen assumes rights not primarily by articulating conflicts within its own society, but by reaching out into the global normative system, and demanding inner-societal recognition for rights that already exist. Rights claimed by one person, therefore, do not require trans-sectoral collective mobilization, and they do not necessarily transform collective life structures. In consequence, the extent to which claims to rights challenge the boundaries of the political system is limited, and most claims emanating from national society can be absorbed through existing sets of rights, which are already stored in the global legal system.

In these respects, international human rights law imposed a more restricted spectrum of political subjectivity on society, and it effectively pre-defined the forms in which political subjects could be constructed, limiting the societal volatility attached to rights claims. Society's potentials for political subject formation were, in part, generated by the law: indeed, society is partly de-subjectivized. Of course, the rise of international law did not bring an end to social mobilization, and, as discussed below, it did not bring an end to the claiming of new rights. However, rights were increasingly formed through an immediate nexus between the single person and global law, and they could be constructed relatively discretely, without requiring the unsettling politicization of all society.

3.2.3 *Margin of Appreciation*

The two processes described above led, gradually, both to an externalization and to a formal abstraction of the essential subject of democracy. One result of this is that socially embedded practices lost some importance in

the reinforcement of democracy, and democracy could easily be solidified around a small set of formal norms. Accordingly, democracies could be established on relatively thin normative foundations, and they did not presuppose the mobilization of deep-lying, complex constituencies or the broad-based experience of citizenship.⁴² One further result of this was that the legitimacy of democratic institutions and the acts of legislation performed by democratic institutions became increasingly measured by abstracted, external standards, not identified with a factually existing subject. Democratic institutions were increasingly defined as legitimate through reference not to aggregated acts of real self-legislating citizens, but to criteria present within an existing legal system.

Importantly, this reconstruction of democracy after 1945 is reflected not only in patterns of democracy promotion, but in the judicial structure of global society, and especially in the interactions between national government organs and principles of inter- or supranational jurisprudence. This can be seen in the fact that many national states began to construct their legislative acts within supranational legal orders. Increasingly, states explained the validity of their legislation, at least in part, by the extent to which single laws tracked or mirrored established higher-order principles, enshrined in international law. In particular, human rights obligations under international law became a measure by which, either implicitly or expressly, all domestic legislation had to be assessed and interpreted. This meant, most notably, that the legitimacy of democratic legislation was partly defined by principles external to the legislative process, external to the factual purpose of any given act of legislation, and external to any *factual subject* that participated in legislation. As a result, in most democracies, at least one component of the legitimacy of law was constructed not by acts of will formation reflected through the law, but by norms stored in a global legal system, to which law, and acts creating law, had to be proportioned. Just as the concrete volitional form of the people became marginal to democracy as a whole, therefore, it also became marginal to single legislative acts, and acts of law began to acquire and signal legitimacy not through the political motivations or demands of citizens, by which they were shaped, but through the international norms to which they were proportioned.

⁴² Many enduring democracies created after 1945 were constructed through inter-elite pacts, in which agreement about recognition of international human rights norms had central importance. Important examples of this are the FRG, Japan, Spain, Chile, Ghana and South Africa.

In some cases, the obligations of national legislators under international law are defined very tightly.⁴³ For example, in Latin America, since the establishment of the IACtHR, domestic law is certified as legitimate if it is in compliance with the ACHR, and the principle of compliance is formulated in the doctrine of the *control of conventionality*. According to this doctrine, the ACHR must be integrated as higher law in the normative hierarchy of the legal systems of states party to it (see Dulitzky 2015: 57, 60). Consequently, legislators in national states are rigidly bound by the ACHR, and domestic judicial actors, and in fact all public authorities, have the duty to ensure full compatibility between ‘internal legal norms’ – the laws of national societies – and the ACHR. In fact, national courts are expected to evaluate domestic legislation both by considering its compliance with the ACHR and by assessing it in light of the ‘interpretation of the treaty provided by the Inter-American Court.’⁴⁴ Some Latin American courts, notably the Colombian Constitutional Court, have adopted the technique of devising a *block of constitutionality* – that is, of directly incorporating some international treaties in domestic constitutional law. These treaties include the ACHR, and, by extension, the rulings of the IACtHR, which means that the jurisprudence of the IACtHR has a position in Colombian law similar to constitutional rank. In establishing this principle, the Constitutional Court aims both to avoid referral of cases to the IACtHR and to obtain semi-legislative power for itself.⁴⁵ In the Latin American setting, generally, domestic courts have a salient role in constructing democracy, and in many states law is legitimated, at least in part, through its correlation with the international normative system.

Outside Latin America, the role of judicial bodies in assessing the validity of national legal norms is less strictly guaranteed. Nonetheless, courts are widely assigned responsibility for establishing the legitimacy of law by assessing its conformity with international law, and especially with international human rights provisions. In other supranational jurisdictions, this procedure is most obviously formalized in the doctrine of the *margin of appreciation*. That is to say, most states now accept that domestic laws can only be legitimate insofar as they are aligned to global normative

⁴³ IACtHR, Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a), and 46(2)(b) American Convention on Human Rights), Advisory Opinion, OC-11/90 (10 August 1990).

⁴⁴ See the first statement of this in IACtHR, Case of *Almonacid-Arellano et al v. Chile*. Judgment of 26 September 2006. See also Colombian Constitutional Court C-410/15. I am grateful to Carina Calabria for lengthy discussion of these points.

⁴⁵ See a leading discussion of this in T-1319/01.

standards, and that, with qualifications, international courts can supervise domestic law to ensure that it does not deviate too far from overarching principles. Nonetheless, domestic law is allowed to deviate from international norms in cases in which a particular legislative act either meets a pressing need within the national society in question, or where it is singularly justified as a reflection of a more local legal convention.

The doctrine of the margin of appreciation is implied in most supranational legal orders. As mentioned, the IACtHR usually requires strict recognition of international norms within domestic law. However, it has at times applied a doctrine close to the margin of appreciation.⁴⁶ This doctrine has been used, more implicitly, by the UN Human Rights Committee.⁴⁷ However, this doctrine has greatest importance in the jurisprudence of the ECtHR. Typically, in the ECHR system, the margin of appreciation has been promoted as a means to make supranational human rights protection workable, and it reflects a compromise between the demands of separate national states and the autonomy of the supranational system as a whole. Nonetheless, the margin of appreciation doctrine clearly limits democratic volition in states that are parties to the ECHR, and it curtails the extent to which law is legitimated by popular political decisions. Clearly, this doctrine places national legislation in a subordinate, or at least normatively circumscribed, position within a transnational legal order, and it implies, centrally, that national laws are formed and justified within a discretionary sphere, the boundaries of which are dictated by international legal norms and bodies interpreting such norms.

At a most obvious level, one consequence of the doctrine of the margin of appreciation is that democratic legislation within national societies is always subject to restrictions by higher-ranking international norm providers. As a result, judicial bodies outside national states are authorized to scrutinize public acts within national societies to ensure that they do not exceed the limits of a sanctioned sphere of national legislative autonomy. In addition, however, this doctrine implies that judicial actors within national states are allowed to assess the actions of their own governments through reference to the margin of appreciation, and they are authorized to evaluate laws and legal rulings not solely on intrinsic substantive grounds, but in light of their position within the international legal order.

⁴⁶ IACtHR, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, 19 January 1984.

⁴⁷ *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, Communication No. 35/1978, (9.4.1981). U.N. Doc. CCPR/C/OP/1 at 67 (1984).

Although not originally conceived as a doctrine to be applied by national public bodies,⁴⁸ in fact, the principle of the margin of appreciation creates a certain latitude in which national judicial bodies can examine domestic acts of legislation and determine whether they fall within or outside acceptable discretionary limits. As a result, national courts interpret international norms to define the sphere of discretion within which national legislative acts can assume legitimacy.

The principle that domestic courts can establish the margin of appreciation was formally stated in one of the main ECtHR rulings applying this doctrine, *Handyside v. UK* (1976). First, in this ruling, the Court set out the basic concept of the margin of appreciation. It recognized that, although all parties to the ECHR are bound by common norms, the Contracting States had 'fashioned their approach in the light of the situation obtaining in their respective territories' and they were qualified to reflect and address 'the demands of the protection of morals in a democratic society' within their own territories.⁴⁹ On this basis, the Court noted that the doctrine of the margin of appreciation implies a supervisory relation between supranational and national courts, and that the primary duty of the ECtHR is to protect higher-ranking norms. Second, however, in this ruling, the Court developed a two-pronged method for protecting human rights. It stated that it itself possessed responsibility for ensuring that the rights required for democratic governance were protected in signatory states, and deviations from Convention standards could only be accepted to the degree that they did not derogate from an overarching commitment to democracy. Yet, it also declared that national courts had a designated responsibility for ensuring that domestic public agencies act within a margin of appreciation, and, to this degree, the supervisory functions of a supranational court are less important than those of national courts. In this instance, it was decided that national courts were authorized to apply a margin of appreciation in their own rulings, and they could decide on the legitimacy of public acts by balancing these acts against international human rights standards. The Court ruled that the margin of appreciation 'is given both

⁴⁸ One commentator states that the margin of appreciation is 'fundamentally a transnational device' and it can 'have no direct domestic application' (Greer 2000: 34). To support this, see the claim, in an ECtHR case, that: 'The doctrine of the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court. It cannot have the same application to the relations between the organs of State at the domestic level': *A. and Others v. the United Kingdom [GC]* - 3455/05. Judgment 19 February 2009 [GC], at para 184.

⁴⁹ *Handyside v. The United Kingdom*; - 5493/72. Judgement 7 December 1976 para 57.

to the domestic legislator ... and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.⁵⁰ Indicatively, the ECtHR stated that 'the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights'.⁵¹

In key respects, this ruling reflected a basic reconfiguration of democratic theory. In this articulation, democracy was defined as a political system founded in a discretionary relation between national political organs and overarching normative dictates, in which legislative acts had to be proportioned *a priori* to pre-defined legal norms. In this relation, national courts and other public bodies were accorded a primary role in giving reality, within a discretionary margin, to human rights norms situated in the international domain, ensuring that acts of legislative bodies did not exceed constraints resulting from these norms. The essential substance of democracy, thus, was construed not as the enactment of a political will, but as an inter-institutional discussion about the variable enforcement of human rights law. A concept of democracy as a *formal process of compensation between existing legal-normative principles*, in which different courts balance legislative imperatives against implied human rights standards, became evident in this process. In this conception, the originating subject of the democratic system was translated into an abstracted construction of the person as rights holder, defined in international conventions. Accordingly, this subject gained political expression not through primary political acts, but through an inner-legal relation between judicial actors and international norm setters.

Over decades, many variations have been added to the classical doctrine of the margin of appreciation. In some countries, the doctrine has justified guarantees for human rights in domestic law that may be at variance with those promoted in international law.⁵² However, in some cases, courts have adopted a reverse practice, and they have posited a wide spectrum of appreciation, in which they are entitled to offer more robust protection for certain rights than provided by international courts. Examples of this are found in Europe, where some national courts have accentuated their independence from the Strasbourg court by claiming the authority to entrench human rights more fully than the ECtHR.⁵³ This is in fact notable

⁵⁰ Ibid para 48.

⁵¹ Ibid.

⁵² This is the principle in *Handyside*.

⁵³ In one UK case the Supreme Court claimed to go 'rather further than the evolving jurisprudence of the European Court of Human Rights has yet clearly established to be required':

in Russia, whose superior courts have in a several cases fleshed out a body of case law that, in some instances, establishes rights above Strasbourg thresholds.⁵⁴ In some cases, national courts have argued that they are not bound by Strasbourg jurisprudence. Yet, in stating this, they have claimed new powers and envisioned new rights in their own domestic systems.⁵⁵ Examples of similar reasoning are also found in Latin America, where some courts have given to some rights a more expansive protection than guaranteed at the supranational level, by the IACtHR.⁵⁶

In such examples, the basic content of democratic law is formed and explained within a relation of balances, and the interaction between national and supranational legal norms becomes an effective wellspring for democratic, even constitutional, legislation. As a result, the basic position of political agency is reconfigured, and primary legal norms are created, transnationally, without reference to any real existing subject. In some cases, in fact, the contested balancing of rights between different courts becomes – of itself – a source of new legal principles. Through each of these processes, the fact that courts conserve an image of the person as an original rights holder partly replaces the democratically engaged people (citizen) as a basic source and reference for legitimate legislation. As a factual agent, the citizen is subsumed within a set of inner-legal exchanges.

Rabone and another v. Pennine Care NHS Foundation Trust – [2012] 2 All ER 381 (Brown SCJ). See also the Norwegian ruling, Decision HR-2011-00182-A, 26 January 2011, in which the Supreme Court expanded ECHR rights concerning self-incrimination. I follow the analysis in Andenaes and Bjorge (2013: 245).

⁵⁴ In Russia, in 2016, the Russian Constitutional Court (RCC) ruled, with reference to Convention on the Elimination of all Forms of Discrimination Against Women, that women have the formal right to be judged by a jury trial (RCC Ruling on Merits No. 6-P of 25 February 2016). The Russian Criminal Procedure Code (Article 31) requires a trial by jury for defendants that committed a crime punishable by lifelong sentence. At the same time, Arts. 57 and 59 of the Criminal Code state that women are exempt from lifelong sentence in general. In theory, this means that women accused of committing crimes potentially resulting in a life sentence are not allowed to be tried by jury. The RCC has altered this situation and recognized the formal right of women to be tried by jury.

⁵⁵ See the claim that the courts may possess the right to oppose franchise restrictions in *Moohan and another v. Lord Advocate* [2014] UKSC 67 (Hodge).

⁵⁶ See the expansive reading of the right to *vida digna* in the Colombian Constitutional Court (T-009/13). Central to the jurisprudence of the Colombian Constitutional Court is the claim (see T-406/92) that, where appropriate, it can establish rights above the thresholds set out in domestic constitutional law and above levels of protection provided by the ACHR and general international human rights law.

