2

National Democracy and Global Law

2.1 The *People Introuvable* and the First Crisis of Mass Democracy

As discussed above, even if defined in minimalist terms, the factual development of democracy initially followed a very fitful path. Before 1914–18, no European societies had constructed political systems even close to the institutional design and integrational reach of full democracies. To be sure, by this time, most countries in Europe, and some countries in Latin America, had evolved polities with some partial democratic features. None, however, could plausibly claim to extract legitimacy to support their legislative acts from an equally and comprehensively included national population. Generally, *strategically selective democratization* was the dominant pattern of political organization from the midway into the nineteenth century until midway into the twentieth century. One of the most persuasive analysts of the history of modern democracy states simply that 'suffrage discrimination' was the normal principle of political citizenship for most of the nineteenth century, and that electoral franchises were created, not as mechanisms of popular inclusion, but as 'extraordinarily effective instruments of political repression' (Goldstein 1983: 334).

To illustrate this, for example, in the longer wake of the Great Reform Act of 1832, the UK progressively developed a constitutional order based on the idea that the elected chamber of Parliament was the core organ of state. As a result, the period after 1832 saw a progressive widening of the authority of the House of Commons within the parliamentary order as a whole, which culminated in its acquisition of evident superiority in 1911. However, until the establishment of full male suffrage in the Representation of the People Act of 1918 and the stepwise enfranchisement of women from 1918 to 1928, the British government had very restrictive electoral laws. From 1884, the last franchise reform prior to 1918, gender, age and housing tenure were still the primary determinants

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of the right to vote.[1] Moreover, general elections before 1918 were marked by entrenched protection of plural voting for privileged groups; in fact, multiple enfranchisement persisted residually until 1950, when the first general elections without plural voting were held.[2] Additionally, through the late nineteenth century, and, even after 1918, elections in the UK were not always fully competitive. After 1918, tellingly, weak electoral competition was most pronounced at critical political junctures. This was evident in late 1918, when, after World War I and the electoral reforms of 1918, the Liberal and Conservative parties campaigned on the same platform. It was again evident in 1931, when, after the Wall Street Crash, the Labour Party split and its more Conservative elements formed a coalition government that effectively eliminated electoral competition until after 1945. Before 1945, in consequence, there were only two years – from 1929 to 1931 – in which, albeit still with plural voting, Britain had a government elected by a full franchise in fully competitive elections. Strictly, in fact, throughout the entire process of democratization up to 1950, British governments were selected by a number of separate electoral franchises, based on different admission criteria.[3] Unlike electoral systems defined by fully constitutional principles, franchise membership in the UK had its origins in private qualifications, and voting rights were initially allocated on grounds of status or group affiliation.[4] The British political system was historically not underpinned by a generalized idea of subjective voting rights or by general ideals of political citizenship.[5] Naturally, selective enfranchisement left a powerful impression on British politics. Owing to franchise restrictions,

[1] In fact, 1918 did not bring an end to electoral exclusion. On one calculation, after 1918 still only 93 per cent of adult men were enfranchised in the UK (Tanner 1990: 387). Moreover, 1918 did not bring an end to the principle of franchise variation, as it established different age qualifications for admission to the franchise for civilians and military personnel, and it created a robust property qualification for female voting.

[2] The extent to which plural voting privileged wealthy voters is illustrated by electoral statistics from Glasgow. Around 1910, the wealthy urban wards in Glasgow, which mainly voted Tory, had over 250 per cent enfranchisement (i.e. more electors than residents, because of plural registration). By contrast, poorer wards often had less than 50 per cent enfranchisement (see Smyth 2000: 12–13).

[3] One account describes the existence of seven separate franchises in the 1910 elections Blewett (1972: 358). See also Hanham (1959: 191).

[4] The existence of multiple, overlapping franchises in the UK in the early twentieth century can be seen as a remnant of earlier regalian systems of representation, in which electoral rights resulted from private grants, privileges and acknowledged interests.

[5] See discussion below at pp. 332–3.

class interests did not become openly politicized until after 1918,[6] which meant that organized labour was weakly integrated in the political process, and the emergence of a strong and nationalized Socialist party was impeded. Consequently, the Labour Party was essentially an adjunct to the Liberal Party until 1918 (Wrigley 1976: 43–4; Packer 2001: 177).[7]

After unification in the 1860s, analogously, Italy had a moderately powerful parliament, but until 1912 its franchise was very small, and electoral rotation of office was not fully competitive (Webster 1975: 14; Romanelli 1979: 217). Before 1948, Italy only had a government created by competitive and fully democratic elections (albeit still without female voting) in the years from 1919 to 1922. After 1871, Imperial Germany had a large male franchise, in which, unlike in Britain, the political system was expected to address divergent organized class interests at a relatively early stage, certainly from 1890 onwards. However, up to 1918, members of the German parliament (*Reichstag*) elected by this franchise had only limited authority: they did not possess full powers to initiate legislation, and members of the Reichstag could not assume ministerial positions. After the formation of the Third Republic, France, which was by some distance the most democratic major European state in the nineteenth century, had a settled full male franchise and competitive elections. In fact, the basis for full male suffrage had been established as early as 1848.[8] However, the Third Republic was created through the annihilation of radical political opposition in the Paris Commune. Throughout the Republic, governmental executives were unstable, governments were sometimes extremely

[6] On the rise of 'class-based electoral politics' in the UK after 1918 see Hart (1982: 820).

[7] Note the following analysis of the political position of organized labour before 1914: 'Labour was operating on the basis of a highly restrictive franchise, and one which was probably peculiarly unfavourable to it. It is difficult for a mass working-class party to be politically successful when about half the working-class is voteless' (McKibbin 1974: 87). Even accounts that stress the growing importance of the labour movement in the UK before 1914 recognize the very limited political representation of labour, even in its industrial heartlands (Laybourn and Reynolds 1984: 64, 94). Organizationally, before 1918, the Labour Party was a 'federation of affiliated trade unions and socialist societies with no official means of individual membership and no set political programme or ideology', which remained in 'the shadow of the Liberal Party' (Worley 2005: 4).

[8] France had a full male franchise in 1848, which was briefly suspended. It again had a full male franchise from 1851, albeit for elections of plebiscitary nature, which were not fully competitive. The 1871 elections seem a good point at which to identify the stabilization of male democracy in France. Some observers would claim it was established earlier (Rosanvallon 1992: 24–5). Some observers claim that it was established later (Rueschemeyer, Stephens and Stephens 1992: 85; Collier 1999: 42).

short-lived, and their powers were not fully anchored in parliamentary elections. Women were not allowed to vote until after World War II.

The USA of course had a relatively large male franchise from the 1820s onwards. Yet, large sectors of society were excluded from participation in elections on grounds of ethnic group membership until well into the second half of the twentieth century, and access to electoral rights varied greatly across regional divides. Notably, the exponential growth of white democracy in the era of President Jackson was flanked by very repressive policies towards non-dominant social groups, such that from this time American democracy acquired a clearly and deeply imbued racist hue.[9] Indeed, in the Civil War and the franchise experiments during Reconstruction, the USA experienced an unusual process of enfranchisement and disfranchisement in which the black population was briefly incorporated in, and then, in many states, once again excluded from, the electorate. Even during Reconstruction, however, enfranchisement of the black population was not uniform. At this time, many northern states did not establish African-American suffrage (see Gillette 1979: 7–10), and the Fifteenth Amendment was needed to secure voting rights for the black population in the north (Gillette 1965: 165).[10] In 1865, there were only five states in which blacks and whites had equal voting rights (McPherson 1964: 333).

Overall, throughout the nineteenth century, national societies were not very effective in creating democratic governance systems. The early processes of citizenship formation and socio-political nationalization that ran through the nineteenth century did not culminate in the consolidation of national democracies. Through the nineteenth century, as mentioned, it was widely claimed – by both advocates and opponents of democracy – that, once established, national citizenship would inevitably give rise to more egalitarian patterns of political-systemic formation, broadly aligned to electorally preponderant social and political interests in society.[11] In

[9] One important account explains that Jackson's presidency was 'radically libertarian', 'militantly republican' and 'openly racist' (Smith 1997: 201).

[10] Gillette calculates that up to late 1868 'no northern state with a relatively large Negro population had voluntarily accepted full Negro suffrage' (1965: 27). A different account calculates that, in 1840, only 7 per cent of free slaves in the northern states were fully enfranchised (Litwack 1961: 75).

[11] See above pp. 22–3. This was intermittently implied by Marx and Engels. This theory was implicit in the *Communist Manifesto*. Notably, Marx saw full enfranchisement, under some conditions, as an alternative to revolution. He stated that universal suffrage in England was a 'socialistic measure' that would lead to 'the political supremacy of the working class' (1852). He also argued that in England 'universal suffrage was the direct content of the

reality, however, it was not the progressive elaboration of citizenship or gradual political enfranchisement that led to the establishment of mass democracy as a general political model. Ultimately, mass-political democracy was jolted into life in unpredicted fashion, and it was initiated, not by acts of national will formation, but by factors linked to exogenic events – by the intense militarization of nationhood and international challenges to national legal systems caused by World War I. The war proved to be the great catalyst for mass politicization in most of Europe, and most European states underwent a process of intensified democratization either during or in the years that followed the period of conflict (1914–18). World War I therefore triggered the first process of large-scale, cross-polity democratization.

The rise of democracy at this juncture was not universally linked to military mobilization. Spain and Sweden became democracies at this time despite the fact that they were non-belligerent in World War I, although full democratization in Spain was delayed until 1931 because it was not directly involved in the war.[12] France already had male mass democracy before 1914. Moreover, intensified democratization also occurred in Latin America at this time.[13] In most cases, however, democratic political systems were created around 1918 in societies in which populations had been acutely affected by the experience of warfare. In each case, the rise of democracy was inseparable from the fact that state structures had been subject to extreme duress by pressures linked to military mobilization, and populations had experienced intensified national integration through military conflict and psychological adversity. In the period around World War I, therefore, conditions close to mass democracy typically came into being through one of three different processes: (1) existing monarchical or imperial governments were replaced by abrupt regime transformation

revolution' (1855). This view later became an article of faith for Eduard Bernstein and other revisionists (1899: 127). This principle was also declared by Proudhon, albeit from a position hostile to centralized democratic systems. Proudhon stated that in democracies, in which the 'right to vote is inherent in the man and the citizen', there will be a national tendency towards 'economic equality' (1865: 270). See the later version of these claims in Kautsky (1918: 5). In the interwar period, the Austro-Marxist Max Adler was still able to argue that 'for the proletariat, political democracy is an indispensable weapon, a powerful means to exert influence in the state' (1926: 11).

[12] Sweden had near complete male suffrage in 1909 and female suffrage in 1921. However, until 1917, the government was not fully democratically accountable. Spain's democratization in 1931 was not directly caused by the war, but it was a longer-term consequence of social forces (class mobilization, industrial agitation, nationalism) released by the war.

[13] In Argentina, for example, expanded, but still very incomplete, male suffrage was introduced in 1912, leading to greatly increased popular participation in elections.

(e.g. Germany, Austria); (2) existing governments implemented hasty reforms, establishing a more equal electoral franchise to permit extended participation in politics (e.g. Italy, UK, Belgium, Netherlands); (3) new states came into being through the collapse of former multi-national Empires (e.g. Czechoslovakia, Poland, Hungary, Yugoslavia), which also established political systems with a large franchise.

The fact that the expansion of democracy was impelled by military conflict throws very distinctive light on its normative foundations, indicating that mass-democratic institution building was first driven by very contingent factors. In fact, this link between war and democracy had important consequences for the eventual construction of democratic institutions in different European societies. Most democracies created around and after 1918 reflected the impact of the war in six separate respects.

First, the rise of full democracy around 1918 was closely linked to Imperialism and the struggle for military expansion. Through the nineteenth century, as mentioned, democracy was often advocated as a mode of political organization which, in helping to motivate the population to support the government, might prove conducive to external expansion, both through economic production and military combat. This reasoning obtained pressing relevance during World War I, which for many combatants was not clearly distinct from an imperial war. In some societies, in fact, governmental executives repeatedly promised reform of domestic suffrage laws as a means of solidifying support for the military effort.[14] As a result, the accelerated path towards democracy after 1914 was tied to considerations of military efficiency and success, and political reform was strongly shaped by strategic calculations, which had little to do with democracy as a normative good.

Second, in the new democracies created around 1918, governmental power was not captured, either in full or incrementally, by organized democratic actors or constituencies. Of course, to some degree, political reform was triggered by the democratizing impact of military conscription, which had levelled out social distinctions on the battlefield and drawn inhabitants of different regions into close proximity to one another, promoting an intensified nationalist pattern of citizenship and political affiliation.[15] Indeed, as in the revolutionary era in the late eighteenth century, warfare,

[14] Famously, at Easter 1917, the German Kaiser promised constitutional reforms, after which a cross-party reform commission was established (see Bermbach 1967: 52–3).

[15] Importantly, like Hobbes before him, Weber saw the shared experience of equality in face of violent death, intensified in the years 1914–18, as formative for democracy (1921: 268).

incubated nationalism, and democratic enthusiasm became inseparable in World War I.[16] However, such experiences did not result in a situation in which newly nationalized societal constituencies, motivated by claims for collective freedom, actually gained hold of power. On the contrary, in most cases, power was given to populations by government elites for a number of different reasons, few of which reflected a deep commitment to democracy and few of which proved propitious for enduring democratic institution building. In some cases, governmental executives in 1918 were extremely anxious about the inflammatory, potentially revolutionary, mood of their (often still armed) populations, caused by long periods of deprivation in military combat, and exacerbated by the revolution in Russia in 1917. Under such circumstances, new democracies were created very quickly, and they were designed not to secure collective freedom, but to prevent complete revolution: their motivation was essentially protective and counter-revolutionary. In some cases, power was partly transferred to national populations because political elites felt a sense of obligation towards their populations for their sufferings in the war, and they granted democratic citizenship as a political right because of a sense of duty.[17] In this respect, however, political elites often noted that their nations had become Conservative and patriotic through military incorporation, such that the gift of democracy appeared relatively risk-free.[18] In these respects, the expedited growth of democracy after 1918 was shaped by a range of quite conflicting motivations. Clearly, however, this most intense wave of democratic formation did not result from simple acts of collective self-legislation.