3.2.4 *Proportionality*

The abstraction of democratic subjectivity through the concept of the margin of appreciation is intensified through the growing judicial application of the doctrine of *proportionality* as a measure of the legitimacy of legislation. In its currently common form, the doctrine of proportionality implies that public bodies can only pass laws that restrict the established basic rights of particular subjects if such restriction is dictated and justified by the fact that it engenders a collective benefit or value that is proportionate to the consequences of the restriction. In applying principles of proportionality, in particular, courts are expected to decide whether a particular law or a particular administrative decision restricting human rights shows due recognition of the rights of the person affected by the act or decision, or whether any disadvantages experienced by affected parties may exceed justifiable limits. In most cases, intrusion on subjective rights is only seen as warranted as it can be construed as necessary for *upholding a democratic society*.⁵⁷

Of course, the principle of proportionality is not of itself new, and basic concepts of balancing have long been familiar in most legal systems. The doctrine of proportionality originated in administrative law and police law, as a principle to obviate the use of unnecessarily harsh measures by public bodies.⁵⁸ In recent years, the spread of proportionality has intensified its meaning and broadened the scope of its application. The contemporary use of proportionality reasoning began – in part – in national legal systems as a means of resolving conflicts between constitutionally guaranteed rights and public interests. The use of proportionality was then expanded in international organizations and international human rights systems, in which proportionality began to cover questions of subsidiarity and derogation from international norms in supranational legal orders.⁵⁹ More recently, the application of proportionality has been widened to the

⁵⁷ This principle is set out in the ECHR and in case law of the ECtHR. It is subject to variable interpretation, allowing states considerable latitude on limiting internationally defined human rights. In *Handyside*, the ECtHR allowed this term to cover censorship intended for ‘the protection of morals in a democratic society’ (para 57). This principle is also expressed in the American Declaration of the Rights and Duties of Man (Art XXVIII).

⁵⁸ It was already formulated in the Prussian Land Law of 1794, which stated that ‘laws and edicts of the state’ should not ‘restrict the natural freedom of citizens any more than was required by the common purpose’ (Remmert 1995: 27).

⁵⁹ In the EU, the principle of subsidiarity contains proportionality implications. In the ECtHR, proportionality is implied in the margin of appreciation doctrine.

degree that many courts use proportionality without fixed reference to a formalized body of constitutional law or human rights law, and courts often simply evaluate acts of domestic public bodies through reference to loosely implied transnational human rights standards. Notable examples of this can be found in Canada, in which proportionality assessment of public acts is intensified where international norms and values have relevance to a case.⁶⁰ Important examples can also be found in Chile, where courts have used proportionality reasoning to ensure that rights protected under international law are accorded higher entrenchment in domestic proceedings.⁶¹ In such cases, proportionality has formed an important sluice through which general international norms have assumed constitutive effect in domestic law.

Significantly, the use of proportionality has led to a relativization of classical patterns of legislative agency, and it has imposed on national legal systems a construction of democratic obligation, and so also of the underlying democratic subject, which is projected in highly abstracted, inner-legal fashion.

One clear implication of the use of proportionality is that the legitimacy of a law or other public act can be established through judicial balancing of two sets of rights: the right of an individual affected by a decision and the rights of the democratic community as a whole. This means that a judge is required to assess which of the competing rights weighs most heavily in a given situation, and which of these rights warrants the most urgent protection in the act in question. Through this process, the legitimacy of a law emerges not as the result of a substantial public decision, but as a judicially constructed relation between rival principles, which are already articulated and stored in the legal system. Indicatively, one tribunal which actively promotes proportionality has stated that the use of proportionality reasoning entails a 'concrete harmonization of rights', in which law's legitimacy becomes measurable not by any substantive value that it contains, but by the fact that it mediates equally between rival rights claims.⁶²

One further implication of the use of proportionality is that, ultimately, courts assume the power to define the broader normative fabric of society, and the extent to which the authority of binding legal norms can be traced to primary political acts or even substantively defined collective

⁶⁰ *Slaight Communications Inc v. Davidson*, [1989] 1 S.C.R. 1038.

⁶¹ See Corte Suprema, 28/01/2009, 4691-2007.

⁶² Bolivian Constitutional Court 2621/2012.

preferences is reduced. In assessing the proportionality of acts of public bodies, courts are expected not only to scrutinize the content of a particular act of a legislative or administrative body, but also both to assess the impact of this act on persons affected by it, and to evaluate whether its benefits for the democratic community are sufficiently great to warrant this impact. In so doing, courts increase the burden of justification that is imposed on public bodies, in their legislative and administrative functions. In fact, courts impose expectations on public bodies that are established, literally, by an anticipation of the social consequences of laws and administrative acts, and by a projection of the ways in which such laws and acts may or may not affect the rights of persons held and exercised, under constitutional law or even under international law, throughout society. In applying proportionality, courts must presume a broad understanding of society as a whole, and make far-reaching decisions about its constitutional nature and its democratic form.

Through the expansion of proportionality, the role of the factual citizen is diminished in democracy, and it is replaced by a more formal inner-legal construction of society's political subject. This occurs, first, because, where laws are authorized on proportionality grounds, judges acquire greatly expanded authority in assessing the validity of acts perpetrated by public bodies, so that the competence of courts often exceeds the limits implied under classical separation of powers arrangements. This occurs, second, because, in applying proportionality, judges become defenders of democracy, and they are charged with responsibility for assessing the normative requirements of democratic society as a whole. Judges are required to authorize law not because it is created by democratic subjects, but because it is proportioned to democratic subjects, defined through a judicial construction of society as a whole. This occurs, third, at a more fundamental level, because proportionality envisages legitimate law not as law that people have willed, but as law that adequately balances different rights. Through this process, implicitly, the citizen is no longer defined as the factual or original legitimating author of law. Instead, law acquires authority as the citizen is transposed into a model of rights-holding legal subjectivity to which laws need to be purposively aligned, and laws are only allowed to restrict recognition of this subject on strictly controlled discretionary premises. In this process, the legitimacy of law is constructed retroactively, through its adequacy to the formal rights of the democratic citizen. In this process, thus, *the citizen moves from the beginning to the end of law*: the citizen brings legitimacy to law not as law's author, but as a judicial construction of law's addressee, often implicitly based on international human

rights law. Courts internalize the figure of the citizen, which is translated into a movable legitimating norm for legislative acts, positioned at the end of law.

Particularly significant in this respect is the fact that, in some societies, superior courts have adopted a distinctive constitutional practice, which is based on proportionality reasoning, but which uses proportionality not only to place normative limits on the acts of state bodies, but to prescribe positive obligations to them. This is especially prominent in Colombia, whose judicial system is in many respects a laboratory for the creation of principles of global democratic law. In Colombia, proportionality is now widely used across a range of cases. However, it has a distinctive importance in cases relating to mass displacement and civil violence, as a result of which large population groups have been deprived of access to basic rights. In such cases, the Colombian Constitutional Court has developed a line of jurisprudence which argues that some social groups are placed at a *disproportionate level of vulnerability* because of their exposure to internal displacement and violence, and the resultant endemic violation of their rights. These groups usually include women, children, elderly persons and indigenous groups; in some cases, in fact, indigenous women and children are classified a particular sub-group of doubly jeopardized, ultra-vulnerable persons.⁶³ On this basis, the Court has argued that the state has a series of intensified obligations towards such groups, and it must promote *proportionate affirmative action* to ensure that their rights are raised to the same level as those of other, less vulnerable groups. The Court has recommended that extensive programmes of action should be initiated, whose implementation it claims authority to monitor, in order to ensure that affirmative action provisions are put into practice.⁶⁴

In each of these examples, proportionality leads to a clear transfer of law-making force from a materially given demos to an abstracted rights-based concept of the human subject. In this process, the factual authority for law is transferred from the active political citizen to citizen qua legal rights holder. As bodies designated to protect the inner-legal construct of the citizen, then, courts become both custodians of democracy and the source of democratic laws, and legislation is enacted and justified because of a construction of democratic citizenship articulated within the law.

⁶³ A-092/08.

⁶⁴ Ibid.

3.2.5 *Inter-legality*

The expanding role of the legal system in establishing the basic elements of democracy means that judicial bodies are often positioned in the interstitial domain between legal orders situated at different parts of global society. In this position, courts create laws by presiding over an interaction between principles stored in different locations of the legal system, and they promote primary legislation, and even perform basic acts of democratic citizenship, through their *inter-legal* position.

Most commonly, this *inter-legal* position of courts is expressed through the fact that they are required to oversee the subordination of domestic law to international law, or at least to ensure the accommodation of these two dimensions of the global legal system. More infrequently, the inter-legal position of courts is expressed in reactive fashion, as courts defend domestic legal principles against international legal norms, often under the banner of national sovereignty. Cases of this kind are frequent in the USA, the UK and Russia, where courts are often reticent to give immediate effect to international law.⁶⁵ In these settings, to be sure, there are obvious examples in which courts simply reject norms contained in international law.⁶⁶ In such contexts, however, international law more generally acquires an osmotic effect, as outward rejection of the application of international law by national courts typically – over time – softens into a position in which domestic legal principles are aligned to the basic expectations of international law.⁶⁷ In some cases, the inter-legal position of courts is expressed more delicately, as courts consider expectations in different dimensions of the global legal system at the same time, and they ultimately construct basic norms on a fluid, hybrid, intrinsically transnational foundation. The use of law of varying provenance to reach verdicts with far-reaching significance

⁶⁵ In a recent case, the RCC ruled on the supremacy of the Russian Constitution above conflicting rulings of international courts and tribunals (RCC Ruling on Merits No. 21-P of 14 July 2015). Later in 2015, a federal constitutional law was adopted solidifying the right of the RCC to rule, essentially, on the constitutionality of a Strasbourg judgement (Federal Constitutional Law No. 7-FKZ of 14 December 2015). On 19 April 2016 this federal law was used for the first time when the Ministry of Justice requested the RCC to assess the constitutionality of an ECtHR judgement on the question of prisoners' voting, handed down by the ECtHR in *Anchugov and Gladkov v. Russia* (Applications nos. 11157/04 and 15162/05, Judgment of 4 July 2013). See RCC Ruling on Merits No. 12-P of 19 April 2016. Also, the RCC has declared that it is an 'impossibility' to implement the ECtHR Yukos judgement (OAO *Neftyanaya Kompaniya Yukos v. Russia* (Application no. 14902/04, Judgment of 15 December 2014)) (see RCC Ruling on Merits No. 1-P of 19 January 2017).

⁶⁶ ICJ, LaGrand case (*Germany v. United States of America*). Judgment of 27 June 2001.

⁶⁷ See general discussion of the USA and the UK in this respect below at pp. 296–9, 343–5.

is observable in the UK courts.⁶⁸ In such instances, national democratic agency is not the basis of law. National law is configured around the interaction between different parts of the global legal system.

In some contexts, the function of inter-legal law making by courts results from the fact that courts are required to balance the norms contained in different dimensions of the legal system that exist in their own societies. In this position, courts acquire very far-reaching sociological significance in promoting overarching processes of social integration. In such environments, courts at times assume responsibility for harmonizing the legal claims of different communities, especially indigenous communities, and they are required to construct a generate legal order to facilitate coexistence between them. Inter-legality, thus, becomes a precondition of objective social inclusion, promoting patterns of citizenship able to integrate diverse factual populations. Indeed, the basic construction of citizenship becomes a central function of judicial bodies.

The assumption that courts need to play a role in ordering plural legal communities as a means of effecting societal integration was pioneered, to a large degree, in Colombia, where the higher courts established a model of inter-cultural and inter-legal balancing to define and address the legal position of indigenous groups. Under this principle, it was accepted that, under most circumstances, indigenous groups should be allowed to assume a certain degree of legal autonomy in their own territories, and they were recognized as holders of a distinctive legal personality, with distinctive, although circumscribed, rights and entitlements. The Constitutional Court, notably, declared *legal pluralism* a basic fact of Colombian society, acknowledging that the national legal order as a whole contains multiple legal domains, as a result of which certain group-specific rights exist alongside each other. In particular, the Court declared that 'the cultural survival of indigenous people' is a constitutional value of great importance, which requires that indigenous communities should be granted a 'high degree of autonomy'. Consequently, it stated that the 'maximization'

⁶⁸ See opinions in *R Osborn v. Parole Board* [2013] UKSC 61. Here, common law principles and ECHR principles were fused. It was stated (Reed SCJ) that 'protection of human rights is not a distinct area of the law, based on the case law of the European Court of Human Rights, but permeates our legal system.' Moreover, it was stated that the ECHR does not 'supersede the protection of human rights under the common-law or statute, or create a discrete body of law based upon the judgments of the European court'. In other words, it was implied that UK courts have a distinct collaborative function in creating European human rights law, to which common law reasoning also contributes. See related discussions in *Kennedy v. Charity Commission* – [2014] 2 All ER 847.

of their autonomy and 'the minimization of restrictions' on this autonomy should be taken as guiding norms in cases concerning indigenous justice.⁶⁹

In establishing these principles, however, the Colombian Constitutional Court argued that the pluralistic quality of the national legal system was necessarily subject to some constraints. In particular, it ruled that the exercise of pluralistic rights by indigenous communities had to be limited by the fact that in some circumstances courts might be required to protect a higher constitutional principle, normally related to basic (international) human rights, to which the pluralistic demands of inner-societal legal orders are necessarily subordinate. As a result, the Court concluded that restrictions on legal pluralism could be legitimated, on proportionality grounds, in cases where judges were called upon to 'safeguard' norms of the highest constitutional prominence.⁷⁰ Following this principle, indigenous liberties and powers of autonomy required limitation in cases in which they entered conflict with a small 'hard nucleus' of essential human rights with obvious higher-order standing: that is, in particular, the right to life, the right not to be tortured, right to due process and minimal rights of subsistence.⁷¹ Accordingly, judges addressing cases in which claims to indigenous legal autonomy posed a risk to the standing of other rights were required to apply standards of inter-legal proportionality – of 'rational evaluation' – to assess which rights and which elements of legal order should, in a given case, 'enjoy greater weight'.⁷² Ultimately, this approach culminated in the principle that the 'imperative legal norms' of Colombian public law should be accorded 'primacy over the usages and customs of indigenous communities when they project a constitutional value that is superior to the principle of ethnic and cultural diversity'.⁷³ Overall, the legal personality of indigenous populations was constructed through the balancing of the demands for indigenous autonomy, which were clearly recognized as *rights*, against the most high-ranking essential norms, declared in national public law and international human rights law.

The use of the concept of inter-legality in Colombia meant that the cultural rights of indigenous communities could be extended, and it created legal grounds to support a condition of multiple inner-societal citizenships. But it also meant that the rights claimed by different groups of

⁶⁹ T-349/96.

⁷⁰ Ibid.

⁷¹ T-903/09.

⁷² See T-254/94; SU-510/98.

⁷³ T-009/07.

citizens could be subject to prior constraint and inner-legal control, and that the attribution of such rights could be managed within the legal system itself. Indeed, this concept expressed the overlying principle that the people has one defining higher will, which, in some circumstances, must prevail over pluralistic or factional interests. The balancing function of the Court meant that the Court was given responsibility for establishing a collective legal form for the people, and for deciding which norms should express the sovereign will of the people in its entirety, above its factually pluralistic, fragmented form. Notably, internationally protected rights played a core role in this process, and the highest will of the people was usually constructed through reference to the citizen as a rights-obligated agent under international law. The people, thus, appeared, in the most essential form, through inner-legal acts, and their legal-political reality was pre-defined by norms within the global legal system.