Third, most democracies established after World War I reflected a very strained definition of their primary constituent subjects.

In most societies, notably, the push for mass political and economic inclusion around 1918 was not supported by a clear construction of the people or the citizens that were to be included in government, and no unified faction of the people was able to present itself as a secure source of

[16] Weber also identified the deep nexus between democracy and nationalism, forged in World War I (1921: 246).

[17] This was the stance, for instance, of Lloyd George, who stated that soldiers had a 'right to a voice in choosing the Government sends them to face peril and death' (Pugh 1978: 51). Weber, writing in 1918, claimed that enfranchisement of soldiers ('returning warriors') was almost a moral command. He viewed electoral reform as the 'only means' to secure the future of German national society (1921: 308).

[18] In the UK, for example, franchise extension was partly based on assumptions regarding the Conservative orientation of the soldiers' vote (Pugh 1978: 51). Female suffrage movements also became less radical during the war (Hause and Kenney 1984: 213).

authority for government. In many cases, the advent of national democracy occurred in a political reality in which institutions were unable to stabilize a unifying model of citizenship around which their functions could be concentrated, and they were incapable of producing a legitimational bedrock for their functions.

Paradigmatic for these problems was the Weimar Republic, the most important of the new democracies established after World War I, which replaced the semi-constitutional order of Imperial Germany in 1918–19.

The Weimar Republic was founded – although ambivalently – in the name of the German proletariat, and it was established in a context marked by the extensive mobilization of radical political factions against the imperial executive, which culminated in the collapse of the Empire's ruling Hohenzollern dynasty in late 1918. Moreover, the legal foundation of the Weimar Republic was a constitution that was clearly committed to the construction of a nationally unified model of citizenship, able to pull together diffuse factions in German society. For example, the German constitution of 1919 was intended to reduce the exercise of separate authority by different regional governments, and to establish the national state as the highest focus of legal authority (Art 13). Moreover, it was committed to the renunciation of pure liberal capitalism as the dominant economic principle. As a result, the constitution espoused strong ideals of material or economic citizenship, and it provided for representation of the workforce in labour councils, placing the political system in close proximity to the people in their everyday life contexts (Art 165). However, despite these integrative ambitions, the Weimar Republic immediately appeared as a democracy without a clearly identifiable subject, which was unable to gravitate around a fixed order of citizenship, and whose stability was deeply undermined by this absence.

This lack of solidity in the construction of the people was reflected, for example, in the bitter hostility between the left-wing factions that initially assumed government functions in Germany after World War I. Notably, the German political left had been divided during the war and the faction of the political left that took control of government after the war, the Majority Social Democrats (SPD), had, by late 1918, already accomplished the reformist ambitions that its leadership had previously pursued. As a result, many leading members of the SPD would probably have preferred to avoid the foundation of a completely new democratic regime, and they were not convinced of the necessity of uprooting the monarchical system of the Empire (Matthias 1970: 22; Mühlhausen 2006: 99). Moreover, by 1919, the claims of the SPD to represent the German people had been

badly undermined by the fact that leading party members had authorized the murders of other important figures on the political left (members of the Communist Party, including Rosa Luxemburg and Karl Liebknecht), who had in fact previously been attached to the left wing of the SPD itself. This lack of cohesion at the core of the Weimar Republic was already evident on the day of its foundation. On this day, symbolically, different factions of the German labour movement made separate proclamations concerning the foundation of the new Republic, so that, initially, two different Republics were created, one by the Majority Social Democrats and one by the Communists, formerly in the SPD.

This lack of solidity in the construction of the people was also manifest in the inter-group agreements that underpinned the Weimar Republic. Indicatively, the Republic was partly instituted because figures attached to the old elites of the Imperial government, especially the more progressive sectors of the military and heavy industry, decided to cooperate with the SPD in establishing the new democracy. These groups were prepared to sanction the creation of a democratic order with mixed liberal and social-democratic features, not because of any deep commitment to democracy, but because they saw this as a means to avoid full-scale revolutionary overthrow and full-scale transformation of the existing economic system (Schieck: 1972: 155; Albertin 1974: 660; van Eyll 1985: 68). This meant that the new Republic resulted in part from pragmatic contrivance, and it lacked deep-set foundations. Moreover, the Weimar Republic was actually constituted by three political parties, forming the Weimar Coalition, which comprised the SPD, the left-liberal German Democratic Party, and the Zentrum (the Roman Catholic Party). These parties had drifted out of their customary political orbit during World War I, in which some of their members had collaborated in cross-party committees to promote constitutional reform (see Patemann 1964: 86; Bermbach 1967: 67–9). The ability of these parties to form a coalition in 1918–19 to support the foundation of the Republic was largely the result of the personal relations, and resultant willingness to enter compromise, that had developed between members of the different parties during the war (Mommsen 1990: 28). Soon, however, it became clear that these personal relationships were insufficiently strong to sustain an enduring cross-party popular-democratic consensus, and the objectives of the founding coalition rapidly lost influence after the creation of the Republic. The Zentrum, notably, avoided pledging loyalty to the new Republic altogether (Morsey 1966: 613). As a result of this, the democratic constitution, drafted by leading members of the Weimar Coalition, did not find strong support amongst

subsequent governments, and some of its core provisions were ignored and then partly suppressed.[19] In fact, the primary elements of the founding constitutional text of the Weimar Republic possessed a shadowy reality through the course of the Republic, as few politicians felt any great inclination to put its policy commitments into practice. Most notably, the material provisions of the Constitution, reflecting corporatist/welfarist ideals of citizenship, were only partially realized, and they were increasingly suspended by the end of the 1920s.[20]

To be sure, the German democracy was a rather extreme example of a democracy without an underlying democratic subject, based on a highly fractured construction of democratic citizenship. The fragmentation of democratic agency in the Weimar Republic was especially manifest because of the accelerated democratic transition from semi-representative to mass-democratic government in Germany. To some degree, however, this phenomenon was common to most interwar democracies, few of which were underscored by a normatively integrated model of democratic citizenship. In the UK, for example, democracy was specifically consolidated in and after 1918 in a form designed to prevent the assumption of government by parties representing the increasingly radicalized labour movement. As mentioned, in the first post-armistice elections, in December 1918, the Liberals and the Conservatives campaigned on a joint platform to obstruct the electoral advance of the Labour Party. Subsequently, an anti-Labour 'equipoise', often entailing strategic coalitions between capitalist parties to eliminate the political threat posed by organized labour, remained the dominant principle of British government until after 1945 (McKibbin 2010: 64).[21] In Italy, the newly democratized political system that emerged from World War I was chronically hamstrung by the fact that its leading democratic parties (the Socialists and the People's Party) found each other ideologically abhorrent and could not agree on principles for collaboration (Knox 2007: 362). In Austria, leading theorists of the political Left endeavoured to construct a model of cross-class sovereignty to cement the foundations of the post-1918 democratic system (see Bauer 1980: 62). However, this system was blocked by anti-labour factions (Gerlich 1980: 245).

[19] See on these points Weisbrod (1975: 243); Petzina (1985: 63); Schaefer (1990: 38); Meister (1991: 189); Lepsius (1993: 81).

[20] See the classic studies in Kahn-Freund (1932: 168–9); Kirchheimer (1981).

[21] On the motives for the creation of a broad anti-labour coalition in 1918, integrally linked to the expansion of the electorate in the same year, see Turner (1992: 3–7). Turner describes this process as an 'alignment of the governing parties against Labour', which 'undercut historic Liberalism' (1992: 448).

Across Europe, in other words, the first factual integration of the people into the national political system was not carried forward by a wave of mass mobilization or by any real expression of a conclusively unified demos. On the contrary, it was determined by an uncertain push-and-pull process between different actors, different organizations and different interests, which hardly shared common principles of democratic self-government, and many of which accepted democracy on a very contingent, pragmatic basis.

Fourth, new democracies created after 1918 were centred around intensely contested, and internally unsettling, constructions of citizenship.

During World War I, for example, most states had passed legislation identifying and making provision for the treatment of enemy aliens, promoting strictly exclusive ideas of citizenship (King 2000: 90; Gosewinkel 2016: 124–30). Democracy was thus implanted in societies marked by virulent nationalist aggression. Further, owing to the military context, democracies created after 1918 were required to incorporate populations marked by recent experience of complete mobilization for, and comprehensive incorporation in, national war machines. Consequently, these new democracies were generally shaped by the conviction that their institutions were required to derive legitimacy from the continued deep inclusion of their constituencies in governmental functions. The military environment surrounding mass democratization, meant that democratic institutions were often expected to integrate the national people at a high degree of intensity, providing both political and material compensation for recent sacrifices in combat and establishing collectivist organs of economic administration for peacefully reincorporating the population in civilian life.[22] As a result, many political observers after 1918 advocated the creation of corporatist systems of political-economic coordination, which were supposed to construct an immediate relation between state institutions and social agents, and in which government organs were required to assume extensive responsibilities for social administration and material distribution. These constitutional models placed only partial emphasis on the recognition citizens as holders of personal subjective rights, and

[22] Notably, the democratic settlements after 1918 included, with variations between polities, expanded social rights for working classes, new powers for trade unions (e.g. co-determination, freedom to create collective wage agreements), labour tribunals to regulate disputes and some mechanisms of social protection. This was most advanced in Germany, where protective rights for workers were established in the constitution of 1919, and some provisions were made for nationalization of leading industries.

instead they constructed state legitimacy as a condition dependent on the integration of citizens as holders of collective material rights.

Such enthusiasm for comprehensive political integration was common on the radical political left in post-1918 Europe, as Marxist theorists sought to redefine democracy on the basis of enhanced material unity between state and society.[23] One broad line of Marxist orthodoxy around 1914, based on a fusion of late-liberal statism and Marxist economic-democratic theory, devised a theory of *organized capitalism* to explain the conjuncture of democracy at this time. Proponents of this theory argued that, owing to its increasingly central position in the national economy, the state could assume a steering function in coordinating large-scale monopolistic enterprises, guiding the economy towards socialism in accordance with a popular political mandate.[24] An alternative, reformist line of corporatist socialism advocated the creation of economic councils at the workplace as part of plan for a broad-based consensual transition to socialism.[25] In some countries, more socially conciliatory representatives of organized labour saw corporatism as a strategy for economic cooperation with employers, aimed at realizing industrial harmony.[26] More moderate welfarists, of course, viewed social provision and basic social rights as means for establishing a deepened connection between state and society, and as a result most interwar states created rudimentary welfare systems. However, corporatist outlooks were also common amongst political Conservatives, who often projected a semi-corporatist polity model in which corporatist deputations in the economy were expected to reinforce the coordinating power of the political system, and to stabilize the position of economic elites.[27] Eventually, such outlooks culminated in the policies of ultra-Conservative, or Fascist corporatist theorists, which were generally based

[23] Famously, in Italy, Gramsci saw egalitarian democracy as a state of proletarian hegemony (1996: 61). In Austria, the Austro-Marxists saw the materially consolidated national community as the basis for a legitimate state (Adler 1922: 33, 49, 196).

[24] This outlook was especially widespread in Germany. On the impact of these ideas on interwar Social Democratic politics see Könke (1987: 101). On the broad spectrum of support for such theories, ranging from Marxists to liberals, see Zunkel (1974: 31, 51–2, 63). For the economic theory underlying this see Hilferding (1910: 295).

[25] This approach assumed greatest impact in Germany (see von Oertzen 1976: 67). But provisions for collective bargaining were widespread across Europe after World War I; in fact, most countries established fora for cross-class mediation during the war. See comments on this in Lorwin (1954: 50); Middlemas (1979: 151); Horne (1991: 15); Turner (1992: 12, 52, 334–5, 369).

[26] For an analysis of corporatism on this pattern, see discussion of the Mond-Turner talks in Britain in the late 1920s in Currie (1979: 134).

[27] See brilliant contemporary analysis in Landauer (1925: 192)

on repressive models of material citizenship, designed to subordinate the labour movement to macro-economic policy making.[28] After 1918, therefore, a material conception of democracy became widespread at different points on the political spectrum, and this conception was centred on an idea of the citizen as an agent endowed with strong claims to material integration in the political system.[29]

Fundamental to corporatist constitutionalism was the fact that it integrated many political and economic actors directly into the political system. Indeed, it premised the legitimacy of the state on an intricately articulated and highly mediated construct of citizenship, based on the principle that the state should allocate political and economic rights to a range of actors across society in order to reduce inter-class conflicts and to solidify its own foundation in society. In this respect, World War I in fact led to an intensified realization of principles of inclusion embedded in the basic normative construction of national citizenship, and the corporatist political systems created after 1918 embodied attempts, initially, to ensure that national political institutions extracted their legitimacy from the full inclusion of the citizen. At the same time, however, corporatism integrated diverse social actors into the political system in their quality, not solely as formal citizens, but as adversaries in the industrial production process, and it sought to produce legitimacy for the political system by mediating the conflicts between citizens in the material, productive dimension of their lives. Owing to their widespread corporatist bias, European states after 1918 were forced to balance sharply divergent ideas of citizenship, and actors in different sectors of national society utilized their position within the political system, assigned to them under corporatistic arrangements, to demand very different entitlements and very different patterns of inclusion. Across Europe, organizations representing the labour movement viewed corporatistic citizenship as an opportunity to demand extended material rights. By contrast, leaders of organized business used corporatism to entrench more limited, monetary rights. As Marx had anticipated, therefore, the first emergence of mass democracy created a situation in which different social factions used rights inherent in citizenship to claim quite distinct, often logically opposed, sets of rights, and society as a whole became deeply polarized through the deep politicization of rival rights claims.

[28] Fascist corporatism began in economic and labour legislation introduced by Mussolini in the mid-1920s. But aspects of this were duplicated in most fascist states.

[29] For still illuminating reflection on this, see Halévy (1938: 95–133).