The superior courts in Bolivia, a society marked by much greater ethnic complexity than Colombia, have gone still further in developing a pluralistic method of inter-legal or inter-cultural constitutional practice, to promote multiple citizenship and to secure conditions of national legal inclusion. In this respect, an important distinction has to be made between patterns of constitutional pluralism in Bolivia and Colombia. The Constitutional Court in Bogotá has much greater structure-building importance in Colombia than the (generally much weaker) Bolivian Constitutional Court in Sucre,⁷⁴ and the Colombian Court has used its influence to impose a stable, vertical and relatively hierarchical system of norms on society.⁷⁵ In Bolivia, the political executive is currently more authoritarian, and courts are less likely to act against governmental directives. In Bolivia, moreover, pluralistic movements in society, especially those tied to the politics of indigeneity, have greater *transversal* force than in Colombia, and they can create normative orders that are more strictly separated from the central legal system.⁷⁶ Notably, Art 9(1) of the Bolivian constitution states that the constitution is designed to create a 'just and harmonious society', based on decolonization, providing 'full social justice' and consolidating 'plurinational identities'. In fact, the legal system as a whole is designed on a model that notionally places indigenous justice on a level of parity with ordinary justice. Unlike Colombia, where the Constitutional Court has acted to reinforce public institutions at all

⁷⁴ See below at pp. 363–6.

⁷⁵ See below at pp. 446–8.

⁷⁶ See below at pp. 440–2.

societal levels,⁷⁷ social mobilization around collective rights in Bolivia has led to a transformation, and even to the partial replacement, of conventional public-legal bodies. For example, some local governments and autonomous indigenous regions have begun to experiment with new patterns of democratic representation, and they have acquired far-reaching freedoms in recasting the form of democracy at a local level (Bazoberry Chali 2008: 153).⁷⁸

As in Colombia, nonetheless, the Bolivian Constitutional Court has developed an approach that acknowledges the pluralism of domestic legal orders as a 'founding element of the state'. The Court both sanctions, and actively attempts to preserve, the coexistence of multiple legal orders, multiple parallel citizenships and multiple systems of justice within the national polity. In fact, the Constitutional Court has established a distinct principle for maintaining harmony between the multiple legal orders contained in society. It has argued that the term, *vivir bien* (living well), supposedly based on the culture of the Aymara people, and designating recognition of harmony in diversity, forms a matrix for incorporating divergent normative expectations in one overarching legal system.⁷⁹ On this principle, attempts in the Constitutional Court to balance the claims to rights arising in different legal orders are intended to guarantee conditions of good life for as many groups within society as possible.⁸⁰ In adopting this approach, however, the Court has assumed a balancing function in relation to different legal orders in society, and, as in Colombia, it promotes a jurisprudence that is intended to transmit higher-order integrative norms across society. Notably, the Court has stated that acts of balancing linked to recognition of 'legal pluralism' and 'inter-legality' serve to uphold the 'jurisdictional unity' of society, and they are to be seen as 'structuring elements' of the political order.⁸¹

In promoting inter-legality, the Bolivian courts clearly intend to protect and to give expression to the factual pluralism of interests within Bolivian society. However, in the doctrine of inter-legality, courts also acquire supreme authority over the pluralistic expressions of the people, and the pluralistic model of judicial control does not imply that all modes of legality

⁷⁷ See below at p. 367.

⁷⁸ See below at p. 441.

⁷⁹ This concept is officially based on socio-anthropological analysis of the moral values of the Aymara people. See for discussion Yampara Huarachi (2011: 13).

⁸⁰ Bolivian Constitutional Court 1023/2013.

⁸¹ Bolivian Constitutional Court 1422/2012.

have equally valid status, in all circumstances.⁸² On the contrary, courts assume a pivotal role within the multi-structural legal order of society, and they have responsibility for the 'weighing up' (*ponderación*) of the relative validity of the rights and claims inscribed in different legal domains.⁸³ Significantly, the Constitutional Court has interpreted the concept of *vivir bien* as a norm that enjoins different communities not to deviate too far from generalized constitutional principles, and not to challenge in disproportionate manner the 'axiomatic guidelines' of the Constitution.⁸⁴ Such guidelines are also strongly linked to international law.⁸⁵ This implies that the principle of inter-legality is employed to ensure that indigenous legal customs and expectations should remain circumscribed by, and, in cases of conflict, *subordinate to*, higher constitutional norms, including internationally defined rights. *Vivir bien*, accordingly, is closely assimilated to a logic of proportionality. In these respects, Bolivian public law follows Colombian law in recognizing that the principle of inter-legality is to be guided, ultimately, by the recognition of normative hierarchy, in which certain basic human rights have primacy. As in Colombia, the judiciary has the duty to decipher the higher sovereign will beneath the plural legal orders of society, and this will is widely constructed through the use of international human rights law.

In Colombia and Bolivia, the commitment to legal pluralism is intended to bring the factual form of the (highly pluralistic) national people into close proximity to the political system, and so to guarantee a high degree of sensitivity between the legal/political order and different material groups in society. This concept is understood as the foundation for a multi-centric, multi-normative democracy, based on multi-centric citizenship, adapted to the post-colonial legal landscape. In this process, however, the essential form of the people is constructed through judicial interpretation, partly through reference to international human rights norms. In their functions at the centre of a complex order of inter-legality, courts clearly stand in for, and in fact give final embodiment to, the people as a national collective actor, or as a legally meaningful aggregate of citizens. The people only

⁸² In some cases, the Bolivian Constitutional Court has used international law to overrule local justice. See discussion below at p. 441. For comment on these points see Attard Bellido (2014: 41–2).

⁸³ This expressed paradigmatically in Bolivian Constitutional Court 1422/2012.

⁸⁴ Bolivian Constitutional Court 1422/2012.

⁸⁵ Art 410, II of the Constitution establishes a doctrine of the block of constitutionality for Bolivia, which means that immediate domestic effect is accorded to international human rights treaties.

become visible above their factual pluralism through the interpretive acts of courts, which establish the most essential components of the will of the people on the basis of human rights norms. In fact, although claiming to give articulation to the pluralistic will of the people, courts actually envision this will through the principle of proportionality, so that this will, in the final analysis, is defined by uniform external norms. The essential core of the popular will is extracted from acts of judicial balancing, and, as such, it assumes a reality above the particular normativities in society. In this respect, above all, the processes of integration that underlie democracy are conducted within the law.

3.2.6 *Open Constitutional Jurisprudence*

Alongside such specific functions, institutions within the legal system form the primary norm-giving subject of democracy in other, more general, ways. In many cases, the basic legal-political order of democracy is now often defined not by political decisions, but by constructive use of the law by advocates and judges, often piecing together a patchwork of national, international and comparative legal sources. Of course, use of comparative and international legal sources to resolve questions of national public law, or even to articulate primary constitutional norms, is not new. Even in relatively established democracies, key constitutional problems have been addressed through citation of international norms.⁸⁶ In some societies, however, constructive judicial citation from international sources has reached a very high level, and it now, at times, fills the gaps in, or even supplants, domestic law. For different reasons, in fact, such citation even replaces or supplements popular sovereign acts in creating, *de facto*, new constitutional norms. Often, the founding norms of democratic government are established through the emergence of a model of *open statehood*, or *open constitutionalization*, in which courts establish constitutional jurisprudence that integrally connects national and international law. In some cases, the basic political form of the people is constructed as an inner-legal hybrid, fusing national and international legal elements.

The importance of open constitutional jurisprudence is observable, in particular, in the legal systems of relatively new democratic states, where national constitutional law is only partly consolidated. In such settings, decisions in controversial matters are often reached on amalgamated

⁸⁶ See the case in the American Supreme Court, *Lawrence v. Texas*, 539 U.S. 558 (2003).

grounds, constructed from national and international law. In fact, in such settings, courts often resolve cases marked by particularly intense constitutional contest by reading domestic law together with international law, and they seek to generate legitimacy for law in disputed areas by borrowing authoritative principles from international law, or from other jurisdictions. Such jurisprudence is often used where the national will is uncertain, or consensus cannot easily be established, and it insulates the legal/political system against the need to identify or to incorporate the real will of citizens. Through these processes, the construction of basic legal norms results from an interaction between legal orders, and cross-penetration between norms stored at different points in the global legal system forms a primary law-creating agency.

Some of most extreme examples of such jurisprudence can be found in the wake of democratic transitions in Eastern Europe. In Hungary, for example, a new constitution was not written following the systemic upheavals of 1989. Instead, senior jurists adopted a doctrine of the *invisible constitution*, which they used to flesh out amendments to the existing constitution by claiming that elements of national law had to be aligned to international law. Indeed, the Constitutional Court used Strasbourg jurisprudence to shape domestic law before Hungary had acceded to the ECHR (see Sajó 1995: 260). Similar patterns of jurisprudence were also used in Poland after 1989. In Poland, international law was used in courts as surrogate constitutional norms until the first democratic Constitution was written in 1992.

Particularly illuminating examples of open constitutional construction, however, can be found in post-transitional public law cases in Africa, especially in cases that address issues with high public sensitivity.

In post-apartheid South Africa, the Constitutional Court welded aspects of domestic law and aspects of national law to address deep-lying constitutional problems, and to create nationally binding constitutional norms. In fact, the Court developed the doctrine that, in highly controversial cases, the national will of the people must be made visible through constructive integration of domestic and international law. For example, in one of the most famous South African cases, *S v. Makwanyane and Another* (1995),⁸⁷ which was heard under the interim transitional constitution of 1993, the new Constitutional Court ruled against the constitutionality of the death penalty. In this ruling, the judges observed that it was their duty to rule in

⁸⁷ *S v. Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

deeply contested matters by establishing legal norms giving expression to the will of the entire South African people: 'to articulate the fundamental sense of justice and right shared by the whole nation as expressed in the text of the Constitution.'⁸⁸ Distinctively, they claimed that, in establishing principles of national jurisprudence, they were required to show regard for the multiple legal orders inherent in domestic society, and to elaborate 'indigenous value systems' as a basis for the national legal order.⁸⁹ In particular, the Court argued that it was obliged to develop the indigenous value of *ubuntu*, defined as an attachment to human dignity,⁹⁰ as a legal foundation for the national community. In the transitional setting, therefore, the Constitutional Court observed itself as obliged both to express the collective will of the people and to show due recognition for the indigenous law of different peoples in South African society, and so to galvanize a characteristically heterogeneous yet unified normative will to support democratic constitutional law. Implicitly, the Court saw itself as responsible for creating a trans-sectoral ethic of national citizenship to support the law, and for projecting a unified constitutional subject to support the new democracy.

In pursuing this nation-forming objective, however, the Court argued that the values inherent in domestic law should be elaborated and reinforced through constructive assimilation of international law.⁹¹ Accordingly, it implied that the values inscribed in the given legal patchwork of indigenous South African law did not of themselves provide a sustainable collective will, and they needed to be systematically interpreted in light of international human rights law. The Court declared that 'public international law and foreign case law' should be cited as a means fully to articulate a meaningfully national system of legal norms.⁹² The constitutional subject of national democracy, thus, could only be created within the law; in fact, the formation of this subject specifically presupposed its abstraction against the factual subjects in society. It was only on the basis of this will that the death penalty, which probably enjoyed majority support, could be declared illegal.

In post-transitional Kenya, further, the superior courts have promoted the constructive hybridization of national and international legal sources in cases touching upon sensitive questions in society, especially questions

⁸⁸ Ibid para 362.

⁸⁹ Ibid para 304.

⁹⁰ Ibid para 225.

⁹¹ Ibid para 373.

⁹² Ibid.

relating to inter-population conflicts. In this regard, they have attempted to craft norms for all citizens, in all ethnic memberships, overarching the conflictual fissures between different social groups. This is visible, for example, in cases concerning land law and evictions, matters which had historically provoked deep social and constitutional controversy,⁹³ and which had been exacerbated through internal population displacements during the long process of democratic transition, starting in the early 1990s.

In one important High Court case, the Petitioners for the affected parties used the UDHR and the ICCPR to give weight to rights of protection from forcible eviction.⁹⁴ Moreover, the trial judge relied on international and comparative legal sources, especially the UDHR and relevant South African case law, to establish a right to housing.⁹⁵ In so doing, the Court rejected, as not being 'good law', previous rulings that had placed international law below domestic law in court proceedings,⁹⁶ stating that it was 'proper and good practice to seek guidance from international law where our laws are silent or inadequate' on an issue of great societal importance.⁹⁷ In addition, the court referred extensively to rulings of the African Commission to create a legal framework for addressing evictions.⁹⁸ Moreover, standing for the applicants was asserted on the basis of Indian case law, *Shetty v. International Airport Authority*. Through this fusion of legal sources, the court was able, ultimately, to overturn established dualistic principles concerning 'the rule of paramountcy' of the written Constitution in Kenya, and it was able constructively to elaborate new constitutional principles on a transnational basis. As a result, the court was able to establish transnational principles to 'direct the Government towards an appropriate legal framework for eviction based on internationally acceptable guidelines.'⁹⁹ In a later eviction case, the High Court presumed 'relevance and

⁹³ For background see Harbeson (2012); Manji (2014).

⁹⁴ *Satrose Ayuma & 11 others v. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* Petition 65 of 2010, at para 25.

⁹⁵ *Ibid* at para 66.

⁹⁶ *Ibid* para 79.

⁹⁷ *Ibid*.

⁹⁸ See for example relevant judgements in the African Commission in *Free Legal Assistance Group and ors v. Zaire*, Communication 25/89; *Centre for Housing Rights and Evictions (COHRE) v. Sudan*, Communication 296/2005; *Centre for Minority Rights and Minority Rights Group International on Behalf of Endorois Welfare Council v. Kenya*, Communication 276/2003.

⁹⁹ *Satrose Ayuma & 11 others v. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* at para 109.

applicability of the general rules of international law and treaties or conventions ratified by Kenya.¹⁰⁰ Additionally, the court placed restrictions on government evictions by quoting the *UN Basic Principles and Guidelines on Development-based Evictions and Displacement* (2007) and other international guidelines,¹⁰¹ thus establishing international soft law norms as applicable principles in domestic law. In one case in the High Court, the court, basing its authority on UN Guidelines on evictions,¹⁰² instructed the government to assist victims by introducing legislation to give effect to social and economic rights, and it demanded more robust protection for such rights than for formal property.¹⁰³

In Kenyan law, therefore, judicial hybridization of legal sources has developed into a process of deep constitutional construction, contestation, and effective political will formation. Indeed, some of the most intensely unsettling historical disputes in Kenyan society, especially those concerning land, have been translated into interactions between different legal domains and legal institutions. Notably, such hybridization is not uncontroversial. One leading ruling of the High Court was ultimately overturned by the Court of Appeal, where it was argued that the courts were not entitled to re-engineer property relations, or to usurp functions of the political branch.¹⁰⁴ However, the contested nature of such open jurisprudence indicates that it acts as a conflictual site for the construction of citizenship.

A similar, yet more enduring process of primary norm production through open constitutional jurisprudence is visible in some societies in Latin America, most especially Colombia, where open jurisprudence has clearly been used to define the basic subject of national democracy. From the early 1990s onwards, the Colombian Constitutional Court committed itself to a strong doctrine of open jurisprudence, with far-reaching implications for the basic structure of the state. First, the Court declared that it had authority to create constitutional law by integrating international norms into domestic constitutional law: as mentioned, it assumed the power to construct a *block of constitutionality*, adding supplementary

¹⁰⁰ *Kepha Omondi Onjuro & others v. Attorney General & 5 others* [2015] eKLR at para 67.

¹⁰¹ *Ibid* para 144.

¹⁰² *Mitu-Bell Welfare Society v. Attorney General & 2 others* [2013] eKLR at para 63.

¹⁰³ Unfortunately the verdict was undermined by legal flaws, notably that the Court devolved authority to non-judicial bodies to supervise adequacy of implementation. *Mitu-Bell Welfare Society v. Attorney General & 2 others* [2013] eKLR at para 79.

¹⁰⁴ *Kenya Airports Authority v. Mitu-Bell Welfare Society & 2 others* [2016] eKLR at para 112.

norms and rights to the existing system of public law. In this respect, the Court ruled that international treaties with *jus cogens* standing had to be directly incorporated in domestic law. Second, the Court argued that the state had an obligation 'to adapt norms with inferior standing in the domestic legal order to the content of international humanitarian law',¹⁰⁵ so that high-ranking international norms were to be used as leading values in constitutional interpretation. This approach was underpinned by the axiom that an international norm should become part of domestic law if it offered greater protection for human rights than any conflicting domestic norm.¹⁰⁶ Eventually, the Court extended such approaches to establish a series of rights not immediately guaranteed by the constitution, including rights to education,¹⁰⁷ and rights of cultural integrity and ethnic diversity.¹⁰⁸ The Court even declared that the block of constitutionality is itself *open*, and that the higher-order norms of national society can be revised retroactively by judicial institutions, if relevant international law changes.¹⁰⁹ Notable in this respect is the fact that the Court has declared itself responsible for defining the persons to whom international *jus cogens* is applicable; it insisted, in particular, that all persons in society, occupying different positions in the ongoing regional civil war, are subject directly to international norms with *jus cogens* rank.¹¹⁰ Further, the Court decided that international soft-law norms regarding treatment of forcibly displaced persons should be domestically integrated as *jus cogens*.¹¹¹ It also stated that international norms were to be used to determine rights to truth, justice and reparation; it thus constructed a doctrine of international *jus cogens* to regulate transitional justice provisions resulting from the civil war.¹¹² On this basis, the Court effectively produced its own definition of *jus cogens*, and it even incorporated principles into the normative ambit of the national constitution whose authority in the hierarchy of international law was unclear.

In these respects, the Colombian Constitutional Court dictated the underlying normative grammar for Colombian society, and it promoted a creative model of open jurisprudence to assume primary

¹⁰⁵ C-225/95.

¹⁰⁶ T-1319/01.

¹⁰⁷ T-306/11.

¹⁰⁸ T-907/11.

¹⁰⁹ C-500/14.

¹¹⁰ C-225/95.

¹¹¹ C-753/13.

¹¹² C-250/12.

constitution-making functions for society, in a context of deep societal division and intense conflict. In Colombia, in fact, such inner-legal supplanting of primary political functions has assumed quite extreme dimensions. In the above examples, the Constitutional Court devised a method of higher norm formation in which it, of itself, acquired clear sovereign responsibility, freely deciding the content of constitutionally binding norms for all society, and freely configuring the sovereign political form of the people. In fact, the Court openly asserted that it possessed greater higher-order norm-setting authority than the government. It decided that the essential sovereignty of the state had to be adapted to the reality of a global constitution, articulated through higher-ranking international norms, and that old-fashioned static ideas of national sovereignty had become unsustainable.¹¹³ Later, the Court claimed that the sovereign power of government was restricted both externally by international norms and internally by 'the rights of persons'. This conception of sovereignty, it argued, was perfectly consonant with the idea of sovereignty expressed by the national constitution, promoting respect for popular self-determination and inalienable rights.¹¹⁴ The assimilation of international law played a central role in this process of political construction. In consequence, open jurisprudence quite literally *stood in for* sovereign political authority.

3.2.7 *Legal Exports and Symbolic Legitimacy*

In some settings, patterns of open jurisprudence have obtained particular legal authority because certain courts have acquired symbolic regional pre-eminence, and their jurisprudence confers high prestige on processes of norm formation when utilized in other courts. Indeed, in some global regions, certain courts enjoy much higher regard than courts in neighbouring or regionally connected countries. As a result, their rulings are widely borrowed by other national courts to give strength to their decisions, especially in questions surrounded by great constitutional controversy. This gives rise to a very distinctively transnational system of norm production or jurisprudential transplantation, in which courts are able to secure constitutional, or at least high-ranking, authority for their judgments by basing them in the jurisprudence of other courts endowed with transnational influence. In such cases, the borrowing of norms replaces

¹¹³ C-574/92.

¹¹⁴ C-225/95.

national or regional political authorization as a foundation for legal formation, and inter-judicial exchanges acquire powerful constituent force.

This pattern of constitutional transplantation can occur for many reasons.

Of course, such transplantation sometimes simply occurs for linguistic reasons, because rulings are published and made available in languages that can be accessed in courts developing new lines of reasoning. For example, the doctrine of the block of constitutionality, which has proved so influential in Latin America, was initially borrowed from rulings of the Constitutional Court in Madrid.¹¹⁵ At a more structural level, however, such transplantation typically occurs when, for embedded societal reasons, there are deep overlaps between different national legal systems. Historically, such transplantation was common in the relation between colonial states and former colonial powers. Obviously, in many former colonial states, the law of former colonial rulers initially possessed high status, and it still retains influence. Increasingly, however, this post-colonial relationship can have a converse effect, and many post-colonial states now widely borrow normative principles from other, non-metropolitan legal systems in order to build up a store of jurisprudence that is severed from the case law of the original metropolitan legal order.¹¹⁶ More commonly, legal transplantation across jurisdictions occurs when one legal system is partly designed on the template of the other. For this reason, German case law is widely used in Eastern Europe, Russia and Central Asia.¹¹⁷ Indeed, recent legal and procedural reforms in Russia are widely based on the

¹¹⁵ See early use of this term in the Spanish Constitutional Court (10/1982, 23 March 1982).

¹¹⁶ Use of Indian law in Anglophone Africa is striking in this regard. Noteworthy is reliance on Indian law in the Kenyan High Court to enhance social rights guarantees and to impose human-rights duties on non-public bodies. See *Satrose Ayuma & 11 others v. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others*. In this case, South African jurisprudence was also used to construct human dignity as a principle that informs adjudication. Through these links, we can see the emergence of an informal *jus commune* in formerly common-law states. See the excellent discussion of this phenomenon in O'Loughlin (2018).

¹¹⁷ The practice of the German Constitutional Court was referred to in one of the landmark RCC rulings, the Ruling on Merits No. 21-P of 14 July 2015 on the supremacy of the Russian Constitution over conflicting judgements of international tribunals. Also, RCC Justices Gadjiyev, Yaroslavtsev, and Bondar often refer to German legislation and case law in their dissenting opinions. For example, see the RCC Ruling on Merit No. 11-P of 14 May 2012 on seizure of a debtor's housing; RCC Ruling on Merits No. 26-P of 2 December 2013 on fair taxation of private vehicles; RCC Ruling on Merits No. 10-P of 28 March 2017 on adequate justification of draft legislation by its initiator; RCC Ruling on Merits No. 12-P of 19 April 2016 on prisoners' voting.

appropriation of norms from German public law.¹¹⁸ Analogously, rulings of Indian and South African courts are widely internalized by courts in states with constitutions that are declaredly programmatic in their enforcement of social rights.¹¹⁹ In such cases, family resemblance between legal systems, based on similar constitutional objectives, underpins the transplanting of authoritative rulings.

In addition, such constitutional transplantation occurs because some courts have already extensively addressed sensitive problems with which other states in the same region are confronted. In such examples, courts export and borrow jurisprudential norms that are applied to specific questions, when one court has developed an important body of case law in questions of rising general significance. One obvious example of this is the position of the Colombian Constitutional Court in Latin America. Notably, rulings of this court form influential authorities in states whose judiciaries engage with legal questions pertaining to indigenous communities and their rights of access to resources.¹²⁰ For similar reasons, South African rulings on rights to medicine and housing also permeate other jurisdictions in Africa, which are required to examine cases on similar questions, and authoritative decisions in South Africa are replicated in other courts.¹²¹ Notably, German rulings on rights of personality, extended to incorporate rights to protection of, and access to, personal information and genetic data, have been transplanted widely from one legal system to another.¹²² In some such acts of borrowing, original German rulings have not even been cited, but lines of reasoning first developed in Germany provide an implied basis for the solidification of rights in other states.¹²³

¹¹⁸ The German Administrative Procedural Code and other relevant laws were translated into Russian. They were used by the drafters of the Russian Administrative Litigation Code adopted by the Duma on 8 March 2015. On the recent use of German law in Russia see Starilov (2005: 36); Lapa (2010).

¹¹⁹ See p. 241 above.

¹²⁰ See use of Colombian case law in the leading ruling of the Bolivian Constitutional Court on indigenous rights, 300/2012.

¹²¹ See use of South African case law on the right to shelter in the Kenyan High Court, *Kepha Omondi Onjuro & others v. Attorney General & 5 others* [2015] eKLR.

¹²² For example, German rulings regarding the right of information regarding family background have been extended in the Chilean Constitutional Court, creating a right to identity, so adding a new right to the Chilean Constitution. See Rol N° 834-2007-INA (13 May 2008).

¹²³ See the case concerning protection of genetic resources of indigenous peoples in Brazil: TRF-1. AC 4037 RO 2002.41.00.004037-0. Desembargadora Federal Selene Maria de Almeida. Julgamento 17/10/2007. QUINTA TURMA. Publicação: 09/11/2007 DJ p. 137.

This constitutional transplantation also occurs, importantly, because some courts are situated in states whose compliance with international law is high, or which have constructively grafted international norms onto domestic case law, and whose jurisprudence acquires prestige on that basis. This can be seen in Indian rulings on social and economic rights, which are often constructed through use of international law, and which have high impact in other countries, especially in Africa.¹²⁴ At a general level, this is again exemplified by the Colombian Constitutional Court whose wide influence in Latin America is partly attributable to its effective internalization of international law. In recent years, notably, the Chilean Constitutional Court has cited from the Colombian Constitutional Court to construe protective rights for children.¹²⁵ It has also used Colombian rulings, in decisive fashion, to establish rights to personal identity.¹²⁶ Most importantly, the doctrine of the unconstitutional state of affairs, which has been used by the Colombian Constitutional Court to implement legislative remedies for displaced persons, has migrated into Peruvian and Brazilian constitutional jurisprudence. In Brazil, albeit as yet only injunctively, this concept has been employed to claim remedies for deep-lying structural problems in Brazilian society, notably relating to prison conditions and human rights violations amongst prison populations.¹²⁷ In each regard, rulings of the Colombian Court have obtained an authority close to that assumed by higher-ranking international law, and they are accorded persuasive force in other courts. Tellingly, the doctrine that supports the authority of international law in Colombia, the block of constitutionality, has been incorporated by other courts in Latin America, where the Colombian formulation of this doctrine has often acquired a status close to that of precedent.¹²⁸

Owing to these processes of transplantation, it is not only international law that assumes primary norm-setting functions across national boundaries. In some respects, quite distinctive transnational legal communities are being formed, connecting different national states, without any immediate foundation in international law. In such instances, some national courts act as authoritative norm providers, which are able to construct firm precedents or even to generate new rights within other national

¹²⁴ See note 117 above.

¹²⁵ Rol N° 1683-10 de, 4 January 2011.

¹²⁶ See discussion in Nogueira Alcalá (2013).

¹²⁷ Brazilian Supreme Court, *Arguição de Descumprimento de Preceito Fundamental* (ADPF) 347. At the time of writing, this case has not yet been judged.

¹²⁸ See use of his doctrine in the Bolivian Constitutional Court in 0110/2010-R.

judicial systems. To some degree, therefore, the law of some national courts is in the process of evolving as a *de facto* system of international law, and it assumes a degree of transnational, semi-precedential authority otherwise enjoyed only by international law. This process is usually driven by the fact that the courts with such influence have established high or distinctive protection for human rights in their legal systems, which facilitates and promotes the borrowing of their rulings across societal divisions. In each respect, the law itself obtains powerful, quasi-sovereign functions, and law-giving processes occur without any authorization by external political acts.

3.2.8 *Living Constitutionalism/ Transformative Constitutionalism*

The emergence of relatively autonomous patterns of legal norm construction is also visible in the proliferation of the doctrine of *living constitutionalism*. This doctrine implies that judges have a distinct responsibility for expanding the text of national constitutions, and they do this by concretely identifying and articulating the will of the people, at a given historical moment. This doctrine further enhances the powers of judicial bodies in creating new laws and in establishing the form of national democracy, often in conjunction with an increase in the force of international law.

The theory of living constitutionalism has acquired distinctive prominence, on one hand, in controversies about constitutional interpretation in the USA. In this context, this doctrine is related to the rivalry between judges and legal theorists adopting an originalist theory of the constitution and judges and legal theorists claiming that the letter of the constitution needs to be adapted to prevalent social conditions. In the USA, originalism has recently emerged as an influential doctrine.¹²⁹ More traditionally, leading judges strongly endorsed the principle that living judicial interpretation and reconstruction of the constitution is a core aspect of democracy,

¹²⁹ It is persuasively argued that originalism is an ideologically generated doctrine, caused by a backlash against the realist impulse of the Supreme Court in the 1950s and 1960s (J. O'Neill 2005: 30).

and that the Constitution must be adapted to changing conditions.¹³⁰ Over a long period, in fact, judicial constructions of the law in the USA have produced a number of new rights, which have been effectively added to the constitution. Since 1945, these rights have included both negative or protective rights against segregation and discrimination, widened rights of human dignity, rights to privacy, and more positive rights regarding reproductive decisions and equality rights for women (Strauss 2010: 12–13). In addition, the doctrine of living constitutionalism has a long history in Canadian constitutional law, in which judges originally used constructive constitutional interpretation to define a distinctive body of Canadian public law, separate from English law.¹³¹ In this context, judges have systematically pursued enhancement of human rights law as a means to consolidate the democratic structure of the constitution.