In most instances, national political systems in post-1918 Europe were not able to resolve conflicts between conflicting constructions of citizenship. Most states were unsettled, usually fatally, by the fact that they institutionalized conflicts between counter-posed sets of rights and interests, articulated with different models of citizenship. Before 1918, as discussed, most governments only possessed rudimentary systems of democratic representation, which were not equipped to conduct the far-reaching processes of class mediation, societal transformation and economic redistribution, to which the material conception of democracy realized after 1918 committed them. As a result, most democracies established after 1918 lacked a stable organizational form in which the national people could be integrated into newly expanded governmental functions. In most cases, the democratic experiments commenced around 1918 were unsettled after just a few years, as governing coalitions failed to establish consensus on the relative weight of socio-economic rights (welfare) and monetary rights (investment, accumulation rights). This became acutely visible as governments were split apart by controversies over fiscal arrangements after the Wall Street Crash of 1929, when, owing to capital withdrawal, governments lost the capacity to balance out rival claims and rival rights in relatively pacified manner.[30] At this point, the inherent tendency in national citizenship to expose society to a process of inclusive politicization, translating originally private rights claims into volatile political conflicts, became strikingly and acutely manifest, with systemically debilitating outcomes. At this point, most European states renounced the attempt to sustain cross-class coalitions and cross-class models of citizenship, which had originally informed their constitutional designs, and they dramatically switched preference towards the economically dominant actors in these coalitions.[31]

Fifth, despite the prognoses of more evolutionary theorists of democracy, the first emergence of the national population as a political agent around 1918 did not result in the more consolidated integration of the people, or even in the steady solidification of representative-democratic institutions.

[30] In Germany, the cross-class Grand Coalition collapsed in 1929/30 over differences in fiscal policy between constituent parties. This led to the end of democracy. On plans for reduced public spending and reduced taxation amongst Conservative elites in the UK, which were reflected in the formation of the semi-dictatorial national government of 1931, see Ball (1988: 156); Ewing and Gearty (2000: 237). As in Germany, the national government of 1931 in Britain was legitimated, even on the moderate Left, by claims that 'national crisis' required 'national retrenchment' (Currie 1979: 140).

[31] A notable exception is Sweden, where inter-group bargains, crossing lines of traditional class adversity, proved relatively solid (see Gourevitch 1984: 116).

On the second point, notably, the expansion of mass democracy around 1918 did not lead to the reinforcement of elected legislatures. On the contrary, it led to the transfer of directive power from legislatures to executives, and to the concentration of executive power in the hands of relatively closed political elites. As Weber and his followers had prophesied, mass-democracy, defined as a system of governance led and legitimated by popular parliamentary legislatures, did not long survive the transition to fully inclusive representation. In fact, the democratic widening of the electorate and the concomitant growth of government functions around 1918 almost invariably meant that the executive soon became the dominant branch of government.[32]

On the first point, further, the expansion of mass-democracy did not lead to the promotion of laws reflecting the wider social and economic interests of the majority of the population. Of course, some experiments in interwar democracy did yield important legislation for the promotion of material redistribution and broad economic amelioration. In the years following 1918, the basic structure of later welfare states was established in a number of societies, including Germany, Sweden and the UK.[33] More pervasively, however, the primary outcome of the first experiments in mass democracy was that large sectors of national populations were prepared to mobilize, often using military or paramilitary force, for political and economic initiatives that clearly favoured the interests, not of newly enfranchised social strata, but of historically dominant minorities. New post-1918 democracies in Austria, Germany, Italy and Spain (after 1931) all rapidly came under attack from intensely militarized social factions (widely associated with *Fascism*), which aimed to sabotage democracy and to replace it with extremely coercive governmental orders. These factions

[32] By 1925, executive prerogative had become a core instrument of legislation in Germany, and, by 1930, executive prerogative was the essential constitutional foundation of government. Notably, key economic legislation introduced by President Ebert in the economic inflation was introduced by executive fiat. In the UK, interwar elections were primarily designed not to represent the people, but to broker an inter-party mandate to support executive authority, a pattern which culminated in the suspension of competitive government in 1931. In Italy, the legislature was effectively eliminated as an independent organ of government in 1922. After 1933, government in Austria was placed on prerogative foundations, based on emergency legislation introduced in 1917. The authoritarian constitution of 1934 was introduced by decree. Across Europe, in fact, the interwar era was defined by the rapidly rising dominance of the executive branch.

[33] On Lloyd George's social policies as the basis of the British welfare state see Morgan (1979: 107–8). On the early development of a welfare state in Germany after 1918, see the standard account in Preller, discussing rising average income (1949: 155), introduction of the eight-hour day (1949: 210), and rising social insurance investment, up to 1930 (1949: 463).

served the protection of barely camouflaged elite prerogatives, but they nonetheless recruited heavily from working-class constituencies. After 1918, therefore, democratization brought a swift and radical turn away from democracy amongst social groups who supposedly stood to benefit most from democratic rule. Even countries that preserved some (partial and thin) vestige of democracy through the interwar era, such as the UK, veered away from conventional systems of representation, and they partly abandoned the competitive component of fully democratic politics.[34]

In addition, sixth, early mass-democratic societies typically lacked overarching national organizational structures, they were still largely dominated by local centres of authority and obligation, and their capacities for integration of mass-political forces were not strong. At one level, World War I brought a great leap forward in the nationalization of democratic political systems, linked to exponentially heightened governmental coordination of the economy and to the intensification of democratic competition between national political organizations.[35] Indeed, the military environment greatly intensified the basic nationalization of society. However, few societies in this period possessed political institutions that were robust enough to contain the politicization and polarization of society caused by mass-democratic mobilization and mass-democratic contestation over different rights. In most democracies that emerged around 1918, political institutions soon began to resort to more personalistic techniques of administration and consensus formation. In fact, the authoritarian polities that were established in the 1920s and 1930s usually reverted in part to a pre-modern polity type, and their leadership structures often relied on older patterns of patronage and favour to generate societal support. Under these regimes, political parties were only able to connect the different population groups in national societies to national institutions by co-opting local and traditional elites, and by entrusting these elites with responsibilities for social coordination between national institutional centres and regional constituencies.[36] As discussed, democracy first began to evolve

[34] See p. 329 below.

[35] For empirical analysis to support this claim see Caramani (2004: 197).

[36] This was especially the case in the authoritarian regimes created in the 1930s in Southern Europe. One commentator on Italy under Mussolini has observed that government was primarily conducted by 'para-state bodies' tending to coalesce with dominant economic and local actors (Bonini 2004: 101). Speaking of Spain under Franco, one important commentary explains how the fascist regime structure converged with ancient, local patronage-based modes of governance (López and Gil Bracero 1997: 137). Generally, interwar authoritarian regimes loudly proclaimed nationality as a founding principle of government. Indeed, the idea of the people as an entity transcending all internal divisions was crucial for

after 1789 through the ideological mobilization of the nation, and early democratic institutions invariably established their authority by invoking the nation as the author of public power. Factually, however, even after 1918, most early mass-democratic societies were only patchily nationalized, and they did not possess either the organizational mechanisms or the institutional infrastructure to consolidate the national people as a unified basis for government. In most societies, political institutions were unable to absorb the pressures triggered by the nationalization of political integration processes and political conflict, and they were not able to project a stable model of national citizenship to encompass and mediate the full set of conflicts existing in national society. As a result, early-modern localism soon reappeared beneath the surface of the democracies created in Europe after 1918, and it remained a dominant political influence until after 1945.

After 1918, in short, national political democracy emerged in Europe, for the first time, as a system of mass-political inclusion. Few societies reached a condition close to full democracy at this time, but most advanced markedly towards democracy. Although paradigmatically exemplified in Europe, in fact, similar processes of political construction can be observed in Latin America. The early processes of democratization and nationalization, which began around 1789 and which ran, at varying degrees of articulation, through the nineteenth century, gained sudden expression, explosively, in the political experiments initiated in and after 1918. Almost immediately after this expression, however, these processes were suspended. By approximately 1940, democracy had virtually disappeared from the global map. Democratization occurred around 1918 in a context marked by multiple, often mutually exclusive, patterns of citizenship, which directed acute social antagonisms towards newly constructed national democratic institutions. Moreover, democratization occurred in contexts in which states lacked organizational forms to absorb the intensified, often intensely conflictual, demands of enfranchised citizens. This meant that institutions struggled to withstand the national articulation of societal conflicts, and they collapsed in face of the pressures caused

the initial emergence of fascism as a movement, which occurred in Italy during and after World War I (see Procacci 1968: 165; De Grand 1978: 159). However, fascist states actually undid long-standing processes of socio-political nationalization. For example, one interpreter of Nazi Germany explains how the societal reality of the regime was determined by the endeavour of regional authorities to solidify their own positions, thus creating a highly centrifugal apparatus (Rebentisch 1989: 265). Democratic governments have usually been much more effectively in promoting the construction of nationalized societies. Indeed, the nationalization of society presupposes the existence of deep-reaching participatory organs.

by the integration of social groups with nationally politicized economic rivalries. Although the figure of the *citoyen* had acted as the construct that first underpinned the differentiation of the modern political system, after 1918, the *citoyen* appeared in an acutely politicized form that could not easily be incorporated in national political systems, and which prevented the stabilization of the political system as an integrative social domain. The impetus towards inclusion of the citizen that shaped the first rise of national societies ultimately culminated in a process that simultaneously accentuated both the particularistic and the homogenizing elements in citizenship, and which resulted in both the stabilization of the position of societal elites and the (often violent) eradication of non-dominant social groups. The intensification of national political inclusion through World War I was the primary explanation for each of these problems.

On these grounds, the period of accelerated democratization in interwar Europe, caused by military mass-mobilization in World War I, brought into sharp relief the essential insight of classical sociological theory concerning the nature of democracy: namely, *that democracy could not, without deep reduction, be centred around the will of the people*. This basic insight of early sociology acquired intensified relevance in post-1918 Europe, where national governments found themselves lacking unifying patterns of citizenship to support their already precariously balanced institutions. After 1918, most states were obliged to manufacture a construction of the citizen strong enough to transcend the acute divisions, linked to class-based, inter-party and regional distinctions, which existed between newly integrated social groups. In this setting, however, states were visibly unsettled by their endeavours to correlate their institutions with a deep-lying popular will and to make the people materially palpable in acts of government. Then, as mass democracies collapsed into authoritarianism, the patchwork form of elite pluralism typical of pre-modern, pre-national, socio-political structure became clearly visible beneath the inclusionary orders established through early national democracy. At this time, many national political systems renounced ideas of national citizenship altogether, reverting to reliance on more traditional local modes of coercion to galvanize societal support. Although interwar polities were based on the attempt to construct complexly mediated patterns of citizenship to support government, they were soon defined by the disappearance of the national citizen as a focus of legitimacy. Throughout interwar Europe, states were unable to construct modes of integration that allowed the people to act as a relatively stable subject, as legally included citizens, through the institutional organs of government. The more the political

system was centred on the people as a factually existing group of citizens, the more unstable democracy became, and the less securely the people were integrated in government. The original sociological intuition about the paradox of democracy thus became reality.

The underlying weakness of political subject formation in post-1918 democracies was clearly observed by legal theorists situated at the sociological end of interwar legal analysis. The primary claim in the works of Carl Schmitt, for example, was that post-1918 parliamentary democracy revolved around a fictional construction of the political subject of society.

For Schmitt, this projective aspect of democracy was expressed in the fact that theorists of parliamentary-democratic representation necessarily resorted to political idealism to support their claims. Such theorists, he argued, only managed to justify their model of democracy by constructing it around an imaginary people, endowed with fictitious ethical-consensual orientations and metaphysical propensities for rational behaviour, which could not be found in the conflictual reality of a modern class society (1922: 46). Above all, Schmitt argued that advocates of parliamentary democracy were forced to presume that members of national populations were naturally inclined towards relatively harmonious coexistence, and that their interests and prerogatives could be peacefully mediated into generalized legal form, facilitating their integration in the political order (1923: 45). When confronted with nations in their objectively existent, materially pluralized shape, however, parliamentary-democratic institutions struggled to produce objective laws that could assume general acceptance amongst all actors in their populations. These institutions typically proved incapable of resolving conflicts between the societal factions, which they had sought to integrate, and they merely provide an organizational form for rival social and economic interest groups (1923: 11). For Schmitt, in consequence, parliamentary-democratic institutions were invariably prone to crisis as they attempted to palliate the real social antagonisms that they internalized as they tried to secure legitimacy through inclusion of their national populations.

In addition, Schmitt argued that the projective, fictional aspect of parliamentary democracy was displayed in the fact that, although parliamentary institutions purported to derive legitimacy immediately from the will of the people, the organizational forms particular to parliamentary democracy in fact served actively to disaggregate this will. Such institutions – for example, delegatory chambers, parliamentary factions, political parties – were incapable of incorporating the will of the people in its cohesive totality, and they inevitably obstructed the integration of the people as a unified

political agent (1923: 19–20). Indeed, he claimed, such institutions had the unavoidable consequence that the people were subject, usually along fissures determined by class affiliation, to pluralistic division, parcellation and fragmentation, before they could be integrated into the political system. Parliamentary democracy, in short, could not be premised in the enactment of the will of a national people, and it could only ever give partial, unmediated expression to the interests of a given population.

On this basis, Schmitt came to the conclusion that the people could only be represented as an *absent force* in the parliamentary-democratic system (1928: 209–10), and a democratic system obtained greatest proximity to the will of the people if it renounced the attempt organically to represent the people through delegatory institutions. Accordingly, he decided that the legal apparatus of parliamentary representation had to be subordinated to provisions for plebiscitary elections, and only direct popular acclamation of political leaders could allow the actual will of the people to become visible (1928: 243, 1932b: 85–7). At times, in fact, he claimed that a system of commissarial dictatorship, legitimated by the symbolic approval of the people for a ruler, could be seen as more democratic and more democratically legitimate, than parliamentary democracy (1919: 136, 1927: 34). In other legal-sociological constructions of this time, the view also prevailed that emergent parliamentary systems lacked the institutional capacity to draw society together in a unified whole, and that democratic political subjectivity had to be constructed by means distinct from the typical institutions of democracy. In such cases, it was argued that democracies were required strategically to materialize the people to whom they attached their claims to legitimacy.[37]

2.2 The Transformation of Democracy

If the experiments in nationalized mass-democracy that began around 1918 met with catastrophic failure, political democracy finally – albeit still gradually – became a more securely established and increasingly widespread political form after 1945. Indeed, the underlying, socially formative trajectories of nationalization and democratization, which had been suspended in most societies after 1918, recommenced after 1945, and, in this setting, these processes experienced much more robust institutionalization.

[37] In 1928, Smend argued that the state obtains legitimacy partly through the 'integrational force' of political symbolism (1955: 163).