Variants on the doctrine of living constitutionalism have been promoted in many societies in recent years. This doctrine became very influential in the FRG in the 1950s, where constitutive interpretation of the *Grundgesetz* was promoted to reinforce a democratic political system that originally had limited societal support.¹³² First, the catalogue of basic rights in the

¹³⁰ See the most famous formulation of this idea, by Wendell Holmes:

[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago

Missouri v. Holland, 252 U.S. 416 (1920). An expanded variation on this doctrine is at the core of what is probably the most famous recent articulation of American constitutional philosophy: Ackerman (1991). In some respects the doctrine of the living constitution was already anticipated by John Marshall who argued that a ‘provision is made in a Constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs’: *McCulloch v. Maryland*, 17 U.S. 316 (1819).

¹³¹ See the classic account of this doctrine in *Henrietta Muir Edwards and others (Appeal No. 121 of 1928) v. The Attorney General of Canada (Canada)* [1929] UKPC 86 (18 October 1929). Note the observation that a constitution is ‘drafted with an eye to the future’ and must be ‘capable of growth’ in *Hunter v. Southam Inc* [1984] 2 S.C.R. 145. Likewise, note the view that ‘[n]arrow and technical interpretation’ can ‘stunt the growth of the law and hence the community it serves’ in *Law Society of Upper Canada v. Skapinker* [1984] 1 S.C.R. 357. For comment see Waluchow (2001).

¹³² See below p. 317.

Grundgesetz was especially conceived as a set of directives for the broad elaboration and expansion of constitutional values. During the drafting of the *Grundgesetz*, Carlo Schmid declared in the Parliamentary Council that basic rights should be interpreted not as a supplement to the constitution, but as its leading and most fundamental principles (see Jestaedt 1999: 8). After the enforcement of the *Grundgesetz*, then, the Constitutional Court promoted a construction of basic rights that insisted that constitutional norms should permeate through all society, allowing the content of basic rights to radiate into all areas of law.¹³³ This expansive construction of constitutional rights, of course, was reflected in very different lines of interpretation, and the widening of rights was expressed in very different doctrinal outlooks. One of the most significant interpreters of the basic rights provisions in the *Grundgesetz* argued that basic rights should be seen as objective institutions, creating an injunction for both judicial figures and legislators continuously to bring them to realization (Häberle 1972: 165). In this argument, the society of the FRG in its entirety was observed as a community of constitutional interpreters (Häberle 1975). An alternative influential account of basic rights argued that the enforcement of basic rights actually freed different societal domains from the immediate control of the state, enabling parts of society covered by basic rights to develop a relatively separate, autonomous constitutional order, especially a *communication constitution*, a *labour constitution* and an *economic constitution* (Scholz 1971: 294, 1978: 219). Yet, across such interpretive variations, the early basic rights jurisprudence of the Constitutional Court clearly impacted transformatively on the constitution, allowing it to assume meanings and to concretize rights not fully envisaged in the text of the Constitution itself.

Significant examples of the doctrine of living constitutionalism can be found in India, where Article 32 and Article 226 of the Constitution authorize the judiciary to issue special directives to protect the rights contained in the constitution. The Supreme Court has interpreted Article 32 to augment its own authority, and it has assumed direct responsibility for the interpretive expansion of constitutional law (see Ray 2003: 147).¹³⁴ This began in the 1960s and 1970s with the elaboration of the concept of the *basic structure* by the courts, which authorized the judiciary to insist

¹³³ This technique, tellingly, has been seen as 'constitutional expansion' (Aulehner 2011: 48).

¹³⁴ One description of this explains that the authors of the 1950 Constitution in India did not anticipate that the judiciary would be frequently concerned with cases 'between citizens and government' and they foresaw an independent but limited role for the courts (Dhavan 1994: 313).

on the inviolability of a hard core of constitutional rights against parliamentary encroachment.¹³⁵ Later, the Supreme Court opted for a more programmatic commitment to living constitutionalism, assuming power to widen rights enunciated in the Constitution. In particular, the Court stated that it was under obligation ‘to expand the reach and ambit’ of any fundamental rights under scrutiny, and to avoid approaches that might attenuate the ‘meaning and content’ of fundamental rights. Accordingly the Court declared that it was required to ensure that constitutional provisions are interpreted and enacted, ‘not in a narrow and constricted sense, but in a wide and liberal manner ... so that the constitutional provision does not get atrophied or fossilized but remains flexible enough to meet the newly emerging problems and challenges’.¹³⁶

The Indian Supreme Court used this approach to flesh out a new range of substantive rights, such as, for example, the right to education,¹³⁷ and protective rights against discrimination.¹³⁸ In some public interest cases, in fact, Indian courts have put in place supervisory arrangements to ensure implementation of their rulings, to intensify judicial presence in policy-making, and even to ensure the impact of judicial interventions in legislation. In such cases, notably, the Supreme Court has broadened the classical reach of mandamus to establish control over some discretionary powers of the government.¹³⁹ For example, the Supreme Court has issued mandamus in cases where hospitals have failed to provide emergency medical care,¹⁴⁰ and in response to petitions for the education of the children of prostitutes.¹⁴¹ The practice of living constitutionalism, thus, substantially extended the reach of bodies situated in the legal system, and, in some respects, it became a material part of the policy-making process.¹⁴² In one notable public interest case, the Supreme Court even outlined draft judicial

¹³⁵ See the famous articulation of the basic structure doctrine in *His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr.* ((1973) 4 SCC 225).

¹³⁶ *Francis Coralie Mullin v. Administrator Union Territory of Delhi and others*, (1981) 1 SCC 608.

¹³⁷ *Mohini Jain v. State of Karnataka* (1992 AIR 1858).

¹³⁸ *Madhu Kishwar and others v. The State of Bihar and others* (AIR 1996 5 SCC 125).

¹³⁹ See *Vineet Narain v. Union of India*, AIR 1996 SC 3386 and *Bandhua Mukti Morcha v. Union of India & ors.* (1997) 10 scc 549.

¹⁴⁰ *Paschim Banga Khet Mazdoor Samity & Ors v State of West Bengal & Anor.* [1996 4 SCC 37].

¹⁴¹ *Gaurav Jain v. Union of India & Ors.* (1997) (8) SCC 114. For this and the above information I am indebted to Sathe (2001: 80).

¹⁴² For example, the Court has acquired legislative functions regarding environmental policy and food provision. See *T.N. Godavarman Thirumulkpad v. Union of India & Ors.* [(1997) 2 SCC 267]; *PUCL v. Union of India and Ors.* 2007 (12) SCC 135.

legislation, based on unincorporated international treaties, in order to remedy lack of effective legal provisions concerning sexual harassment.¹⁴³

In some African countries, especially South Africa, judges have devised a yet more radically purposive approach to constitutional interpretation. As mentioned, in *S v. Makwanyane and Another* (1995), judges in the South African Constitutional Court argued that they have a duty to give effect to certain transnational values in their constitutional jurisprudence, and they applied such jurisprudence as a transformative ethic through society. In other cases, the Constitutional Court interpreted the Constitution, jointly with international law, to create distinctive sets of rights, including rights to housing, rights of access to medicine, and rights of privileged access to land.¹⁴⁴ Moreover, as in India, judges in South Africa have made wide use of supervisory orders, to ensure that judicial provisions are implemented.¹⁴⁵ Indian and South African contributions to the model of living constitutionalism have been widely appropriated in other parts of Southern Africa, where a purposive approach to constitutional law has acquired central importance in processes of constitutional consolidation. In Botswana, for example, the principle has been proposed that 'the primary duty of the judges is to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever developing society which is part of the wider and larger human society governed by some acceptable concepts of human dignity'.¹⁴⁶

In these examples from India and Africa, the basic idea of the living constitution, constructed through judicial interpretation, has been expanded to form a doctrine not only of living, but in fact of *transformative* constitutionalism. Indeed, in some societies, the primary tenets of living constitutionalism have established a quite distinct constitutional model, in which judges assume extensive powers of societal transformation. In this model, judges extract from basic norms set out in the constitution the authority to read new meanings into the constitution and to expand the societal obligations generated by the constitution, using a broad construction of constitutional law to shape social relations. In this, strong impetus is provided

¹⁴³ *Vishaka and others v. State of Rajasthan and others* (1997) 6 SCC 241.

¹⁴⁴ *Alexkor Ltd and another v. Richtersveld Community and Others* (CCT 19/03) [2003] ZACC 18.

¹⁴⁵ *Sibiya and Others v. Director of Public Prosecutions: Johannesburg High Court and Others* (CCT 45/04) [2005] ZACC 16.

¹⁴⁶ *Sesana and Others v. Attorney-General* (2006) AHRLR 183 (BwHC 2006).

by international law. In fact, it is now possible to identify a distinct family of transformative constitutions, in which judges have arrogated interventionist powers to control the political branches, to oversee acts of government, and to instil jurisprudentially configured human rights norms into the structure of society. Notably, transformative constitutions are usually reflected as highly political constitutional systems, designed to provide not only a normative order, but a solid organizing form for popular democracy.¹⁴⁷ Yet, in most such constitutions, the responsibility for implementing democracy is ultimately attributed to the judicial branch, and high-ranking judges promote constructive jurisprudence as a primary force in the realization of transformative democratic values.

In Kenya, which clearly belongs to this constitutional family, the promotion of transformative jurisprudence by the superior courts has assumed unusual dimensions. During the process of constitutional transition, first, the Kenyan courts adopted a living tree approach to constitutional interpretation.¹⁴⁸ Later, however, this approach was expanded to generate a constructive reading of the social rights contained in the 2010 Constitution. In particular, judges in the Kenyan Supreme Court have commonly argued that they are entitled to reach rulings by taking non-legal facts and non-legal phenomena into consideration, and by showing regard for the sociological context of cases brought to court.¹⁴⁹ As a result, judges have looked beyond settled positivist constructions of the law, and they have decided cases for reasons intended to promote the programmatic transformation of society as a whole. This transformational approach of the courts is partly based on the Constitution itself, notably in Art 20(2) and 20(3)(a) and (b), which implicitly authorize judges to expand existing human rights provisions. However, this approach is more firmly grounded in Section 3 of the Supreme Court Act (2011). This Section states that it is the responsibility of the court to ‘develop rich jurisprudence that respects Kenya’s history and traditions and facilitates its social, economic and political growth’.

This provision has provided the cornerstone for the development of transformative jurisprudence. Notably, in an important ruling, the former Chief Justice, Willy Mutunga, declared that ‘this provision grants the Supreme Court a near-limitless, and substantially elastic interpretive

¹⁴⁷ See discussion below at p. 357.

¹⁴⁸ *In Re Estate of Lerionka Ole Ntutu (Deceased)* [2008] eKLR.

¹⁴⁹ *Communications Commission of Kenya & 5 others v. Royal Media Services Limited & 5 others* [2014] eKLR at para 357.

power', and it creates an 'interpretive space' in which the Court can shape the normative form of society.¹⁵⁰ In the same ruling, Mutunga also stated:

Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretive guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents'. As a result 'constitution making does not end with its *promulgation*; it continues with its *interpretation*.¹⁵¹

In a different Kenyan case, the strategy of transformative constitutionalism was fleshed out further, and the Supreme Court posited an integral relation between the founding will of the constitution and the interpretive will of the judiciary, stating that: 'Transformative constitutions are new social contracts that are committed to fundamental transformations in societies ... The Judiciary becomes pivotal in midwifing transformative constitutionalism and the new rule of law'.¹⁵² In this setting, overall, Kenyan judges have increasingly renounced classical political-question doctrines concerning the judicial branch. Instead, they have construed the judiciary as a co-legislator, or even, at times, as a co-constituent force, using interpretive acts to transfuse society with constitutional norms, and to shape societal relations on this basis.¹⁵³

In the Kenyan context, it is notable that, at the time of writing, the promotion of transformative jurisprudence by the superior courts remains contested. In fact, political parties and governmental leaders have demonstrated only a qualified interest in implementing the democratic constitution. As a result, the judiciary has been placed in an at times isolated normative position, and judges have been obliged to exercise discretion in their consumption of public and governmental confidence. In fact, senior judicial appointments remain susceptible to political pressures, such that the recent body of progressive case law is susceptible to being overturned.¹⁵⁴ This problem is intensified by ethnic biases within leading political parties, which mean that political influence on judicial appointments often reflects a privileging of one ethnic group. In Mutunga's judicial work, however, the

¹⁵⁰ *Senate & another v. Attorney-General & 4 others* [2013] eKLR at para 157.

¹⁵¹ *Ibid* at para 156.

¹⁵² *Communications Commission of Kenya & 5 others v. Royal Media Services Limited & 5 others* [2014] eKLR at para 377.

¹⁵³ Notably, these policies have been accompanied by more day-to-day policies, intended to improve access to justice, to raise the quality of judicial services, and, above all, to reduce judicial corruption. This was initiated through the Judiciary Transformation Framework, led by Joel Ngugi.

¹⁵⁴ As an indication that this might be happening, see *Kenya Airports Authority v. Mitu-Bell Welfare Society & 2 others* [2016] eKLR.

strategy of transformative constitutional analysis was designed to establish the Supreme Court as an elevated bearer of the national will, able to detach the basic structure of national democracy from the factual, parcelled interests of society, and to galvanize it, in manifest form, for all citizens.¹⁵⁵ Underlying this approach was an endeavour to consolidate a fully national jurisprudence, in which Kenyan citizens, historically divided into ethnic sub-communities, could interpret their interests and direction in generalized form. This in turn underpinned a conception of the state as a discursively created organic national community, in which interpretation and enactment of the founding substance of the constitution, centred around judicial actions, binds together the people as a national whole.¹⁵⁶

Importantly, Mutunga's nationalizing construction of the judicial role was underpinned by extensive use of international law, and in fact by the insistence that, under Art 2(5,6), Kenyan constitutional law had to be interpreted in monist fashion (Mutunga 2015a). In other words, the construction of a distinctively *national* jurisprudence, separated from private or ethnic interests, was seen to presuppose *international* law as its foundation. The essence of the national citizen, distinct from the particular interests of sub-national populations, was projected through inner-judicial acts, partly involving an internalization of international law.

The most extensive willingness of judges to engage in transformative application of the constitution is evident in some Latin American states. Most notably, some Supreme Courts and Constitutional Courts in Latin America have decided that they are authorized to implant new norms in domestic constitutional law, often giving heightened protection to principles declared in international human rights conventions. In some cases, this occurs in relatively predictable fashion, as courts simply place international treaties and conventions within the hierarchy of domestic norms, following clear constitutional directives. As mentioned, some Latin American courts, led by Colombia, have assumed responsibility for developing a doctrine of the block of constitutionality, in which they decided that some international treaties should be viewed as parts of the domestic constitution.¹⁵⁷ In Colombia, this doctrine is loosely authorized by Art 93

¹⁵⁵ In the Matter of the National Land Commission [2015] eKLR.

¹⁵⁶ In Re the Matter of the Interim Independent Electoral Commission [2011] eKLR at para 86.