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To be sure, in the immediate wake of 1945, democratic states still formed a minority grouping in the international community. Self-evidently, the influence of the Soviet Union in Eastern Europe until the 1980s prevented the emergence of regular democracies in this region. Moreover, many new states created after 1945, especially in post-colonial Africa, were initially founded as nationalized democracies, but, as in Europe in the interwar era, their institutions lacked deep-lying social foundations, and they collapsed into one-party systems, almost invariably dominated by local elites or privileged social groups.[38]

To an increasing degree, nonetheless, after 1945, democracy gradually became a norm by which nation states were measured and legitimated, and there evolved a growing presumption that, in order to presume legitimacy, states should take democratic form. As a result, most states that were reconstructed, or which came into being, after 1945, were designed, at least officially, as democracies. This began in the immediate aftermath of 1945, with the foundation of new democracies in the FRG, Japan, India and Italy. This continued through decolonization in the 1950s and 1960s, and through the transitions in Southern Europe in the 1970s. Democracy then eventually became a global norm through the Latin American transitions of the 1980s, the Eastern European transitions of the 1990s and the African transitions of the 1990s and the first decade of the twenty-first century. These different processes of transitional polity building induced an effective *globalization of democracy*. Naturally, this does not mean that democracy exists everywhere. Clearly, non-democratic governance is currently prevalent in much of Central and East Asia, and many states classified as democracies contain authoritarian features. However, democracy is a global political form, and polities with no democratic features are rare.

There are several factors in the process of democratic globalization that began after 1945 which require particular attention, and which, like the failure of democracy after 1918, throw broad light on the essential foundations of contemporary democracy. Analysis of these factors again calls into question more classical explanations of democracy. However, it allows us to understand democracy in a global sociological perspective.

2.2.1 Full Inclusion

First, the years after 1945 witnessed the growth of political systems in which collective participation of citizens in the foundation of government,

[38] See for discussion of one example below pp. 402–5.

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and the ongoing inclusion of popular representatives in political processes, unmistakably increased. In fact, for the first time in world history, after 1945 national populations, acting as equals citizens, were able, step-by-step, enduringly to claim some responsibility both for the founding laws of their polities and for laws passed at a day-to-day level.

At the level of constitution making, this process varied from society to society. Some new democracies were created with only minimal popular consultation about the form of government. In many democracies created in the immediate aftermath of World War II, constitutional laws were imposed by external actors, often by occupying forces or organs of territorial administration.[39] In many post-colonial states, departing imperial actors were keen to ensure a pacted transition to democratic rule, and they only negotiated the terms of constitutional transfer with small coteries of hand-picked elite players.[40] The model of pacted transition reappeared later in Spain after 1975, and, by contagion, in different Latin American states (see Weyland 2014: 60). In some democracies established at a later stage, by contrast, democratic constitutions were created through wide-ranging consultation, linking the process of constitution writing to the participation of different societal groupings, and even to civil-society organizations.[41] Across the spectrum of democratic re-orientation, however, polities created through these separate processes made at least some claim to originate in the interests of a national people.

Most importantly, this period solidified the presumption that democracy should be a system of *full inclusion*. After 1945, few new democracies were created that endorsed franchise restrictions. Similarly, most polities that had already evolved partial democratic features prior to 1945 revised their electoral laws to ensure that full suffrage became commonplace, and economic privileges in voting allocations or constitutional influence were widely abolished. Examples of this are electoral reforms in the UK in 1948–50, removing all remaining electoral privileges, reforms in France in 1944–5 that guaranteed female suffrage, and constitutional reforms in Denmark in 1953, limiting the impact of established social privilege on legislation. Moreover, crucially, overt racial or ethnic discrimination in electoral provisions became unusual, and it was subject to broad censure.

[39] See below p. 312.

[40] For instance, the insertion of bills of rights in post-colonial constitutions was often promoted as a means to facilitate the peaceful transfer of power to new elites, guaranteeing protection for established interests. See general discussion in Parkinson (2007: 273).

[41] See pp. 434–7 below.

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Such discrimination survived in Canada until 1960, Australia until 1962, the USA until 1964/5 and South Africa until 1991–4; it was also fundamental to the state of Rhodesia created in 1965. However, such states formed a minority, and they were widely exposed to international pressure, of different kinds, to reform their electoral policies.[42]

2.2.2 *Full Nationalization*

Second, most democracies created in the processes of polity building beginning after 1945 witnessed the beginnings of a process of *political nationalization*, in which political authority was divided more evenly across the constituent memberships of national societies, and political institutions obtained inclusionary support from a widened range of social groups.[43] As discussed below, the globalization of democracy inevitably meant that new patterns of democracy began to emerge, some of which fell clearly short of the criteria normally used to define democracy. Political nationalization, giving rise to the even inclusion of national citizens, rarely became a fully consolidated reality. Nonetheless, most new democracies established in the decades after 1945 developed national political parties, articulated with social groups consolidated at a national level, and they were increasingly founded in reasonably uniform processes of collective national will formation, political integration and general representation.

Alongside this, further, societies that converted to some form of democracy during the waves of post-1945 transition usually experienced a process of *structural nationalization*. Through the nationalization of political institutions, the historically localized structure of societies was increasingly eroded, and societies tended, to an increasing degree, to converge around centralized institutions, such that private centres of authority lost their influence. This phenomenon is discussed more extensively below.[44] Suffice it to say here, however, that, in new post-1945 democracies, constitutions or high-ranking laws were introduced that limited the remnants of local, feudal traditions, and which made the legitimacy of legislation

[42] On the destabilizing impact of international censure in Rhodesia, whose legitimacy following its unilateral declaration of independence from the UK was very thin, see White (2015: 116).

[43] Note that Caramani identifies 1918 as the point in which, in Europe, political systems became nationalized (2004: 197). I agree with this, but my claim is that the moment of nationalization in 1918 resulted in institutional collapse, and states were not able to maintain stability in the face of their own nationalized structure and environment until after 1945.

[44] See p. 162.

contingent on nationally established normative systems. This was evident in political systems created in societies as diverse as Japan (1945–7), Italy (1948), the FRG (1945–9), India (1947–50), Bolivia (1952), Ghana (1957), Kenya (1960–3), each of which had historically been marked, to varying degrees, by low levels of structural unity.[45] In societies with older democratic lineages, local points of intersection between the governmental apparatus and members of society also became weaker.[46]

On this last point, certain variations need to be observed. In many cases, the institutionalization of national democratic representation after 1945 was only possible because democratic political systems were organized on a diffusely decentralized or federal model, permitting the coexistence of different regional groups beneath the normative order of the national legal system. In extreme cases, in fact, democratic political systems were only able to take root because they conferred high degrees of autonomy on regional groups defined by minority ethnic affiliation. This was especially common in Latin America, in which, as discussed later, eventual democratic consolidation often depended upon the recognition of multiple constitutional subjects, with distinct collective rights.[47] Nonetheless, such decentralization was usually linked to a parallel process of societal formation, in which political authority was attached to uniform legal norms, and the ability of regionally embedded actors and local elites to monopolize public power for purposes not formally sanctioned by national law was diminished.

Overall, the processes of democratization that occurred after 1945 gradually began to establish a basic condition of nationalization in domestic societies. That is to say, these processes began to construct a societal order in which national laws were created by national subjects, and different domains of national societies were integrated, relatively evenly, in the same legal system and the same political system. In these processes, consequently, a relatively solid and geographically stable model of the citizen became the defining source of legislation.

[45] See discussion of Germany and Kenya in Chapter 4 below. For other examples, measures introduced in Japan after 1945 removed the feudal 'house system' of family authority (Oppler 1976: 113). Measures introduced in Bolivia in 1952 removed feudal land tenure and created a national system of trade-union-based organization, which constructed a national pattern of citizenship (García Linera 2014: 198). Measures introduced in Ghana in the 1950s and early 1960s were designed to abolish chieftaincy and to create a unified national order (Rathbone 2000: 140).

[46] See for instance discussion of the USA below at p. 295.

[47] See p. 439.

2.2.3 International Law and National Sovereignty

Third, importantly, these overlapping dynamics of democratic inclusion and systemic nationalization took place in a broad legal environment, which profoundly reconfigured the concepts of national sovereignty and national citizenship developed through the earlier history of democratic theory and democratic practice. The emergence of national populations as powerful actors in the political system usually occurred through a process in which more classical ideas of national political agency were replaced by new patterns of primary legal norm formation. Indeed, secure democratization typically occurred in settings in which the assumption that the acts and demands of national citizens form the essential source of legitimate political order was strongly relativized. After 1945, most significantly, the global reproduction of democracy was closely tied to the growing power of international law and international organizations, and the importance of international law had a deeply consolidating impact, both normatively and systemically, on the emergent global form of democratic government. Particularly prominent in this context is the fact that the period after 1945 saw the promulgation of a number of instruments of international human rights law (with either global or regional reach), and these instruments promoted a distinct definition of democracy, which discernibly shaped the emergent constitutional form of both new and old democracies. Indeed, in many cases, these instruments constructed a meta-normative order for national democratic constitutions, providing for extensive cross-fertilization and normative interpenetration between the national and the international legal domains (see Shany 2006: 342).

For example, the primary documents of international human rights law introduced after 1945, notably the Charter of the United Nations (UN Charter), the Universal Declaration of Human Rights (UDHR) and later the International Covenant on Civil and Political Rights (ICCPR), all fostered a constitutional presumption that legitimate states should recognize the persons in their territories as holders of certain generalized rights. All these documents implied that states had a duty to provide protection for the singular/subjective rights of individual citizens. To some degree, these documents implicitly affirmed 'the participation of the individual in international law' as an agent 'possessing rights and freedoms directly rather than through the State as a conduit of individual protections' (Weatherall 2015: 190). In addition, more mutedly, these documents promoted rights-based government as a political ideal. At the very least, these instruments implied a global model of the citizen, in which citizens were viewed as endowed

with the same rights, across all borders, and which conferred legitimacy on acts of law in necessarily generalized fashion, insisting that laws of national states were to be proportioned to a global idea of the citizen as a holder of fixed rights. Together, these documents reflected the rise of a global legal system in which certain normative principles acquired legitimacy above national jurisdictions, originating in norms whose existence was increasingly independent of different nation states, national governments and national societies. Indeed, the original impetus towards the expansion of human rights law after 1945 was driven in part by the proceedings against war criminals in Japan and Germany, in which it was decided that certain norms had globally immutable authority, and individual persons representing their governments had singular responsibility in cases of egregious human rights abuses. On this basis, governments were imputed strict obligations regarding the promotion of human rights for individual members of their societies. From this time on, very slowly, it became accepted that national legal orders were, at least in principle, overarched by a system of higher norms, largely extracted from human rights law, by which states were morally obligated as constitutional subjects, and by which, in some cases, individuals were permitted to seek redress against their own governments.

Self-evidently, the international legal norms formalized after 1945 did not immediately become a global reality. The penetration of such norms into national societies was slow and fitful. Still today, clearly, this process remains incomplete. Moreover, these norms did not immediately construct a foundation for national democracy. It was not until the 1970s that human rights protection and democratization were clearly and unreservedly correlated.

One reason for the limited impact of international human rights law on democratic formation was that the realization of the democratic potential of international human rights law was decelerated by the intensification of the Cold War in the early 1950s. A further reason for this was that the wave of decolonization in Africa had a very ambiguous effect on the political effects of international human rights law. Over a longer period, the global consolidation of international human rights law was clearly induced, partially, by anti-colonial actions – especially by protests against apartheid in the 1960s, backed by UN Declarations and (eventually) by rulings of the International Court of Justice (ICJ).[48] However, during the period

[48] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21).

of decolonization itself, newly mandated heads of African states were usually (quite justifiably) very protective of their sovereignty, and they rejected external interference in their domestic politics. This tendency was underlined in quite simple terms by the Declaration issued by the summit conference of the Organisation of African Unity (Cairo 1964), which emphasized both the categorical nature of the right to national sovereignty and the inviolability of national borders. This sovereigntist outlook inevitably created a (still persistent) tension between the relative authority of collective rights to national sovereignty, exercisable by governments, and the singular rights of individual persons, located within national societies (Burke 2010: 26). Indeed, this outlook clearly weakened the domestic impact of international human rights, especially those of a political nature. At the end of decolonization in the 1970s, consequently, human rights law reached, globally, a singularly low ebb, as many African states refused to protest against atrocities in Uganda. At the same time, dictatorships were established in much of Latin America. Although constructed as systemic principles after 1945, therefore, human rights, especially those relating to collective political freedoms, did not acquire global political authority for roughly 25 years.

A further reason for the limited impact of international human rights law on democratic formation was that international human rights declarations and conventions did not immediately contain a full and unequivocal endorsement of democracy. In fact, owing to the democratic crises in interwar Europe, these documents expressed scepticism about the unrestricted exercise of popular sovereignty.[49]

In the first instance, most international human rights documents were focused on the rights of single citizens, and singular rights were promoted as the most essential focus of governmental legitimacy. The rise of human rights law, consequently, did not imply an unequivocally binding right to democracy. Importantly, the Council of Europe viewed human rights and democracy promotion as integrally linked. The European Convention on Human Rights (ECHR) did not initially contain an express right to democracy, but it was marked, programmatically, by a commitment to furthering political democracy, and by the assumption that the necessities of democratic society should act as guidelines in the implementation

[49] Tellingly, Lauterpacht, one of the leading theorists of the post-1945 human rights system, argued both that global human rights necessarily implied a 'limitation of the sovereignty of states' (1945: 211) and that the right to 'national self-legislation' was not 'rigid or absolute' (1945: 145). Instead of self-legislation, he saw the 'primary right of freedom', meaning single freedoms for individual agents, as the goal of international human rights law (1945: 145).

of ECHR norms. Article 3 of the First Protocol to the ECHR then declared a right to free elections. The Charter of the Organization of American States (OAS) also declared a commitment to promoting democracy (Art 2(b)). By contrast, however, the right to democracy in the UN Charter was – at best – more implicit, and the extent to which the UN instruments established a right to democracy is open to dispute. Art 21 of the UDHR declared a right to democracy, with full and free elections. However, this right was not expected to be enforceable. It was only later, in the ICCPR of 1966, that it was stated, in Art 25(b), that electoral participation is a binding basic right, and the ICCPR set out a series of further rights which prescribed, if not democratic, then at least liberal government structures, with rights-conscious legislatures, free judiciaries, gender equality and equality before the law.[50] Even in the ICCPR, however, the actual definition of democracy was rather vague (Fox 1992: 55).[51]

A particular complication surrounding the initial relationship between international human rights law and democracy arose from the fact that, as decolonization gathered global momentum, the UN emphatically proclaimed a categorical right to *national self-determination*. This right was expressed in the UN Charter, and it was more forcefully declared in the General Assembly in 1960.[52] Indeed, in 1980, the right to self-determination was described in the UN as part of international *jus cogens*.[53] The right to self-determination has obvious implications for democratic self-government, and promotion of self-determination is not strictly separable from the promotion of democracy. Classically, however, self-determination was usually interpreted, primarily, as a right to territorial sovereignty: that is, as a right to be exercised by nations within recognized state boundaries, and to be enacted by governments. This state-focused construction of the right to self-determination was largely shaped by the

[50] Note the initially relaxed interpretation of these provisions by the UN Human Rights Committee, which accepted that single-party states could meet global standards of democracy (Cassese 1995: 63).

[51] One account explains how the diversity of governmental orders amongst states in the UN 'precluded consensus on the specifications' of the right to political participation (Fox and Roth 2001: 327).

[52] General Assembly Resolution 1514 (XV) of 14 December 1960.

[53] Report on the Right to Self-Determination, E/CN.4/Sub.2/405/Rev.1 (1980). See discussion in Parker and Neylon (1989: 440). This idea had already appeared in earlier opinions in the ICJ. See the 1971 opinion of Judge Ammoun in the Advisory Opinion, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276. In this opinion, the 'right of peoples to self-determination' is 'not merely "general" but universal' (75).

fact that it was formulated in terms designed to stabilize newly formed post-colonial governments, and, above all, to avert minority secession in such contexts.[54] As a result, the right to self-determination expounded as *jus cogens* is most essentially, not a right to electoral participation, to which single persons lay claim, but a right of collective sovereignty, or even as a right to territorial decolonization (Burke 2010: 37). As such, the right to self-determination is not identical with a right to democracy.[55] Tellingly, the UN Declaration on self-determination in 1960 provided an entitlement for colonial peoples to form their own states, but it did not protect single or collective political rights for persons within newly formed territories (see Macklem 2015: 170).

It was only rather gradually and tentatively that the increasingly protected right to self-determination was interpreted internationally as containing, at least implicitly, a right to some degree of popular-democratic self-legislation. For example, in resolutions concerning apartheid in South Africa and Rhodesia, the UN closely linked self-determination, democracy and human rights. In 1965, the UN issued a resolution condemning the 'usurpation of power by a racist settler minority' in Rhodesia, which clearly implied that self-determination necessarily implied majority-based government.[56] The UN continually voiced criticism of South Africa, and it expressly supported the 'legitimacy of the struggle of the oppressed people of South Africa in pursuance of their human and political rights, as set forth in the Charter of the United Nations and the Universal Declaration of Human Rights'.[57] The General Assembly then suspended representation of South Africa in 1974.[58] In fact, in Art 1(3), the ICCPR itself (1966) declared that self-determination should be exercised 'in conformity with the provisions of the Charter of the United Nations'. The probable democratic nature of self-determination was again implied in the UN in 1970, in the statement

[54] After 1945, recognition of collective rights of minority peoples within established state borders was initially very cautious. See the general discussion of the attempt to avoid secessionist movements in early UN norms on self-determination in Thornberry (1989: 874, 882).

[55] These two meanings of self-determination were always kept separate (see Laing 1991: 240–2). One important observer states that in early instruments promoting national self-legislation the democratic aspect of consensus-based self-government was 'totally disregarded' (Cassese 1995: 72). A different account argues that the democratic implications of self-determination were 'abandoned' through the course of decolonization (Musgrave 1997: 97).

[56] Security Council Resolution 217 (1965).

[57] Security Council Resolution 311 (1972).

[58] On the status of apartheid-era South Africa as 'international outcast' see Geldenhuys (1990: 269).

that 'all peoples have the right freely to determine, without external interference, their political status'.[59] Later, the advisory opinion of the ICJ in *Western Sahara* (1975) might be taken to indicate that self-determination has democratic implications. This opinion construed self-determination as the right of a people 'to determine their future political status by their own freely expressed will'.[60] In some settings, the UN endorsed democracy more actively. For instance, UN bodies monitored pre-independence electoral participation in a number of African countries (Franck 1994: 86). The UN also prepared the foundations for democratic government in Namibia (Fox 1992: 577). By the 1980s, the UN Commission on Human Rights declared that popular participation in political decision making is a right.[61] By the 1990s, it was declared in organs of the UN that democratic self-legislation had become 'one of the essential principles of international law', with *erga omnes* force.[62] Notably, in Resolution 940 (1994) concerning Haiti, and Resolution 1132 (1997) concerning Sierra Leone, the UN Security Council demanded restoration of democratic government. Moreover, UN peacekeeping mandates increasingly often involved oversight of elections (Joyner 1999: 342). Later still, the ICJ pushed its reasoning further in the direction of the recognition of a right to democracy, implying that states are required to promote democracy under international human rights law.[63] As a result of these developments, some authors have argued that there now exists a *global right to democracy* (Cassese 1979: 157; Franck 1995: 85, 139; Benhabib 2012: 207).[64]

[59] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Res.2625 (XXV) (24 October 1970). One interpreter argues that the UN declarations concerning the 'internal aspect of self-determination' covered 'all elements of democracy' (Wheatley 2002: 231).

[60] Western Sahara, Advisory Opinion, ICJ GL No 61, [1975] ICJ Rep 12, ICGJ 214 (ICJ 1975).

[61] UN Commission on Human Rights, Resolution 1983/14 (22 February 1983).

[62] ICJ, East Timor, Portugal v Australia, Jurisdiction, Judgment, [1995] ICJ Rep 90, ICGJ 86 (ICJ 1995), 30 June 1995.

[63] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion, 9 July 2004.

[64] Such claims imply that national government obtains recognition and legitimacy through satisfaction of norms endorsed by the international community, which actively promote democracy (Franck 1992: 91). Some observers claim that the right to democracy has existed since 1948, with the passing of the UDHR (Cerna 1995: 290). Some observers even claim that democracy is now established as a norm with *jus cogens* status (Ezetah 1997: 509). These claims are surely exaggerated, and it is improbable to imagine that the international community as a whole might enforce sanctions against a state falling below common standards of democracy. Here I agree with Cohen (2008: 585). Yet, it is beyond doubt that the spirit of international human rights law, impelled by a sense of horror at the results

On these grounds, international law has only provided a rather uncertain imperative for democratic polity building. Despite these qualifications, however, in the longer wake of 1945, international human rights law became increasingly prominent as a basis for democratic institutional construction, and eventually it was only through the impact of international human rights law that democracy became globally widespread.[65]

First, the link between international human rights and democracy was due, simply, to the growing presumption in favour of democracy in international law. As discussed, even if such provisions are difficult to enforce, the right to electoral participation is set out in a number of international instruments. Although it is doubtful that we can identify a binding global right to democracy, moreover, some hard provisions of international law generate the presumption that legitimate government will approximate to the model of democracy. Some principles of international law with clear *jus cogens* authority, especially concerning racial equality, almost of necessity create a presumption in favour of political equality, which is typically realized in a democracy.[66] At the very least, therefore, international human rights contains an emphatic *orientation towards democracy*. Even if it falls short of *jus cogens* status, democracy is widely viewed as a precondition for the international legitimacy of governments.[67]

Second, the link between international human rights and democracy was due to the fact that different international instruments constructed a series of personal rights that, taken together, strongly implied a right to democracy. These rights included rights contained in the UDHR, such as rights to free expression, rights to justice, rights to free movement and rights to legal and procedural equality, which cannot easily be accessed outside a national political system with some resemblance to a democracy. In these respects, international law implied a norm of citizenship likely to be found in a democracy, and it promoted rights likely to be exercised under political systems ensuring relative legal and political equality.

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of combined authoritarianism and racism in the 1930s, implied a strong endorsement of democracy as a governmental ideal (see Bradley 2016: 49).

[65] As Przeworski has noted, most models of democratization do not consider this fact (2008: 305). Przeworski himself argues that international norms were of 'overwhelming' importance in the enfranchisement of women. My claim is that effective enfranchisement for both genders required international norms.

[66] On the particular significance of the global anti-apartheid movement as a driver in democracy promotion in the UN see Klotz (1995: 45).

[67] Apart from UN practices, this is reflected *inter alia* in the Helsinki Accords (1975), the 1990 Charter of Paris, the EC Guidelines on Recognition of New States in Eastern Europe and in the Soviet Union (1991).

International human rights law gained democratizing effect partly because it became enforceable through international organizations, so that human rights principles impacted widely on patterns of democratic formation. By the 1970s, the system of international law was relatively consolidated, and it had begun to assume material results. The major UN human rights covenants were approved in 1966 and took effect in 1976. Notably, the 1970s saw the intensification of monitoring by UN bodies, the establishment, ultimately of vital significance, of the Inter-American Court of Human Rights (IACtHR) (1978–9), and the propagation of the Helsinki Accords (1975), which provided important normative directives in Eastern Europe. At this time, the ICJ also began more consistently to develop jurisprudence with direct human rights implications.[68]

However, the democratizing effect of human rights law also became palpable in more diffuse processes, in which a broader range of actors endorsed international norms as a framework for democratic reorientation.[69] As mentioned, for example, the impact of international human rights was visible in the creation of post-authoritarian democracies after 1945, such as the FRG, Italy and Japan, in which international legal principles played a key role. This was also visible in the construction of post-colonial polities, such as India and Kenya, which, initially, were keen to signal their legitimacy through the domestic reproduction of international norms. Few democracies evolved in the decades after 1945 which did not to some degree adhere to the model of rights-based democracy promoted under international instruments. This tendency was then greatly reinforced in the transitions in Latin America and Eastern Europe in the 1980s and 1990s and the transitions in Africa in the 1990s and the early twenty-first century. In such cases, international law was not strictly imposed as a pattern of democratic formation. However, states possessed strong incentives to absorb global norms concerning democracy, and external norms

[68] In the *Tehran Hostages* case (1980), the ICJ based its ruling in part on human rights considerations.

[69] Yuval Shany provides an important account of some of the ways in which international and national legal norms intersect. He particularly mentions local remedies, complementarity, enforcement of arbitral agreements, and margins of appreciation (2007: 27–37). This is a helpful start, but it is not extensive enough. For other lines of transnational legal articulation, see Chapter 5 below. However, I agree with Shany's basic claim that these processes bring about an internationalization of national norms (2007: 9). See the classical discussion of this in Jessup (1956: 136). On the generally intensifying fusion between domestic and international law see Nollkaemper (2009: 75).

provided an immediate matrix for constructing the legitimacy of new governments.[70]

In conjunction, these processes had distinctive implications for the basic form of contemporary national democracy. In fact, these processes had the outcome that the most essential basis for democracy – the power of national self-legislation – was, in most of the world, pre-configured by the system of international law. Indeed, democracy only became globally widespread as the right to democracy was promoted by global norm setters. This transformed the basic theoretical architecture of democracy, as the determinant normative motivation for constructing and justifying democracy was reoriented from *freedom* to *compliance*. In this process, a model of citizenship was imposed on societies by external norm setters as a *remedy* for the crises of citizenship caused by national democratic formation after 1918, and it was deeply marked by its remedial content. Through the processes of post-1945 democratic formation, the extent to which the domestic political acts of national populations could assume founding significance for the institutional order of their society was restricted, and acts of national populations were subject to increasingly powerful prior normative limits by principles of international law. Progressively, in fact, international norms came to set a basic, widely reproducible normative template for democratic institutional construction. Indeed, basic institutions of national democracy were often expected to assume a pre-defined form, giving priority to particular rights of persons as the most essential preconditions of democracy (see McCorquodale 1994: 865, 876). As a result, the rising prominence of international human rights laws undermined certain classical principles of democracy. In particular, the prior authority accorded to international human rights law meant that democracies were generally stabilized around a clear, uniform normative design, in which the law-making capacities of the national people were subject to external construction. Of course, it is also widely noted that international law is not of itself inherently democratic, and organizations that create international law operate in tension with classical norms of democracy.[71]

On each of these counts, contemporary democracy has the paradoxical feature that it is not created democratically. In some respects, it originates in norms and norm-setting actions that are intrinsically undemocratic.

[70] To explain this see select literature on norm diffusion at note 109 below.

[71] James Crawford has sketched some of these points, noting *inter alia* that international law has weak democratic credentials because it privileges domestic executives; it dictates prior principles to national legislatures; it allows states to bind future legislatures; and it is difficult to apply to international organizations (1994: 117–18; 132).

2.2.4 *International Law and the Sovereign People*

One outcome of these processes, fourth, was that in many cases of democratic polity building after 1945, national populations only became sovereign citizens in their own societies as a result of externally imposed norms, and on the foundation of external constructions of legitimate sovereign power. The achievement of democratic sovereignty, classically conceived as the free act of the collective body of national citizens, was widely realized as the consequence of international normative directives and expectations. In fact, national populations only became sovereign actors under conditions in which sovereignty was exposed to constraint by prior global norms, and the content of sovereign legal acts was partly predetermined. International human rights instruments become the founding norm of most national polities, and they assumed the functions of primary authorization originally imputed to acts of sovereign populations.

In these respects, the correlation between the solidification of international law and the growth of democracy meant that national communities lost some autonomy in their domestic political acts. National democracy was gradually consecrated as a global legal form as part of a process in which external organizations imposed tighter normative controls on nation states in their domestic legislation, both constitutional and statutory, and nation states increasingly aligned their internal normative systems to internationally extracted directives.[72] In fact, in most societies, citizens became full citizens of nation states and citizens of global order at the same time, and democratic citizenship became widespread as national citizenship internalized principles declared in international law. In this respect, citizens themselves acted as points of filtration, through which global norms entered national legal systems, often heightening the obligations placed on national political actors. As discussed below, this process of transnational democratization followed a variety of paths.[73] Broadly, however, after 1945 legal norms ordained by acts of national will formation were necessarily relativized. Where such norms deviated from shared human rights constructions, they slowly became open to challenge by individual citizens on grounds provided by higher-order international norms.