¹⁵⁷ The theory underlying this concept states that the constitution is a block of higher-ranking norms that is subject, where appropriate, to expansion by the courts. It can include 'norms and principles which, without appearing formally in the articulated sense of the constitutional text, are utilized as parameters for the constitutional review of laws' (C225/95).

of the Constitution, which provides for the direct effect of international law. In parallel, however, the Colombian Constitutional Court has developed this doctrine in a direction not foreseen in the Constitution itself, and it has applied it as part of a broader strategy of transformative constitutional concretization, designed to craft solutions for the most pressing problems of domestic society by reinterpreting basic constitutional provisions.

Central to this transformative approach to the Constitution in Colombia is the principle, established by the Constitutional Court, that the list of rights formally set out in the 1991 Constitution is not exhaustive,¹⁵⁸ and that these rights can be purposively adapted to the changing demands of society. As a result, when faced with cases with human rights implications, Colombian judges are able to widen the substance of existing rights, and even to establish new rights, with constitutional authority. A live constituent power thus remains vested in the Constitutional Court. This process is guided by the fact that judges take the commitment to protecting the dignity of the human person as the defining, overriding value expressed by the Constitution, and they apply this as an interpretive norm that authorizes them to adapt existing rights to changing conditions or exigencies or to crystallize new rights (López Cadena 2015: 67, 81). Judges are thus required to pursue 'systematic' and 'axiological' interpretation of individual cases, to determine whether they potentially give rise to new rights.¹⁵⁹ In one key early case, notably, the Constitutional Court stated that the Constitution had initiated a 'new strategy for realizing the effectiveness of fundamental rights': this depended on the assumption that judges, not the public administration or the legislator, had primary responsibility for giving effect to them.¹⁶⁰ On this basis, the Court decided that judges were authorized to identify and establish new rights, as long as such rights could be viewed as 'inherent to humanity', and as necessarily connected with the basic values elaborated in the constitution.¹⁶¹ This meant, in particular, that judges were able to interpret commitments to social and economic rights proclaimed in the constitution as key determinants in the concretization of rights. In fact, judges claimed that they were placed under a particular injunction to translate social rights into reality, and even to treat them as a precondition for the effectiveness of primary civil and political

¹⁵⁸ For background see López Medina (2004: 443).

¹⁵⁹ T-002/92.

¹⁶⁰ T-406/92.

¹⁶¹ *Ibid.*

rights.¹⁶² As discussed below, further, the Colombian Constitutional Court has developed an extensive monitoring system in cases addressing large-scale human rights abuses, and it has assumed material responsibility for the implementation of new constitutional rights. In each respect, the Colombian Constitutional Court has defined itself as a constituent organ of societal transformation, which welds together a robust body of human rights law to recast the basic normative structure of society. In each respect, the Court defines the essential form of the national citizen, and it constructs the rights to which citizens can lay claim, in conformity with which it then develops its jurisprudence.

Overall, the idea that constructive or transformative judicial interpretation can produce the basic legal architecture of democracy has become a dominant idea in many legal/political systems. Widely, in fact, the doctrine of living or – in intensified form – transformative constitutionalism is seen both as a proxy and as a supplement for the exercise of democratic sovereignty by the people.

Three points have particular importance in the growth of the doctrine of living constitutionalism.

First, in its classical form, the doctrine of living constitutionalism is typically associated with the attempt, articulated especially by judges and legal professionals, to make sure that a given national society does not become trapped in the past by its constitution. Accordingly, it is intended to guarantee that the idea of popular sovereignty originally articulated in the constitution can be re-expressed and re-enacted, within the broad constraints of the original constitutional text, in a form adjusted to contemporary societal conditions.¹⁶³ The living constitution is construed as an evolving expression of the primary sovereignty of the people, in which courts and judicial bodies act in conjunction with other political institutions to express moments of deep transformation in the popular will, and in the legal-political form of the citizen (Ackerman 2007: 1758, 1791). At the core of this doctrine is an endeavour to balance objective legal obligations with the changing expectations of the national population, and judges assume a coordinating position in deciding which momentary demands of the people should be allowed to impact on the factual structure of the constitution. In some quite extreme cases, in fact, judges have

¹⁶² Ibid.

¹⁶³ One exponent of living constitutionalism in the USA declares himself 'dedicated to the elaboration of the original understanding of We the People at one of the greatest constitutional moments in American history' (Ackerman 2014: 329).

openly expressed the opinion that they are qualified, or even *obliged*, to read new constitutional norms into a given constitutional text, and spontaneously to align a constitutional order, parts of which they perceive as redundant, to existing societal circumstances.¹⁶⁴

Through this doctrine, the essential constitutional idea of popular sovereignty is transformed into a practice of judicial interpretation. In many cases, the theory of the living constitution rests on the presumption that society as a whole is constantly in the process of expressing a changing constitutional will, which is articulated through everyday political procedures such as elections, legislation and even seismic shifts of opinion. The task of the courts, then, is to adapt the existing text of the constitution to the manifest will of society, and to translate the will of society into constitutional formal provisions. In some cases, in claiming authority to interpret the will of the people, judges clearly assume the entitlement to replace the constituent power as the originating source of legal norms.

Second, in many cases, the theory of the living constitution is closely linked to public interest litigation, or cause lawyering. Indeed, the practice of judicial constitutional transformation is often flanked by a willingness of judges to encourage litigation by groups representing interests to which they impute public significance, but in which their immediate interest is limited. Accordingly, this doctrine often goes hand in hand with a relaxation of laws on standing, through which the range of persons able to initiate litigation is broadened, and groups acquire personality if they can claim to express interests of general constitutional importance.¹⁶⁵ As a result, the doctrine of living constitutionalism reflects the presumption that judges are authorized not only to interpret the will of the people, but to open new channels of articulation between government and society, and even to define the emergent interests in society warranting constitutional recognition. Examples of this can be seen, most famously, in the USA, in which the transformation of constitutional law during the era of the Civil Rights Movement was shaped by the strategies of politicized advocacy groups.¹⁶⁶ In India, the transformative judicial elaboration of the constitution is difficult to separate from the growing liberalization of rules on standing and from the resultant recognition of new subjects in public interest cases. In Latin America, the consolidation of the block of constitutionality has been integrally determined by litigation initiated by strategic

¹⁶⁴ *Ghaidan v. Godin-Mendoza* [2004] UKHL 30 (21 June 2004) 24.

¹⁶⁵ See below at pp. 466–8.

¹⁶⁶ See below at pp. 303, 468–9.

litigators.¹⁶⁷ In each case, courts have claimed an entitlement to designate and integrate new constitutional subjects and new modes of citizenship, presuming to express the will of the nation more clearly than the text of the constitution itself. In so doing, and they have allocated *de facto* constituent power to new holders of constitutional agency, or to persons assuming distinctive citizenship roles.

Third, the growth of purposive reasoning encouraged by the theory of the living constitution is closely linked to the wider rise in the authority of international law. The exercise of purposive constitutional construction by judicial actors typically entails an adjustment of existing constitutional or administrative norms to reflect common standards of international human rights law. This is clearly observable in Canada, the homeland of living-tree constitutionalism, where constructive constitutional interpretation takes place within a normative framework partly determined by international law.¹⁶⁸ This is also visible in African polities, where the alignment of domestic law to international standards forms a powerful impetus for purposive judicial interpretation. In some African courts, purposive readings of the constitution clearly extract supplementary authority from norms declared in the international domain.¹⁶⁹ This is most evident in Latin America, especially Colombia, where, as discussed, the fusion of international law and domestic law is at the centre of transformative constitutionalism.

In each of these respects, courts apply the doctrine of living constitutionalism to claim authority to speak *as the will of the people*, in conditions

¹⁶⁷ See Colombian Constitutional Court T-967/09 (here, the court incorporated new rights in the block of constitutionality relating to displaced persons); C-753/13 (here, the court established certain rights of transitional justice not based on, but loosely extracted from, international treaties).

¹⁶⁸ After the passing of the Canadian Charter of Rights and Freedoms (1982), it was declared in the Supreme Court that the proper approach to the interpretation of the Charter of Rights and Freedoms is a purposive one: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295. To realize this, it was also argued that domestic and international human rights should be interpreted together: that international obligations should be a 'relevant and persuasive factor in Charter interpretation'. Notably, it was also argued that 'the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified'. In other words, domestic human rights protection should be at a higher level than protection granted under international law. See Reference Re Public Service Employee Relations Act (Alta), [1987] 1 S.C.R. 313.

¹⁶⁹ See most famously *Government of the Republic of South Africa and Others v. Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).

where the existing legal order of popular sovereignty is contradictory, inadequate and unable to accommodate, or adapt to, societal pressure. In such cases, the courts construe the living constitution to create a unified popular will, typically underwriting their authority to construct the *national* will by referring to norms inscribed in *international* law. The growth of the doctrine of living or transformative constitutionalism reflects a process, quite emphatically, in which democratic agency is internalized within the legal system, which projects the basic form of the citizen to support legislation. Moreover, it reflects a process in which the law itself generates new laws, even of a founding/constitutional nature, and the interpretive interaction between laws established at different points of the global legal system is able to define society's basic political substance. In these respects again, the underlying form of the citizen is imprinted in national society by the legal system, and the sovereign citizen is constructed by courts on premises at least partly established in international law. In some cases considered here, in fact, the sovereign population only assumed legal form because it was aligned, by acts of constructive jurisprudence, to a global model of the citizen, based on international human rights.

Importantly in this respect, the doctrine of living constitutionalism has also been translated into a doctrine that is applied in international courts. For example, the ECtHR has defined the ECHR as 'a living instrument' which 'must be interpreted in the light of present-day conditions'.¹⁷⁰ Both in advisory Opinions and rulings, judges on the IACtHR have claimed authority to construct the ACHR as part of an 'international human rights corpus juris' or a 'corpus juris of international human rights law', reflecting the fact that the international community has the right to develop new concepts and new norms.¹⁷¹ On this basis, the IACtHR has assumed the power to promote 'an evolutionary interpretation of international rules on the protection of human rights' and to generate expanded rights from already formulated international norms.¹⁷² The Court thus perceives itself not merely as an actor in a regional human rights system, but as a participant in the creation of global human rights law. Moreover, like national courts, judges on the Court have asserted that the Court is authorized to determine which international norms have *jus cogens* rank, and to add

¹⁷⁰ *Tyrer v. The United Kingdom*-5856/2 25 April 1978.

¹⁷¹ IACtHR, *Juridical Condition and Rights of the Undocumented Migrants, Mexico*, Advisory Opinion, Advisory Opinion OC-18/03; IACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*. Judgment of 17 June 2005.

¹⁷² IACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*. Judgment of 17 June 2005.

new norms to the list of those with *jus cogens* force.¹⁷³ Even the international norms from which domestic constitutional jurisprudence extracts political authority are produced through judicial norm construction, as part of the relatively autonomous system of international law.

3.2.9 *The Right to Rights*

This transformation of national democracy and national citizenship is also visible in the fact that the power of courts widely leads to a reinforcement of rights relating expressly to judicial functions. Indeed, courts typically place particular emphasis on the protection of rights of access to courts, and they often define the right to judicial remedy as a right of distinctive importance, or as a parent of other rights. It was lamented by Hannah Arendt in the aftermath of World War II that rights were inalienably attached to national citizenship, and that persons could easily be deprived of the 'right to have rights': this could be effected through displacement, expulsion or other modes of coercive disfranchisement (Arendt 1951: 296). In fact, Arendt placed this observation at the centre of a critique of human rights. In contemporary society, however, the purely nationalized model of citizenship is increasingly eroded or at least supplemented by a more transnational construction of citizenship, which is generated within the law, and which stretches beyond nationally allocated rights. Of course, some persons are selectively excluded from rights holding, and, self-evidently, human rights do not form a universally binding grammar. Clearly, the access to rights is still determined by laws of national citizenship. Communities falling outside territorial limits have weakly protected access to rights, and migrants within national societies have relatively reduced rights. Moreover, in some states, communities of marginalized or displaced persons lack access to rights.¹⁷⁴ In extreme cases, persons are deprived of access to rights by torture or incarceration. Increasingly, however, at different levels of the global legal system the presumption has hardened that there is a relatively robust *right to judicial hearing*, implying that there is no situation, globally, in which people can legitimately be deprived of the right to have rights.

In international human rights instruments and conventions, first, the right of access to justice is subject to intensified legal protection. In international human rights courts, denial of effective access to courts has

¹⁷³ IACtHR, Case of *Yatama v. Nicaragua*. Judgment of 23 June 2005.

¹⁷⁴ See below at pp. 462–3.

frequently been taken as grounds to delegitimize sitting governments. Important examples of this are found in the case law of the IACtHR, where, owing to a long history of political manipulation of the judiciary in Latin America, the Court has strongly censured states restricting access to courts.¹⁷⁵ In one leading case, access to justice was described as 'an imperative of jus cogens'.¹⁷⁶ Important instances of this are also evident in rulings of the ECtHR. For example, many notable cases are found in rulings against Russia. In fact, almost half of all ECtHR cases against Russia are Article 6 cases, regarding violations of the right to a fair trial and access to justice. These include over 750 judgements, including important recent cases concerning access to justice by organizers of gay pride events,¹⁷⁷ arbitrary detention of opposition leaders¹⁷⁸ and inadequate provision of evidence in administrative proceedings against protesters.¹⁷⁹

Partly because of the importance of these rulings in international courts, domestic courts have also constructed a broad body of case law that accentuates the right to judicial remedy as a primary right, often using international law to support this. Rights of access to justice have been hardened across the spectrum of democratic institutionalization. Jurisprudence concerning such rights has acquired greatest importance in relatively recent democracies, or in states with only partial democratic features. In fact, enforcement of access to justice is often pursued in such contexts as a strategy of democracy reinforcement, and increased popular use of law is seen as a means for heightening the effective accountability of governing bodies. This is exemplified in court rulings during processes of democratic stabilization in Latin America, Africa and Eastern Europe.¹⁸⁰

¹⁷⁵ As basis see IACtHR, Juridical Condition and Rights of the Undocumented Migrants, Mexico, Advisory Opinion, Advisory Opinion OC-18/03; Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87, 6 October 1987.

¹⁷⁶ IACtHR, Case of the *Pueblo Bello Massacre v. Colombia*. Judgment of 31 January 2006.

¹⁷⁷ *Lashmankin and Others v. Russia* (Applications nos. 57818/09 and 14 others. Judgment of 17 February 2017).

¹⁷⁸ *Navalnyy v. Russia* (Applications nos. 29580/12 and 4 others, Judgment of 2 February 2017); *Nemtsov v. Russia* (Application no. 1774/11, Judgment of 31 July 2014).

¹⁷⁹ See, for example, *Kasparov and Others v. Russia* (No. 2) (Application no. 51988/07, Judgment of 13 December 2016).

¹⁸⁰ In Ghana for example, Art 2(1) of the 1992 Constitution any person may initiate litigation to defend the constitution. For an important ruling on access to courts in Ghana see *Sam v. Attorney-General No 2* [1999–2000] 2 GLR 336. See the later statement of Chief Justice Date-Bah, in *Adofo v. Attorney-General* [2003–5] 1 GLR 239:

The unimpeded access of individuals to the courts is a fundamental prerequisite to the full enjoyment of fundamental human rights. This court has a responsibility to preserve this access in the interest of good governance and

In some such instances, domestic courts have taken international provisions concerning access to justice to initiate legislation in the domestic arena, and to facilitate judicial redress for prospective litigants. In Russia, for example, which was traditionally marked by low confidence in the formal legal order, the Supreme Court has used the ECHR as a basis for introducing measures to heighten judicial transparency, and generally to expand the openness of the judicial system to society.¹⁸¹ Moreover, the Supreme Court has tied such policies to specific rulings of the ECtHR against Russia. However, this elevation of rights concerning access to justice is also a feature of more established democracies, for example the UK, where in recent years judges have clearly taken pains to reinforce rights of adequate access to courts.¹⁸²

In addition, the right of access to courts has expanded beyond the context of more classical international and national judicial systems, and it is now widely emphasized in international organizations. Increasingly, for example, international organizations are subject to customary norms in this regard, and they are expected to provide access to justice for their employees and for persons affected by their actions. This development in fact began in the 1950s, in the ILO.¹⁸³ More recently, employees of

constitutionalism. Unhampered access to the courts is an important element of the rule of law to which the Constitution, 1992 is clearly committed. Protection of the rule of law is an important obligation of this court. Accordingly, we are willing to hold that, quite apart from the legal reasoning based on article 140(1) of the Constitution, 1992 which is outlined later in this judgment, it is incompatible with the necessary intentment of chapter 5 of the Constitution, 1992 for a statute to provide for a total ouster of the jurisdiction of the courts in relation to rights which would otherwise be justiciable.

See also the case in Chilean Constitutional Court, Rol 205/1995. The Russian courts have made many rulings on this question, often using Art 6 ECHR. Art 46 of the Russian Constitution protects access to courts, including anti-government litigation and international protection of human rights. Art 46 is cited in well over 26,000 cases of Russian courts. There are almost 16,000 cases in all Russian courts (1998–2016) that refer to Article 6. One of the most important RCC Rulings on merits in which Art 6 ECHR was used is RCC Rulings on merits No. 13-P of 30 July 2001 [Izykskiy mine].

¹⁸¹ Supreme Court of the Russian Federation (2012), Plenum Ruling No. 35 of 13 December 2012 'On the Openness and Transparency of Judicial Proceedings and Access to Information on the Activities of Courts'.

¹⁸² See for example *Leech v. Governor of Parkhurst Prison HL* ([1988] AC 533; *FP (Iran) v. Secretary of State for the Home Department* [2007] EWCA Civ 13; *R v. Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531; *R (Osborn) v. Parole Board* [2013] UKSC 61.

¹⁸³ See Administrative Tribunal of the International Labour Organization, *Waghorn v. ILO* (1957), Judgment No. 28.

other international organizations have been able to seek judicial redress against these organizations.¹⁸⁴ Of course, remedies against international organizations can easily conflict with state immunity provisions, especially in the case of the UN, which means that a categorical right of access to a court is not guaranteed for persons adversely affected by acts of international organizations.¹⁸⁵ However, provisions for protection of such rights in international courts have been discernibly extended. Notably, the ECtHR has recently ruled that domestic implementation of UN directives must be balanced against the obligation to ensure access to court for parties affected by such directives. This has particular importance in decisions regarding governmental classification of persons as terror suspects, in which cases the ECtHR has insisted that decisions must be amenable to legal challenge.¹⁸⁶ Moreover, domestic courts have found ways of reviewing acts of international organizations, in particular the UN. Directives of the UN Security Council implementing asset freezing for persons suspected of terrorist involvement have been declared void by national courts on grounds that the listing of suspects denied the right of legal challenge for those affected.¹⁸⁷ In a case of this kind, the European Court of Justice (ECJ) decided that access to court should be seen as a right with *jus cogens* rank.¹⁸⁸

Overall, presumptions in favour of a *right to have rights* are now consolidated at different levels of global society. In different ways, the growing width of the protection granted to access to justice affects the form of national democracy, and it has clear constitutional implications.

Most evidently, the growing prominence attached to the right to rights means that international courts produce founding norms for national polities, and they even assume clear legislative functions. In some cases, international courts have used access to justice provisions in international

¹⁸⁴ For an important rejection of an international organization's claim to immunity from suit in a national court, see the Belgian Labour Appeal Court case, *Siedler v. Western European Union* (2003). See the ECtHR rulings in *Waite and Kennedy v. Germany* (1999); *Beer and Regan v. Germany* (1999).

¹⁸⁵ See *Mothers of Srebrenica et al v. State of The Netherlands and the United Nations*, Supreme Court of The Netherlands (2012); *Delama Georges, et al, v. United Nations, et al*, U.S. District Court for the Southern District of New York, No. 1:13-cv-7146 (2014).

¹⁸⁶ ECtHR, *Al-Dulimi and Montana Management Inc v. Switzerland* (Application no. 5809/08) (21 June 2016).

¹⁸⁷ *HM Treasury v. Ahmed & Ors* [2010] UKSC 2 (27 January 2010).

¹⁸⁸ ECJ, *Joined Cases C-402/05 P and C-415/05 P. Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission*.

conventions to intervene directly in domestic policy-making.¹⁸⁹ In other cases, where access to justice is compromised, international courts have recommended far-reaching reform of national court systems.¹⁹⁰ Further, international courts have reasoned that access to justice concerns should prevent recognition of domestic amnesty for perpetrators of breaches of *jus cogens*, so effectively overruling domestic law.¹⁹¹ Alongside this, the increasing emphasis on the right to rights reflects a process in which different courts can at times disentangle their functions from specific territorial locations, and they create a socially abstracted web of interactions, providing primary norms to regulate actions performed by bodies in other societies. As mentioned, the growing right to rights has led to a presumption that international organizations must provide avenues for legal redress. To some degree, as considered below, this presumption is also reflected in the fact that it is possible to initiate extra-territorial litigation against human rights abusers. Indeed, extra-territorial suits are usually filed where they provide the only effective access to justice for victims of violation:¹⁹² that is, where states in which violations have been perpetrated deny access to justice in domestic judicial fora. In such cases, the broad reading of the right to rights means that courts in one society can hear suits filed for abuses in a different society. Through this, courts are able, to some degree, to position themselves outside their given physical jurisdictional location and they project a fabric of citizenship, based on a primary right to rights, that reaches outside formally constituted territories.¹⁹³ As a result, the emphasis on the right to rights transforms judicial bodies into primary law makers, projecting laws beyond their traditional jurisdictional limits.

In some cases, naturally, the expansion of rights of access to justice has extended beyond the recognition of a simple right to seek a formal judicial hearing. Judicial pronouncements on such rights have involved the insistence that courts are required not only to provide judicial redress,

¹⁸⁹ IACtHR, *Case of the Constitutional Court v. Peru*, 31 January 2001; IACtHR, *Case of the Dismissed Congressional Employees (Aguado-Alfaro et al) v. Peru*, 24 November 2006.

¹⁹⁰ IACtHR, *Case of Radilla-Pacheco v. Mexico*, 2v November, 2009; *Case of Rosendo Cantú et al v. Mexico*, 31 August 2010.

¹⁹¹ ECtHR, *Ould Dah v. France*, No. 13113/03 (2009). See comment in Weatherall (2015): 331–8).

¹⁹² For example, in the Pinochet cases in London, one key argument supporting the presumption of Pinochet's liability was that his victims would not find justice in Chilean courts.

¹⁹³ See discussion of the 'right to prosecute' in *R v. Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte (Amnesty International and others intervening)* (No. 3), – [1999] 2 All ER 97 179.

but also to offer remedies that meet a certain international threshold. In many cases, judicial directives regarding provisions of effective remedies have had deep-reaching institutional effect in national societies. This is common in the Inter-American system, where the IACtHR has prescribed improved judicial remedies, which at times has led to extensive institutional reform in national political systems.¹⁹⁴ It is also common under the ECHR, where many states have been instructed to improve standards of justice, and domestic courts have then applied these rulings to initiate reforms to domestic judicial and constitutional practice. In Russia, rulings handed down by the ECtHR regarding Art 6 breaches have led to significant judicial reforms, especially regarding the speed of judicial proceedings and the implementation of judicial remedies. For example, following the pilot judgement *Burdov v. Russia (No. 2)* of 15 January 2009 new federal legislation was adopted to provide compensation for lengthy trials.¹⁹⁵ Subsequently, the same guarantee was reproduced in the Administrative Litigation Code.¹⁹⁶ One outcome of criticism of the Russian courts in Strasbourg is that the Russian Supreme Court has actively promoted publication of court proceedings.¹⁹⁷ In the UK, famously, the ruling in *Smith and Grady v. UK* that the UK military had violated ECHR Art 13 eventually had the outcome that the courts altered more traditional modes of judicial review. In this case, in fact, the courts effectively recognized a *right to remedy by proportionality* for persons claiming abuse of rights defined under ECHR.¹⁹⁸

The growing protection of the right to an effective remedy has instilled a uniform system of norms across different states, which has profoundly moulded their normative architecture. In many cases, the insistence on the domestic availability of effective remedies has engendered substantively new rights within, and across, domestic legal orders. *Smith and*

¹⁹⁴ Far-reaching constitutional reforms in Mexico, which gave higher protection to international human rights law, were conducted against a background marked by IACtHR censure of the Mexican judicial system. See note 192 above. See also IACtHR, Case of *Fernández Ortega et al. v. Mexico*, 30 August 2010.

¹⁹⁵ Federal Law No. 68-FZ of 30 April 2010 'On Compensations for Violation of the Right to Justice in Reasonable Time or the Right to Execution of the Judgment in Reasonable Time' [O kompensatsii za narusheniye prava na sudoproizvodstvo v razumnyy srok ili prava na ispolneniye sudebnogo akta v razumnyy srok].

¹⁹⁶ Federal Law No. 21-FZ of 8 March 2015.

¹⁹⁷ See Supreme Court of the Russian Federation (2012). Plenum Ruling No. 35 of 13 December 2012 'On the Openness and Transparency of Judicial Proceedings and Access to Information on the Activities of Courts'.

¹⁹⁸ *Smith and Grady v. UK* (1999) 29 EHRR 493.

Grady v. UK clearly had this effect in the UK, as it altered the procedural rights guaranteed under the classical system of administrative law and led to a heightened judicial scrutiny of public acts in human rights cases.¹⁹⁹ The Pinochet rulings in London had far-reaching resonance in Chilean law, providing heightened domestic protection against human rights violations.²⁰⁰ In Mexico, IACtHR rulings on access to justice have led to a wholesale rewriting of the human rights sections in the constitution.²⁰¹

In each case, the protection of judicial rights forms a powerful link in the architecture of the global legal system. The global legal system attaches particular weight to the right to rights, which structurally presupposes the right of access to court. This right, based on a common, globalized concept of citizenship, generates legal obligations that extend beyond regionally defined societies, and it forms the cornerstone for a transnationally extended normative-democratic order, integrating national and international judicial institutions. Within national societies, this right imposes a relatively standardized form on political institutions, it limits the scope of national judicial policies, and it creates an emphasis in favour of particular remedies and particular grounds for administrative action. As discussed more extensively below, moreover, this right also allows new democratic subjects to emerge within the law, which are then able to lay claim to new rights.

3.2.10 *Rights Create Rights*

The increasing linkage between national courts and international courts also releases free-standing processes of law making, because it means that courts, quite generally, acquire the capacity to create new rights, often with *de facto* constitutional effect. Classically, as discussed, rights were created by acts of citizens, acting in their basic political capacity. Now, however, rights are widely created, at least in part, by articulations within the law. This is of course not in itself new. There are many historical instances in which existing rights have been constructed to create further rights. This is especially prominent in the construction of privacy rights, which has

¹⁹⁹ *R v. Secretary of State for the Home Department, Ex p Daly*, [2001] UKHL 26 (23 May 2001).

²⁰⁰ See Corte Suprema, 28/01/2009, 4691-2007. In this case, the Court used international law to determine that some crimes committed under the dictatorship could not be subject to limitations.

²⁰¹ See note 196 above.

given rise to additional rights, such as sexual and reproductive rights.²⁰² The construction of rights from other rights, however, has become increasingly detached from acts and demands of citizens, and many rights, often forming basic laws in national societies, are produced through inner-legal actions. In many cases, this occurs because courts are able to extract new rights from the rights that already exist in the legal system, whether expressed in an international instrument or in a domestic constitution, such that existing legal rights can be interpreted expansively, generating new rights *by contagion*. Through this process, basic rights are often created, in purely inner-legal fashion, by other rights.

Above the level of national societies, for example, regional international courts have often argued for an integrated construction of human rights instruments, declaring that primary human rights ought to be interpreted, consequentially, to engender subsidiary or secondary rights, required for the concrete materialization of primary rights. Most notably, the IACtHR has adopted a holistic approach to interpreting human rights, arguing that all human rights are interconnected, and they are defined by ‘principles of universality, indivisibility, and interdependence.’²⁰³ As a result, the Court assumes the authority to expand secondary rights, and to promote new rights, because of their linkage to primary rights.

As one important example of this, the IACtHR has strategically amplified provisions for basic rights to produce extended rights for different social groups, and for different ethnic communities. First, the IACtHR has argued that essential rights to life and rights to health necessarily imply rights of land use and even rights to territory for indigenous and other marginalized peoples.²⁰⁴ Importantly, second, the IACtHR has stated that the right of access to justice for indigenous groups means that they must have access to remedies in cases in which their particular rights – that is, rights distinctively inhering in indigeneity – are violated. On this basis, the Court decided that, given the significance attached by indigenous peoples to communally owned land, these peoples must have access to remedies if communally owned land is forcibly damaged or expropriated: the Court thus found that the indigenous communities, as free-standing legal persons with rights of judicial redress, can necessarily presume possession of a ‘right to collectively own property’, and they can claim distinct damages

²⁰² *Griswold v. Connecticut*, 381 U.S. 479 (1965). See discussion of this process in Germany at p. 317 below.

²⁰³ IACtHR, *Human Rights Defender et al v. Guatemala*, 28 August 2014.