[72] See discussion of Germany below. Note, similarly, that drafters of the Indian Constitution were strongly influenced by post-1945 international discourses on human rights (see Chaube 2000: 159).

[73] See Chapter 4 below.

2.2.5 *International Law and Democratic Institutions*

A further result of these processes, fifth, was that, in the institutional architecture of new democracies, the classical relation between branches of government was revised, and the institutions conventionally intended to give expression to the will of the national people lost some of their importance.

In the early democratic experiments of the eighteenth century, the idea was prevalent that democratic self-rule was most effectively guaranteed through the separation of powers within the state, and that in any political system centred on the separation of powers all branches of government needed to emanate directly from the people. In general, this theory was not very effectively realized, and it was subject to great variation in different societies. For example, the separation of powers in the USA followed a quite specific course, and the judiciary played a much more powerful role in the construction of American nationhood than in post-1789 Europe (Lacroix 2010: 201). In the French Revolution, however, great care was taken to promote the supremacy of the legislative body, which was emphatically proclaimed as the primary organ of the sovereign people (see Troper 1973: 35, 58, 92, 176, 205; Achaintre 2008: 329). The constitutions of revolutionary France were designed, in particular, to ensure that the judicial branch operated within strictly defined normative parameters, and it could not arrogate powers and enact interests that pertained to the legislative branch (Lafon 2001: 102). As discussed, moreover, democracy eventually took shape, after 1918, on a pattern that very greatly privileged, not the legislature, but the executive branch of government. To be sure, this period saw a gradually increasing interest in the judiciary as an apparatus able to bring additional protection to democratic institutions. This was reflected in the constitutions of Austria and Czechoslovakia established after 1918, both of which provided for Constitutional Courts, albeit still with limited competences. A rudimentary system of judicial control was also established in the German constitution of 1919. Generally, however, the constitutions of this period remained defined, at least conceptually, by the notion that the vertical linkage between a parliamentary legislature and a strong executive was the most secure pattern of democratic organization, giving full expression to the principle of popular sovereignty.

After 1945, the basic principles regarding the separation of the powers in classical democracy, rooted in the strict idea of national sovereignty, experienced far-reaching revision, which was integrally determined by the rise of international human rights law. Overall, the rise of a global system of human rights, which pre-constructed sovereign legislative acts, meant

that legislatures gradually lost influence as primary organs of legal formation. In particular, domestic judicial institutions acquired greatly increased importance, as they were required to give effect to norms contained in, or at least extracted from, the global legal system, and they acquired greatly increased importance on this basis. Indeed, in post-1945 polities, domestic courts often evolved as structural links between national law and the international legal system, locking the national constitutional order into a wider, internationally overarching legal order, and proportioning domestic legislative practices to internationally pre-defined norms.

This institutional transformation of democracy was most evident in the fact that, in the longer wake of 1945, most new democracies established constitutions granting far-reaching powers to institute Constitutional Courts, with authority to review legislation for compliance with constitutional norms. This meant that, in some cases, Constitutional Courts acquired the position of *co-legislators*, policing the acts of democratically mandated assemblies, and ensuring that legislative and executive powers were exercised within strict procedural and normative limits. The rise in the authority of Constitutional Courts was strongly connected to the growing importance of international law, and such courts were often assigned the duty to ensure that norms defined at the international level were recognized and reflected in domestic legislation. This tendency is clearly exemplified in the new democracies created after 1945 in the FRG, Italy, Japan and India. In these settings, typically, constitutions were created which internalized international human rights law in domestic law.[74] Moreover, such new Constitutions established a strong independent judiciary, and Constitutional Courts, or powerful Supreme Courts, quickly assumed the power to hold other branches of government to account in light of international norms.[75]

In this context, the basic model of contemporary democracy, and, indeed, the basic model for democracy as a globally sustainable institutional order, was first fully consolidated in the allied-occupied Western zones of Germany. Here, tellingly, a pattern of democracy was created in which the people *did not* create the essential order of the state, and the people *did not* act as a constituent power. On the contrary, after 1945, constitution-making acts in Western Germany were formally limited by

[74] See below pp. 312–4.

[75] In post-1945 West Germany, for example, the drafters of the *Grundgesetz* were clear that a strong independent judiciary, able to scrutinize laws and to protect individual rights, was prescribed by the allied powers (Säcker 1987: 268).

certain normative ground-rules, set out by external military bodies and based on international preconditions. Further, the emergent corpus of international human rights law formed a de facto pre-constituent power in this setting, pre-structuring individual decisions regarding the design of the constitution of the nascent state of the FRG, and pre-defining the overall scope of constitutional authority.[76] The impact of external norm providers was especially evident in the presumption that the new constitution of the FRG would establish a powerful Constitutional Court, with powers of constitutional review, and that the competences of the court would be linked to the ongoing protection of internationally defined human rights. Of course, Germany is usually seen as a late democracy, with an ingrained tradition of hostility to democracy.[77] In fact, however, Germany actually set the parameters, globally, for most effective processes of democratic state building. It was only when the German model of democracy – based on internationally pre-formed constituent power, strong obligations to international law, and robust judicial authority – was consolidated that democracy became a global political form.

The pattern of democracy building that developed in the decades after 1945 was marked by important variations. In some new democracies, international law was allowed to assume direct effect in national judicial rulings, even to the degree that it could shape the content of national constitutions.[78] Few states created immediately after 1945 ascribed such authority to international law. However, by the 1980s, many countries had witnessed a broad judicial arrogation of authority, in which courts typically based rulings, often of a transformative nature, on international law. Ultimately, in some societies, the functions of Constitutional Courts in overseeing compliance between domestic and international law were transferred to distinctive non-judicial institutions, which were designed to prevent conflicts between these two legal domains before they become manifest in open judicial controversy. In Brazil, indicatively, the department of the Federal Attorney General has established representatives in all federal ministries to ensure that all new acts of legislation are compatible

[76] The authority of international human rights law in the FRG was established before the *Grundgesetz* was written, and the principle that 'the general rules of international law' would form an 'integrating component of federal law', creating 'immediate rights and duties for all inhabitants of the territory' was settled prior to constitution making. The same applies to the principle that the Constitutional Court would be the 'Guardian of the Constitution' (Constitutional Commission of the Conference of Minister Presidents of the Western Occupation Zones 1948: 23).

[77] See lengthier discussion below p. 326.

[78] See below p. 342.

with international law and, by extension, with rulings of international courts. Moreover, this department scrutinizes decisions citing international law in state courts to prevent conflicts with internationally accepted norms. Special officers are therefore positioned at many institutional levels of the federal polity to ensure that international human rights law is consistently applied. In Russia, some new laws and draft legislation are scrutinized by a separate academic institution, the Institute of Legislation and Comparative Law under the Government of the Russian Federation, one of whose functions is to ensure compliance of domestic legislation and executive acts with international law.

2.2.6 International Law and Domestic Sovereignty

In addition, sixth, a further consequence of these processes is that states lost their monopolistic position in defining the basic normative grammar for their societies in which they were located. Increasingly, states operated within contexts in which high-ranking norms entered society from multiple sources, some based on national authority, some based on international law, some based on mediated exchanges between national bodies and international courts. Of course, historically, national states had always been situated in complex, pluralistic legal orders, and the claim of national states to determine the entire legal structure of society was always aspirational.[79] After 1945, however, it was increasingly accepted that sources of authoritative law could penetrate national societies from many points, and that inner-societal actions were structured through a broad range of norms. Public law was no longer anchored in unifocal constructions of the citizen, and citizens could claim rights and freedoms from many different sources.

On each of these counts, the spread of democracy as a mode of national political organization after 1945 depended on the attenuation of some key principles of classical democracy and classical democratic constitutionalism. Generally, in fact, it was only after the renunciation of the core institutional assumption of democracy – namely, that the will of the people, acting as an aggregate of citizens, sets the foundations for national political order, and is then continuously enacted through an elected legislature – that

[79] As discussed, this was due to the fact that, historically, states were always components within a pluralistic social landscape. However, it was also due to the fact that states operated in legal environments in which much law, especially in the realm of private law, was made by actors outside the state (Jansen 2010: 49).

democracy became a broad, consolidated, and ultimately *global* political form. Beneath the emergent process of global democratic formation after 1945, it became visible that the growth of democracy was driven by factors that were not envisaged in earlier democratic theory, and the primary categories of classical democratic theory were not easily able to account for the modes of agency which underpinned democracy in its eventual global character. Democratic systems that actually became reality after 1945 deviated substantially from classical constructions of democratic formation. In particular, the global emergence of democracy after 1945 was most strongly determined, not by popular political activism or citizenship in national societies, but by the *incremental rise of a global legal system*, and the constitutional basis for democracy resulted from interaction, not between factual citizens, but between national and global law. Democracy, in other words, developed for reasons that were not primarily connected with democracy, and it was created by patterns of agency that acted, essentially, as functional equivalents to the constructs of political subjectivity in classical democracy.

2.3 National Democracy and the Global Legal System

After 1945, a legal system began to evolve which was produced through interactions between organizations, often with either judicial or legal norm-setting functions, located at different points in global society. This legal system disconnected itself from national legal-political orders, and it acquired a relatively invariable form both within and across different national societies, increasingly overarching and incorporating different national legal systems. After 1945, moreover, a legal system began to emerge which was capable of producing justification for legal rulings and legitimacy for political institutions on global legal premises, which were located above national structures of legitimacy. In particular, after 1945, a legal system progressively developed which attached particular legal authority to individual human rights, which were imputed to all singular persons in all societies, simply as subjects of law, and which were applied as sources of authority for actions and decisions by institutions in different parts of global society. In its centration on human rights, the legal system as a whole entered a process of *intensified differentiation*, *intensified inclusion*, and *intensified global extension*. The legal system expanded beyond the limits of national societies by extracting a source of legitimacy from single persons, located in all spheres of global society, and it began to assume global authority, uniformity and extension

by isolating individual persons – as rights holders – as its primary point of reference. Eventually, this reference to singular rights holders meant that the global legal system internalized a relatively autonomous source of legitimacy for legal norms, and it was able to assume a broadly consistent form, to presume broadly analogous principles of legal validity, and to produce broadly similar binding norms in different regions of the world. In this process, the primary reference for the production of law was, not the citizen as political agent located in national society, but the generic singular citizen, constructed as a holder of universal rights. Once it began to construct its authority around this generalized model of the citizen, the legal system was separated, globally, from more classical, nationally embedded sources of legitimacy, and it acquired a norm for authorizing laws that was not attached to particular decisions, to particular locations or institutions, or to particular patterns of agency and participation. Of course, the global legal system did not become a globally differentiated entity in a short period of time, and it took decades until the legal system, integrating institutions and assuming authorization at national and supra-national level, was fully formed and fully autonomous as a global order. The switch from the national citizen to global human rights as the primary source of legitimacy for law which occurred after 1945, however, clearly marked the moment of take-off in a longer process of global legal-systemic differentiation.

This rights-based differentiation of the global legal system can be observed in a number of different processes.

2.3.1 Jus Cogens

The differentiation of the global legal system can be seen in the projection of certain human rights as principles with *jus cogens* authority, placed above other norms of international and national law. The construction of norms with this rank in a global legal hierarchy began in effect shortly after 1945 – notably, in the Convention on the Prevention and Punishment of the Crime of Genocide (adopted 1948). This process was then implicitly solidified both through rulings of the ICJ in the 1960s and the early 1970s. Importantly, the ICJ did not develop a conventional body of human rights jurisprudence until much later than this, and the extent to which it can pronounce on human rights questions is still subject to limits. However, at least in a standard-setting dimension, the ICJ articulated human rights norms from an early stage, and, soon after its establishment, it began to develop the idea that there are human rights that reflect an international

'community interest' (Simma 2013: 589).[80] As early as 1949, the ICJ declared that certain general normative obligations were to be derived from 'elementary considerations of humanity'.[81] Subsequently, judges on the ICJ began to propose the theory that norms with *jus-cogens* standing formed something close to a global constitution, which cannot be changed, in positive fashion, through inter-state agreements, and to which the 'law concerning the protection of human rights may be considered to belong'.[82]

Defined strictly, human rights comprehended as *jus cogens* may be quite limited in nature. For example, such norms may clearly be seen to incorporate the rights of protection from torture, slavery, racial oppression or apartheid, use of force, aggressive war, piracy and crimes against humanity (see Bassiouni 1996: 68).[83] However, *jus cogens* has been widely subject to increasingly expansive construction. As discussed, *jus cogens* norms are widely seen to include rights of self-determination. Many courts now argue that the right of access to court is part of international *jus cogens*.[84] Some human rights courts have deliberately expanded the interpretation of *jus cogens*, asserting, for example, that 'a person's dignity and physical integrity' are protected by *jus cogens*,[85] and that the 'fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*'.[86] Such claims are not fully realistic; even the most basic principles of *jus cogens*, such as the prohibition of torture, are not robustly

[80] For an ICJ ruling stressing the status of human rights as principles with *erga omnes* force see Case Concerning Barcelona Traction, Light, and Power Company, Ltd [1970] ICJ 1.

[81] *Corfu Channel, United Kingdom* v. *Albania*, Judgment, Merits, ICJ GL No 1, [1949] ICJ Rep 4, ICGJ 199 (ICJ 1949), 9 April 1949.

[82] Judge Tanaka (Dissenting Opinion), *South West Africa, Ethiopia* v. *South Africa, Second Phase*, [1966] ICJ Rep 6, ICGJ 158 (ICJ 1966), 18 July 1966.

[83] Judge Dugard expressed the separate opinion in the ICJ in 2006 that norms with *jus cogens* standing are a 'blend of policy and principle'. He claimed that they 'affirm the high principles of international law', including 'the right to be free from aggression, genocide, torture and slavery and the right to self-determination'. These norms 'enjoy a hierarchical superiority to other norms in the international legal order': Armed Activities on the Territory of the Congo (New Application: 2002). (*Democratic Republic of the Congo* v. *Rwanda*), ICJ Reports 2006, Separate Opinion Dugard.

[84] See 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*.

[85] IACtHR, Case of *Caesar* v. *Trinidad and Tobago*. Judgment of 11 March 2005.

[86] IACtHR, Case of *Yatama* v. *Nicaragua*. Judgment of 23 June 2005. Other courts have asserted a long catalogue of rights with *jus-cogens* standing, including rights to property and religious freedom. See the Greek Supreme Court case, *Prefecture of Voiotia* v. *Federal Republic of Germany* 11/2000 (288933) (4.5.2000).

protected, and they have often not stood up to state immunity challenges.[87] Nonetheless, the catalogue of rights understood as having *jus cogens* status extensive potential reach, and it implicitly contain some rights of individual and collective autonomy and dignity. In an early authoritative discussion of *jus cogens*, it was claimed that breaches of such norms 'refer to cases where the position of the individual is involved, and where the rules contravened are rules instituted for the protection of the individual' (Fitzmaurice 1958: 40).

Especially important in the concept of *jus cogens* is the fact that it is conceived as a normative order standing separate from the legal systems of national states, and requiring elaboration through jurisprudential methods and perspectives that states do not possess. In other words, *jus cogens* is law, not of states, but above states, to which all states are subordinate. To some degree, of course, this can be said of all international human rights law. For practical purposes, obligations set out in the UN Charter are often considered to have, if not *jus cogens*, then at least *erga omnes* force, and fulfilment of such rights is a precondition of membership in the international community of states (MacDonald 1987: 144; Van der Vyver 1991: 26; Weatherall 2015: 105). As early as 1948, in fact, the ICJ declared that, to be a member of the UN, a state needs to 'accept the obligations of the Charter', implying that the Charter has *erga omnes* force.[88] More recently, however, the principle that *jus cogens* lies in a normative domain that is categorically distinct from the law of states has acquired emphatic support in different judicial fora.

For example, the Inter-American Commission on Human Rights has proposed a definition of *jus cogens* as a 'superior order of legal norms, which the laws of man or nations may not contravene' and as the 'rules which have been accepted, either expressly by treaty or tacitly by custom, as being necessary to protect the public morality'. On this account, it is distinctive for such norms that they possess 'relative indelibility'. Indeed, on this account, norms of *jus cogens* 'derive their status from fundamental values held by the international community, as violations of such peremptory norms are considered to shock the conscience of humankind and therefore bind the international community as a whole, irrespective of protest, recognition or acquiescence'.[89] In a recent report on the meaning

[87] See ECtHR, *Al-Adsani* v. *the United Kingdom* [GC] – 35763/97. Judgment 21.11.2001; ECtHR, *Jones and Others* v. *The United Kingdom* Nos 34356/00 and 40528/06 14 January 2014.

[88] Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion of 28 May 1948, I.C.J. Rep. (1948).

[89] *Domingues* v. *United States*, Case 12.285, Report No. 62/02, 22 October 2002.

of *jus cogens*, the UN Special Rapporteur clearly separated such norms from inter-state acts, explaining that 'the existence of a *jus cogens* norm' is mainly to be determined 'on the basis of customary international law' instead of on the grounds provided by treaties.[90]

Implicit in these accounts is the claim that *jus cogens* is best interpreted by courts and quasi-judicial bodies with an international perspective, able to perceive and interpret the highest norms of global society. Paradigmatic for this construction of *jus cogens* is a declaration of the IACtHR, which defined its own role in the following terms:

> It is the courts that determine whether a norm can be considered *jus cogens* … Such norms establish limits to the will of States; consequently, they create an international public order (*ordre public*), and thus become norms of enforceability *erga omnes*. Owing to their transcendence, human rights norms are norms of *jus cogens* and, consequently, a source of the legitimacy of the international legal system. All human rights must be respected equally, because they are rooted in human dignity; therefore, they must be recognized and protected based on the prohibition of discrimination and the need for equality before the law.[91]

At the heart of this interpretation of *jus cogens* is a direct and systematic link between global law and individual persons, which implicitly cuts through and relativizes the powers of sovereign nation states.[92]

2.3.2 Human Rights Courts

The differentiation of the global legal system has also become visible in the increasing facility with which individual persons are able to present cases before international human rights courts and commissions. By the last decades of the twentieth century, individual persons in most national societies in Europe, Latin America and Africa were able, with some reasonable hope of success, to appeal directly to international courts and commissions in cases of human rights violation.[93] In other parts of the

[90] See Special Rapporteur on *Jus Cogens* (2017:30).

[91] IACtHR, Advisory Opinion OC-18/03, 17 September 2003, Requested by the United Mexican States. For a theoretical position close to this see Brudner (1985: 253–4).

[92] See overlapping discussion in Weatherall (2015: 135, 172).

[93] See widening of rules on individual standing in the Latin American system in IACtHR, Case of the *Pueblo Bello Massacre* v. *Colombia*, Series C No. 140, Judgement of 31 January 2006; Case of the *Saramaka People* v. *Suriname*, Judgment of 28 November 2007 Case of the *Saramaka People* v. *Suriname*. Judgment of 28 November 2007. One judge on the IACtHR even claimed that 'effective recourses under domestic law, to which specific provisions of human rights treaties refer expressly, are part of the international protection of

world, access to global human rights law was more difficult, but still possible through international monitoring bodies and other norm setters. Moreover, most international courts endeavoured to create wide rules of standing to link global law immediately to single persons in national societies. Of great significance in this process was the creation of the International Criminal Court, which, although not created by a general binding UN regulation, acquired powers of jurisdiction relating specifically to individual citizens in national societies. In each instance, there emerged a direct and systematic legal nexus between global law and the national citizen.

2.3.3 Human Rights Corpus Juris

The differentiation of the global legal system is also manifest in the fact that the courts attached to the UN system and the courts linked to the ECHR and, later, to the American Convention on Human Rights (ACHR) were able to produce norms in self-authorizing fashion, typically from within a general canon of human rights law. As a result of this, the system of global law experienced a substantial extension, and international legal bodies were able to produce and reproduce law on independent foundations. Naturally, different courts developed separate bodies of jurisprudence. However, various international courts contributed in distinct ways to the establishment of a free-standing global legal order, typically extracting authority from human rights.

As mentioned, tellingly, the ICJ, although not created as a human rights court, has utilized human rights as important elements in its rulings.[94] Indeed, at a very early stage in its operations, it implicitly construed some human rights as reflecting a common global interest, and as separate from the interests and motivations of individual states.[95] Importantly, in 1971, in a case with important human-rights implications, judges on the ICJ stated that they had a duty to contribute interpretively to the broad formation of a canon of international law, stating that an 'international instrument

human rights', Separate Opinion of Cançado Trindade in IACtHR, *Case of the Dismissed Congressional Employees. (Aguado-Alfaro et al.)* v. *Peru*. Judgement of 24 November 2006.

[94] One informed observer has stated that the ICJ now has 'no competition' in the 'international protection of human rights' (Simma 2013: 601). For examples see Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo* v. *Uganda*). Judgment of 19 December 2005; Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004.

[95] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951.

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has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation'.[96] Analogously, the European Court of Human Rights (ECtHR) has commonly defined itself as the promoter of a 'public order' for Europe, and it conceives human rights as binding constitutional principles for all Europe.[97] The IACtHR has repeatedly presented itself as a creative participant in the interpretation of the '*corpus juris* of the International Law of Human Rights', and it has shown distinctive freedom in establishing principles with international authority.[98]

2.3.4 Treaties

The differentiation of the global legal system can be seen, further, in the fact that some human rights, as part of *jus cogens*, are defined as an inviolable normative horizon for the establishment of inter-state treaties. This was reflected in the Vienna Convention on the Law of Treaties (1969), in force from 1980, in which the expectation was expressed that all inter-state treaties should comply with certain general norms of international law. Although not expressly formulated as rights, these norms include the higher-ranking principles constructed in UN instruments. This meant that treaties were authorized on grounds independent of the states that were party to them, and all states that were signatories to treaties were expected to recognize binding obligations regarding human rights.

2.3.5 Domestic Courts

In addition, the global differentiation of the legal system is evident in the fact that courts within many national polities have acquired the authority directly to apply human rights norms, partly based on international instruments, in order to act against the executive branches of their national governments. This means that many national governments are increasingly subject to appeal by individual citizens, using international law either directly or indirectly. In fact, owing to the increasing force of international human rights systems after 1945, domestic courts have

[96] Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276.

[97] See for example *Loizidou* v. *Turkey (Preliminary Objections)* – 15318/89. Judgement 23.3.1995.

[98] The IACtHR construes itself as the guardian of a 'corpus juris of international human rights law', which, on its own account, 'comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations'. This view is set out in IACtHR, Advisory opinion OC-16/99 of 1 October 1999).

often been required to collaborate with international courts in creating and giving reality to different international instruments. This means that courts at both levels gradually became co-players in the formation of a broad transnational legal order.[99] Eventually, many domestic courts promoted the presumption that they had an obligation to contribute to the development of international law, at least within the horizon of their own societies, so that both national and international courts acted together to lock national states into a legal structure, a diffuse *corpus juris*, which was not created by national norm setters.[100] In consequence, national courts acquired responsibility for interpreting international law in their own societies, and for measuring the acts of coordinate branches of government against principles originally derived from international treaties and conventions. As a result of this, in turn, the acts of elected legislatures became increasingly proportioned to norms stored in and prescribed by judicial bodies, and actors within national judicial systems were able to project strict normative constructions for the acceptable use of political power. This again meant that national will-formation was intrinsically limited by fixed legal principles of non-national derivation. In this process, notably, national courts increasingly took notice of rulings in other national courts, and inter-judicial borrowing became a common practice, induced partly by the underlying jurisprudential congruence of national legal systems based on shared expectations regarding human rights.[101]

Through these processes, human rights law was formed as a set of recursive principles, by means of which the global legal system was able to assume and to sustain its extended and differentiated position in global society, marked by increasing inclusionary authority. The growing salience of human rights law meant that the global legal order acquired a relatively autonomous normative basis, constructed by a number of loosely connected norm setters, and it was able internally to generate higher norms to regulate interactions that occurred above, between and, eventually, *within* national states. By the 1980s, it was widely accepted that international law, founded in human rights, was normatively independent of the states that created it, and it was produced primarily by actors within the global legal

[99] For different accounts of this see Scelle (1932); Jessup (1956); Koh (1999: 1411); Roberts (2011: 68, 69, 80).

[100] One early account states that domestic courts operate 'at a peculiarly sensitive point where national and international authority intersect', constructing law from two sources (Falk 1964: 170).

[101] See examples below at pp. 244–8.

system.[102] By the late 1990s, the direct connection between international legal order and the individual citizen had become increasingly robust, and international norms were solidly institutionalized within national societies. Sociologists of human rights institutions have documented the exponential growth of bodies protecting human rights at a national level in the late twentieth century, which they describe as a 'human rights revolution' (Koo and Ramirez 2009: 1326).

Overall, the core principles of post-1945 international law – namely, that the individual person stands as a point of imputation for some inviolable rights, and that all persons have a right to an effective remedy in cases where such rights are abused – meant that a clearly global legal system was able to develop, which did not rely solely on individual treaties or formal acts of state for its existence and enforcement. Within this global legal framework, today, international courts and semi-judicial bodies routinely sanction national states in order to protect certain core individual rights, and, although not always successful, the protection of individual rights is widely accepted as a global legal function. One leading judge on the IACtHR has spoken extensively of the creation of a global legal order that leads to an 'emancipation of individuals from their own State'. This legal order is seen as resulting from the fact that the 'right to access (lato sensu) international justice has finally crystalized as the right to have justice really done at the international level'.[103] To be sure, this claim is overstated. Yet, it is not devoid of truth. Moreover, domestic courts routinely interact with international courts to configure the normative fabric of their own societies. After 1945, therefore, the lateral transnational nexus between single human subjects, defined as holders of rights, formed a central impetus for the evolution of a global legal system. This system was gradually constructed as a relatively autonomous, self-reproductive order of norms, distinct from classical political institutions, positioning national citizens immediately within a transnational legal-normative order.

This process of legal formation, defined by the disembedding of the law as a global system, had deep and pervasive consequences for the development of national democratic institutions. In fact, the globalization of democracy and the global differentiation of the legal system emerged, temporally and causally, as two closely linked occurrences.

[102] This is reflected in the increasing presumption in favour of a right to democracy discussed above, which implies that states have to create themselves in a form that fits an overarching normative order.

[103] IACtHR, Case of the *Sawhoyamaxa Indigenous Community* v. *Paraguay*. Judgment of 29 March 2006.

As mentioned, the defining features of democracy after 1945 were integrally shaped by the fact that national political institutions became partly fused with institutions in the global domain, and partly, at a fundamental level, legitimated by norms originating outside national societies. Although physically situated in national societies, in fact, national legal and political institutions were increasingly defined by interaction with global legal bodies, and they formed integral parts of the global legal system. Decisions of national bodies could not easily be separated from norms distilled from their interaction with international bodies. Above all, citizens of national societies were increasingly pre-defined by international law, and they held rights, and assumed legal form, which were originally defined under international law. Indeed, in more extreme cases, the consolidation of national democracy was only possible because persons and institutions extracting authority from the international system assumed responsibility for overseeing the formation of democratic institutions.[104]

This general transformation of democracy has led many observers to suggest that the period after 1945 began to witness the rise of a *world polity*, or even that it created the rudimentary foundations for a global political system or a global state, assuming regulatory authority for exchanges in global society as a whole. In fact, the idea has become widespread in certain avenues of political inquiry, especially in international relations, cosmopolitan political theory, and some lines of global sociology, that national democracies are integrated into a global political order.[105] The global transformation of democracy, however, was not induced by the emergence of a world *polity*. On the contrary, this process was shaped by a relative diminution of the importance of strictly political institutions in relation to legal institutions, and it meant that political institutions forfeited their claims to primacy in the global ordering of society. In fact, the period after 1945 witnessed, not the rise of *world politics*, but the rise of *world law*. At the core of this process was the fact that national states

[104] See discussion in Chapter 3 below.