²⁰⁴ IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. 31 August 2001; *Yakye Axa Indigenous Community v. Paraguay*. 17 June 2005.

if this right is adversely affected.²⁰⁵ Perhaps most importantly, third, the IACtHR has determined that the basic right to life should be interpreted not as a mere right to bare existence, but as a right to live life with dignity: as a right to *vida digna*. Indeed, the IACtHR has developed an important body of case law concerning *vida digna*, which has radiated throughout Latin America. The right to *vida digna* was originally construed by the IACtHR as a right of ultra-marginalized persons, living in extreme poverty, and it was conceived as a protective right, expressing an obligation on states that are parties to the ACHR to treat such people with dignity.²⁰⁶ Later, however, the construction of this right was linked to indigenous rights, and it became a platform on which indigenous communities were granted expansive positive rights, such as rights to use lands with sacred importance to them. In particular, this right was constructed to indicate that indigenous persons have a right to own, or not to be relocated from, their ancestral lands because of the fact that these lands are culturally fundamental to their wellbeing and to their ability to live their lives in dignified fashion.²⁰⁷

Within national societies, domestic courts have promoted transformative jurisprudence in order to construct new rights for their populations, sometimes dictating new basic rights through inter-judicial dialogue. As mentioned, in some societies in Latin America, domestic constitutional law is expressly founded in the assumption that the group of rights formally outlined in the constitution is open to interpretive expansion by the courts.²⁰⁸ In such settings, courts have been able to create quite distinctive rights, and very broadly to expand the catalogue of publicly protected goods. Typically, such expanded rights are consolidated on the grounds that they are seen to flow inevitably from other given rights – for instance, from the right to life – and they are justified on grounds of propinquity to other rights.²⁰⁹ Usually, such expanded rights include post-classical rights, such as the right to water or the right to health care.²¹⁰ In some cases, however, courts have created rights only rather intuitively linked to other core rights, such as, for example *the right to public space*.²¹¹ In fact, some national

²⁰⁵ *Saramaka People v. Suriname*. 28 November 2007, para 78.

²⁰⁶ *Case of the 'Street Children' (Villagran-Morales et al) v. Guatemala*. Judgment of 19 November 1999.

²⁰⁷ See important discussion in Antkowiak (2014).

²⁰⁸ Colombian Constitutional Court C-1062/2000.

²⁰⁹ See early use of this argument in Colombian Constitutional Court T-491/92.

²¹⁰ Colombian Constitutional Court T-597/93.

²¹¹ Colombian Constitutional Court T-503/92; Bolivian Constitutional Court 0014/2013.

courts have actively elaborated rights that contradict more classical rights, and, especially when addressing claims of distinct population groups, they have established protection for collective property rights, rights to natural resources and rights to use of particular territories, which limit more classically constructed rights of ownership.²¹²

An extreme example of this autonomous self-generation of rights is evident in the Constitutional Court in Bogotá. In some instances, this Court has created a chain of rights in which its establishment of one new right has stimulated the emergence of other subsidiary rights, so that the right itself engenders further rights, usually on grounds that subsidiary rights are *necessarily connected with* other, preceding rights.

One key example of this is health rights. The right to health is not recognized as an unqualified right in the Constitution of 1991. However, in the 1990s, the Constitutional Court began to construct health rights using the principle of connectedness, which it had already applied in addressing other rights.²¹³ Over a longer period of time, the Constitutional Court intensified its protection of health rights to declare that the right to health is a fundamental right.²¹⁴ Subsequently, the Court established that the right to health gives rise to secondary rights, and the fundamental guarantee of the right to health created, by a logic of connection, other rights relating to health care. For example, the right to health was declared, in the first instance, to include the right of access to effective and good-quality medical services.²¹⁵ This right was then further amplified to incorporate, *inter alia*, rights to continuing treatment for illnesses and to effective diagnosis.²¹⁶ Eventually, the right to mental health was also placed under constitutional protection.²¹⁷ Through this secondary process, the basic right to health itself acquired a constitutional – or, strictly, constituent – power, radiating through the health care system, and generating connected rights, effectively producing a normative order for health care as a distinct social domain. Ultimately, the principle of connectedness was also used by the Court to rule that rights to health possess correlated environmental implications, so that the right to health produced rights to a clean environment, in cases where pollution poses a risk to health.²¹⁸ Notably, principles of

²¹² See Colombian Constitutional Court T-257/93; Bolivian Constitutional Court 0572/2014.

²¹³ T-491/92.

²¹⁴ T-760/08.

²¹⁵ *Ibid.*

²¹⁶ T-361/14.

²¹⁷ T-010/16.

²¹⁸ T-046/99.

international law were widely used to consolidate health rights.²¹⁹ These rulings also gave rise to important packages of legislation to protect health rights.²²⁰

Similar examples can be found in Colombian education law. The 1991 Constitution did not guarantee education as a fully enforceable fundamental right. However, the Constitutional Court has established a right to education on the grounds that there exists a 'close linkage' between education and the basic values enshrined in the constitution, notably free development of personality, equal opportunities and access to culture.²²¹ Later, the Court established the right to education as a fundamental right for all persons under 18 years of age.²²² This right was subsequently expanded to generate more differentiated rights, as the Court placed the government under obligation to offer education that was available, accessible, acceptable and adaptable: the right to education acquired four subsidiary characteristics, generating sub-differentiated rights.²²³ Moreover, this right was expanded to include differentiated education rights for disabled persons, who were defined as subjects requiring enhanced constitutional protection.²²⁴ It was also interpreted to determine that indigenous population groups possessed a fundamental right to a 'special system' of education, linked to the right to identity.²²⁵ Notably, principles of international law were widely used to consolidate education rights.²²⁶

In these examples, primary norms of social life are created through the expansionary judicial construction of rights. The rights structure of society now typically originates in the global normative system, and this structure then evolves at a high degree of autonomy, stimulated by judicial actions. This process forms a parallel to classical patterns of citizenship, in that it marks a widening of the rights structure in society. However, unlike classical patterns of citizenship, it occurs within the law. In such processes, basic laws are produced not as the results of primary societal/political decisions or practical/political acts, but *within the legal system*.

²¹⁹ See for example very extensive use of international law in T-760-08.

²²⁰ See discussion of this effect in Uprimny and Durán (2014: 8, 13).

²²¹ T-329/93.

²²² T-775/08.

²²³ T-743/13.

²²⁴ T-247/14.

²²⁵ T-907/11.

²²⁶ One leading case on the status of the right to education as a fundamental right (T-775/08) made wide use of international law.

3.3 Inclusion Not Participation

Through this range of processes, a deep and basic alteration to the concept of the democratic citizen and democratic practice has occurred. As discussed, the classical construction of democracy was centred on the idea that the citizen stands at the origin of the law, and, as the interests of citizens are mediated through representative procedures, law obtains legitimacy as a legal enactment of a will originally imputable to citizens. Above all, in the classical construction, citizens assumed a political role by politicizing rights and by articulating claims to rights towards the political system. In contemporary society, however, the underlying reality of democracy is largely determined not by acts of politically identifiable citizens, but by a construction of the person as rights holder, which is stored, consolidated and reproduced, within the legal system, where it acts as a principle for law's production and legitimation. Of course, this model of democracy is marked by variations, and some governmental systems are defined by the tendency, at least in part, to reject it. Indeed, some constitutional democracies have in recent years been created by multi-centric, highly activist processes of foundation, which stress the constitutive role of political participation, and express particular hostility to autonomous judicial norms.²²⁷ Despite this, however, the judicial or inner-legal form of democracy remains much the most dominant pattern of democratic institution building and legal authorization in global society. Even in societies where states avowedly found their legitimacy in specifically and distinctively national modes of justice and political volition, the highest source of normative authority remains based on the self-construction of the law, centred around human rights.²²⁸

Through the rise of democratic systems with this inner-legal focus, the condition classically known as democracy has been supplanted by a political-systemic order in which, in many respects, the law generates the law, and the citizen as a factual legal agent loses its status as the author of the law. In this process, the citizen does not disappear from the law. Indeed, law conserves a formal model of the citizen as rights holder, which underlies and supports inner-legal acts of law construction. Yet, the citizen loses its status as an external legitimational figure, claiming externally constructed rights. In many situations, the citizen has no obvious reality outside the law, and the law constructs the citizen through its

²²⁷ For an account of Bolivia as one example of this see Lazarte (2010: 36).

²²⁸ Bolivian Constitutional Court, 1624/2012, 1422/2012.

own communications. In this system, the concept of material/political participation loses importance as a primary source of legal authority, and many law-creating acts bypass the political system. Instead of a *system of participation*, democracy becomes a *system of inclusion*, and democracy is increasingly defined as a condition in which courts construct generalized norms for the expansive inclusion of society. Basic functions of integration and legislation attached to democratic citizenship are configured around functional equivalents inside the legal system. This condition is not restricted to particular geographical territories, and, given its reference to a generic form of the citizen, it necessarily extends across historical boundaries between states and societies.

3.4 The New Semantics of Legitimacy

These processes, in total, have given rise to a deep transformation in the vocabulary of political legitimacy. Historically, both the political system as a whole and its single legal acts explained their legitimacy in distinctively and generically political categories. As discussed, the idea of a shared political bond, or a shared political decision, was fundamental to democratic enfranchisement, and early democracy was centred on the categorical distinction of political membership from other non-elective social units. More broadly, it is a fundamental feature of the modern political system that it owed its rise to the separation of the vocabulary of political legitimacy from all other functional categories.

First, from the Reformation to the French Revolution, the concept of political legitimacy was formulated in categorically secular political terms, particular to the political system itself, and it was detached from religious vocabulary. Accordingly, political legitimacy was phrased as the result of the positive rational command of a sovereign, whose authority was supported by the idea of the state as a formal secular order, forming an alternative to religious patterns of authority.²²⁹

Second, after the revolutionary *époque*, the legitimacy of the political system was phrased as a reflection of citizenship, in which laws were accorded validity as expressions of collective social interests and unifying commitments, and legislation extracted validity from its positive inclusion of the people as sovereign actor. Both these concepts allowed the political system to evolve on free-standing foundations, and to generate quite distinctive reserves of authority and recognition for its functions.

²²⁹ See the claims in Koselleck (1959: 101).

As discussed, the legitimational idea of citizenship did not acquire material political reality for a long time after the French Revolution and the American Revolution. Nonetheless, the revolutionary period spelled out a distinct political norm of legitimacy, based on a mixture of individualism and collective obligations, through which the modern political system was able to explain its authority across society, and on the foundation of which it gradually took shape as a differentiated set of institutions. After 1789, increasingly, the legitimacy of political acts, and especially acts of legislation, began to be measured by the extent to which they enacted interests of citizenship or originated in the will of the people, reflected through processes of participation. Through this construction, the people were imagined as the original subjects of the law, and they contributed to the formation of law by extracting political resonance from claims to rights.

To an increasing degree, this classical political vocabulary of legitimacy is now being supplanted by a vocabulary in which the legitimacy of political acts is defined not by a link to the people, but by the extent to which they accord with human rights norms: that is, with norms which the law itself already contains. As a result, the matrix in which law is legitimated, accepted or challenged is now subject to far-reaching alteration, and law's authority is increasingly either accepted or challenged on the grounds of its conformity, or otherwise, to basic human rights. This is reflected at a national level, as most domestic laws are expected to reflect basic human rights norms. This is even more evident in the international and the transnational domain, as laws produced outside national societies are increasingly susceptible to challenge on human rights grounds.²³⁰ Overall, the contestation of law's legitimacy rarely focuses on the question whether law originates in collective acts of participation. The claim that law is proportioned to rights, however, is vital both for law's authorization, and for its contestation. As discussed, in fact, the law now at times recursively produces not only the grounds for its own contestation, but also the citizens who contest its legitimacy. In consequence, the law authorizes itself by referring to a normative construct of the citizen that is actually fabricated within the law, and the real existence of citizens outside the law is diminished. *The subject of law (the citizen) moves from the beginning to the end of law.*

²³⁰ For example, human rights norms are now used by the ICJ to address acts in the inter-state arena. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion, 9 July 2004. As discussed above, further, UN directives are also subject to being struck down on human rights grounds. See above at p. 264.

Underlying this is a deep systemic process, in which the legal system appears as a dominant system in global society. In consequence, national democracy evolves as a secondary outcome of this process of global legal-systemic differentiation.

3.5 Conclusion

At a primary level, of course, there is no contradiction between democracy and human rights law, which is usually pre-figured by international law. Many theorists have argued – with perfect plausibility – that democracy, even in a classical construction, presupposes human rights (Habermas 1992: 124; Beetham 1999: 114). However, the correlation between human rights and democracy rests on the presumption that human rights law creates a set of preconditions for the effective performance of democratic functions, essentially ensuring that members of a *demos* are institutionally able to exercise the degree of participation required to contribute to acts of legislation. On this account, rights need to be perceived as corollaries of some underlying political agreement. In recent decades, however, the political system known as democracy has undergone a quite profound political and conceptual transformation, such that the role of the people in creating laws is subject to constraint, and much law identified as democratic is produced through processes in which the people are only marginally present. At the centre of this transformation is a process in which the subjective author of democratic law has been moved *from a position outside* the legal system *to a position inside* the legal system. As a result, *the law refers to the law as the ground of law's authority*, and processes of legal construction classically pertaining to political actions now widely occur as elements in a process of *secondary constitution making*, in which already defined legal norms are re-articulated. That is to say, the citizen is now constructed, largely, in inner-legal processes, and the rights exercised and laws formed by citizens are often articulations of the law itself. Through this process, the formula of legitimacy is partly disconnected from factual processes of interaction and articulation, and rights of citizenship lose force as lines of social contestation. In this system, the citizen is constructed through interaction between different elements of the global legal system. The citizen is of course still implicated in making laws. However, the citizen contributes to making of laws not through primary non-setting acts or through factual contestation of rights, but either as a secondary agent or as a formal legal construct. The citizen, therefore, evolves in modern society, neither as a concrete source of law nor as an agent engaged in democratic

practices, *but as a centre of attribution in a transpersonal process of inclusion*. Although originally conceived as a categorically political order of social organization, in its factual form, democracy has evolved as a *comprehensively and intrinsically legal system of inclusion*. The essential functions of political subjects have been internalized to such a degree within the law that politics and law have become inseparable. As discussed, the classical structure of politics, in which the political system is determined by an external will, did not, conclusively, create an enduring differentiated political system.

Of course, none of this implies that mechanisms of democratic representation have become invalid, or that the people have disappeared from democracy. However, the basic subject of democratic representation (the citizen) has only been established through a coalescence of national agents and global law, and it is only through a process in which the citizen has been partly insulated against its own politicization that the form of democracy has been stabilized. As discussed below, in fact, the political branches of the government have usually proven structurally incapable of solidifying a concept of the citizen to produce legitimacy for laws. Although the classical conception of the citizen imagined the rights of the citizen as enacted through legislatures, in most cases, legislatures could not achieve this objective. On this basis, early sociologists were correct in arguing that democracy evolves as a process of differentiated institutionalization and autonomous legal integration. However, this only occurred as law became fully free-standing, which, in turn, only occurred as law was infused with content extracted from international norms.