[105] For different versions of this position see Meyer (1980: 131), arguing for the existence of a 'world polity' as a 'decentralized polity', based around a system of rules dictating state behaviour; Wendt (2003); Held (1991: 165, 1996: 354, 1997: 97); Boli and Thomas (1997: 187); Linklater (1998: 36, 2007: 93), identifying first steps towards a global polity; Goodin (2010: 179); with greater reservations, Beck (1998: 65); Höffe (1999: 426); Schmalz-Bruns (1999: 237); Shaw (2000: 255); Young (2000: 271); Archibugi (2008: 97); Brunkhorst (2007: 101); Koo and Ramirez (2009: 1329); Albert (2014: 517), recognizing some polity-like features in global society; earlier Albert claimed that 'the development of world-statehood' is 'not in sight anywhere' (2002: 322).

were increasingly obliged to recognize human rights norms as inviolable sources of legitimacy for domestic law. Through the rise of single human rights, national democratic institutions were locked into the global legal system, into the *system of world law*, and, both internally and externally, their legitimacy was made contingent on their enactment of human rights norms, enshrined in global law. As national states defined their legitimacy through reference to human rights law, they became increasingly porous to global norms, they proportioned their laws to norms that were replicated across the divides between national societies, and they established the architecture of democracy on relatively generic foundations, as part of a global legal system. Above all, national states usually became democracies as they constructed their citizens in accordance with norms established in the global legal system, and as they adapted their laws to the idea of the person (the citizen) as a holder of a globally acknowledged set of subjective rights. Through these rights, national law and international law entered an increasingly deep coalescence, and both formed correlated parts of a global legal system.

At an institutional-sociological level, this correlation between the solidification of global human rights law and the generalization of democracy as a national mode of political organization can be ascribed to a number of factors, in different functional domains.

On one hand, it is often claimed that the global emergence of democracy after 1945 and the global consolidation of democracy since the 1980s were connected, even causally, to the expansion of a hegemonic brand of liberalism, linked to patterns of capitalist individualism.[106] On this account, the connection between democracy and human rights law results from inter-elite interactions, promoting human rights law partly because it creates conditions that are favourable for global capitalism (see Dezalay and Garth 2002: 15; Guilhot 2005). These arguments clearly have a certain weight, as waves of democratization have usually, although not always, followed international macroeconomic shifts. However, the globalization of democracy cannot be seen as a process that simply provided global entrenchment for neo-liberalism. Most democracies created since 1945 have been less committed to depredatory capitalism than their authoritarian precursors. Indeed, with the exception of those created in Eastern Europe after 1989, most new democracies created since the 1980s

[106] On the post-1945 period see Ruggie (1982). On the 1980s see Conaghan and Malloy (1994: 99, 261); Wylde (2012: 33).

specifically replaced governments that embodied booty capitalism.[107] In some cases, notably Brazil under Lula, Argentina under Kirchner, Bolivia under Morales, relatively new democratic systems have been solidified that performed wholesale processes of capital transfer to disadvantaged social groups.

In fact, the most important cause of the link between the global legal system and national democracy is that, as they connected their legitimacy to formally defined external norms, national states usually underwent a process of more robust and enduring institutionalization in their domestic environments. Paradoxically, the linkage between national law and international law meant that national political institutions became more resilient in face of pressures caused by the nationalization of the societies that surrounded them, and by the political constituencies contained in these societies. Aspects of this paradox are discussed more extensively below, in examples given in Chapter 4. Broadly, however, where they acquired support through international human rights law, state institutions were able to gain a certain degree of structural autonomy against their own constituencies, and they were less likely to be unsettled by the endemic social conflicts that, as national democracies, they were forced to internalize. That is to say – as state institutions internalized principles of legitimacy from international law, they acquired the capacity to legislate without refracting deeply embedded societal conflicts, and they were less likely to experience the crises of the type that afflicted European States in the period from 1918 to 1939, when they extracted legitimacy immediately from the resolution of conflicts between national citizens. In particular, the assimilation of international law helped to establish a construction of the citizen to underpin democratic governments, and it facilitated the legitimation of legislation around a stable, and stabilizing, model of the democratic citizen.

As discussed above, national democracies created after 1918 had struggled to solidify a model of the citizen from which they extracted their legitimacy. Some states pursued deep incorporation of their societal constituencies, constructing citizens as holders of pervasively integrative

[107] For example, the dictatorships in Brazil, Chile and Argentina embodied extremely aggressive forms of monopoly capitalism, characterized by virulently oppressive policies towards organized labour. One observer describes the regimes in the Southern Cone as based on a 'marriage of convenience' between military repression and economic liberalization (Ramos 1986: 7). Some pre-transitional African states paid lip-service to non-capitalist ideals. But most embodied a strongly patrimonialist variant on booty capitalism. This is acknowledged even by observers who are deeply critical of the economic background to the democratic reforms (Fatton 1992: 26; Shaw 1993: 87).

rights of political participation and material co-ownership. However, almost without exception, these states failed to stabilize a unitary, enduringly legitimational idea of the citizen, and they were deeply unsettled by the adversity between the groups of citizens which they had internalized: they failed securely to institutionalize the citizen as a source of legal authority. Importantly, this failure to solidify the citizen revealed a deep paradox at the core of national citizenship itself. As discussed, the idea of the national citizen promoted a general pattern of social inclusion. However, as this pattern of inclusion was extended to integrate social actors in their material dimensions, it triggered intense inter-sectoral conflict around the state, leading to the fragmentation of citizenship and national society. In its generality, moreover, the concept of the citizen was focused on legislative institutions as organs of integration. However, as these institutions encountered conflictual tensions in society caused by the material fragmentation of the citizen, they were prone to locate power in the hands of dominant social factions, ultimately excluding minority groups from effective access to political rights. From the outset of modern democracy, the high generality of the concept of the citizen contained the risk that it excluded minorities, it surrendered authority to elite interests and particular powerful factions, and it weakened the general cohesion of national society as a whole. Each side of this paradox became starkly visible in the collapse of democracy in the interwar era.

After 1945, by contrast, the model of the citizen was displaced from the inner-societal domain, and it was increasingly patterned on norms derived from international human rights law. In this form, the citizen gradually emerged as a relatively secure, static source of legitimacy for governmental acts, and it was less prone to generate volatile inter-group conflict or to perpetuate entrenched elite monopolies around the state. The national citizen had originally formed the basis for the growth of national democracy. In fact, however, national democracies had only been able to incorporate the citizen in partial, selective form. When the citizen was integrated in national political systems in its full material complexity, national state institutions could not incorporate it as a stable focus of legitimacy for legislation, and they collapsed in face of the social antagonism that citizenship generated. National democracy was only stabilized, eventually, on the foundation of the citizen extracted from global law, in a form not burdened by inter-party, class-determined and regional distinctions. In this construction, the external abstraction of the citizen helped to avert the systemic crises that characterized purely national democracy, producing a form of legitimation that was less susceptible to deep

and volatile politicization. As discussed below, this meant that organs of political democracy were less likely to be dislodged by the societal conflicts with which they were confronted, they were less vulnerable to elite colonization, and they typically became more robustly institutionalized at a national level.[108]

On these counts, as international law entered the fabric of national society, it made it possible for democratic institutions in national societies *structurally to adapt* to the pressures with which they were confronted within their societal constituencies, and it alleviated their exposure to pressures caused by their own nationalization. The global construction of the citizen as universal rights holder was conceived, internationally, as reaction to the endemic violence, the institutional implosion, and the ultimate multiple genocide, that accompanied the first wave of democratization after 1918. However, it entered national societies as a source of *structural adaption*, around which national institutions began to configure their legitimational processes in more sustainable procedures. *International* law, thus, played a key role in cementing democracy as a *nationalized* political order. In other words, national states only completed their inner trajectories of democratic nationalization as they became intricately enmeshed in the system of global law, and the legitimational figure of the citizen, around which the nationalization of state institutions was configured, was only cemented through the domestic incorporation of international norms. Both formative processes of modern statehood – nationalization and democratization – only became sustainable because of the domestic internalization of global law.

It is often argued that a precondition for the full recognition of globally defined legal norms is that they are recognized through patterns of contention, through which they acquire reality and vitality (Brunnée and Toope 2000: 70–4; Wiener 2014: 7). Seen over a longer period, this claim probably has some justification, as founding democratic norms have entered national societies through multiple lines of diffusion. However, it is a fundamental aspect of modern democracy that its foundations were imprinted in national society by exogenic processes and external acts.[109]

[108] The claim that the insertion of nation states in transnational systems reinforces processes of societal nationalization may seem counterintuitive. However, it is also implied, from a different angle, in research on educational sociology and human rights institutions. See for examples Meyer, Ramirez and Soysal (1992: 134); Koo and Ramirez (2009: 1334).

[109] The time has long passed in which it was possible to claim that 'regime transitions' are 'the outcome of a domestic political process that is not influenced by actors outside the nation-state' (Pevehouse 2002: 517); Pevehouse's argument contains an early rejection of

Indeed, one core reason why democracy was able to take hold in different societies after 1945 was, specifically, that it did not originate in objective societal contests, it partly closed national political systems against intensified conflicts, and, above all, it was structured around an external definition of citizenship rights.

Of course, such processes of national democratic institutionalization after 1945 did not always occur in the same ways, or for the same reasons, in different societies. Moreover, these processes did not always create fully, or equally, functioning democracies. In broad terms, as examined in Chapter 4, the linkage between the growing authority of international law and the institutionalization of national democracy took several different forms. First, this link can be seen in societies with longer-standing democratic elements, such as the UK and the USA, in which, owing to the interpenetration between national and international law, the democratic constitutional order became more effectively generalized (nationalized). Second, this link can be seen in societies which historically possessed weakly institutionalized and weakly nationalized democratic systems. In such societies, typically, the rising power of judiciaries, mediating international law into domestic law, played a core role in the relative stabilization of democracy, standing alongside and supplementing functions of other branches of the governance system. Paradigmatic for this is the case of the FRG after 1949. But, in the contemporary world, Colombia and some other Latin American states exemplify this model. Third, this link can be seen in societies, in which a full democracy has not been established, but in which elements of democracy are reinforced by interaction between national institutions and the global legal system. Russia is perhaps the key example of this. Fourth, this link can be seen in societies in which historic ethnic rivalries between different population groups impeded the

the nationalist view of democracy claiming that interaction with international organizations with a higher democratic intensity is a salient cause of democracy (2002: 529). For an assertion of a direct causal link between the standing of international law and the growth of democracy see Simmons (2009: 55). For alternative examples of theories of externally triggered norm diffusion as a source of contemporary democracy see Gourevitch (1978: 911), offering an early account of the importance of the international system in domestic politics; Weyland (2014: 222), stressing the importance of 'external stimuli' and external models in creating democracy; Greenhill (2010: 129, 141), arguing that norm-constructive socialization, linked to membership in intergovernmental organizations, is a key factor leading to democratic formation; Keck and Sikkink (1999) and Park (2006), emphasizing the role of transnational advocates in promoting democracy; Risse and Sikkink (1999), accentuating interest of the international community as a key determinant of democratization; Gleditsch and Ward (2006: 925, 930), explaining how the regional proportion of democracies impacts on processes in particular states.

formation of a national political system, drawing legitimacy from national citizens. Kenya is an important example of this model. These categories are ideal types, and many states show features that could be included in more than one of these types. Generally, however, the interpenetration between global law and national law, especially in the dimension of human rights, has played a vital role in democratic institutionalization and broader systemic nationalization across the whole range of polity types, shaped by a range of resistances to democratic citizenship. The inscription in national law of the features of generic citizenship, defined under global law, has proved indispensable in permitting the emergence of national citizenship, exercised in a democratic order. Indeed, this interpenetration has often (in fact, almost invariably) facilitated processes of national democratic institution building which national societies themselves were not able to achieve.

None of this is meant to imply that the growth of democracy did not entail the strengthening of representative institutions, or that it did not require an expansion of concrete citizenship practices. However, democracy finally evolved, globally, on a pattern in which the functions of representative institutions were subject to normative influence, pre-formation, and constraint by pre-determined global norms. In this pattern, representative institutions became one part of an institutional/legitimational mix, and their functions were clearly limited by some higher elements of global human rights law. In this pattern, further, representative institutions acquired legitimacy, not by integrating real citizens, but by displaying compliance with norms attached to global definitions of citizenship. This meant that legislative processes of social inclusion were subject to prior normative filtration, and governments were not required to internalize conflicts between social actors in order to show legitimacy.

Likewise, none of this is meant to imply that, in some settings, the global rise of national democracy after 1945 was not impelled by inner-societal struggles, by the politicization of specific inner-societal conflicts, or by the mobilization of national political subjects, as activist citizens. Clearly, the growth of democracy after 1945 resulted from concerted mobilization by social groups against, depending on location, class-based, imperialist, or dictatorial structures of domination. To deny this, evidently, would be absurd. Even in such cases, however, the rise of democracy was in part attributable to the prior expansion of a global legal system; the global rise of rights created an overarching order in which democratic struggles and patterns of citizenship could be articulated and legitimized. In many cases, the global legal system promoted a universal political vocabulary, in which

specific social struggles could be easily translated into political practice.[110] Even in highly conflictual settings, institutions created within national democracies after 1945 were not fully separable from the global legal system: such institutions normally defined their legitimacy in relation to this legal system, they acted within constraints imposed by this legal system, and, importantly, they played a core role in perpetuating and reproducing the content of this legal system within national environments.

In certain respects, on this basis, the global rise of democracy after 1945 can be observed as a *secondary process*, or even as a *process of secondary constitutionalization*, in which the increasingly dense interrelation between the legal structures of national societies and the global legal order as a whole set the basic legal-constitutional form of democracy at a national level. Of course, as mentioned, it took decades until this democratic form became a fully evolved reality. After 1945, nonetheless, human rights law increasingly became the dominant criterion for the organization of actions in the global legal domain, and human rights norms rapidly came to act as *primary constitutional* principles, which framed and legitimated actions of institutions and organizations in the inter-state arena. Incrementally, moreover, the institutions of national democracy began to mirror this process, and, in different settings, national democratic institutions evolved as subsidiary components of the higher constitution of the global legal system. In consequence, national democracy was instituted as the result of *secondary constitutional acts*, in which processes of legal foundation within national societies, often mediated through judicial interactions, transposed the constitutional norms of the global legal system into the norms of national legal systems.

Whereas in the classical concepts of democratic constitutionalism citizens were defined as agents that create the law, after 1945 a model of the citizen was implanted within national society by the global legal system, and constitutional laws were consolidated on that basis. The citizen itself became the product of a global legal system. National societies did not create the conditions of national citizenship; instead, they assimilated constructions of the citizen from the global legal domain. Of course, national societies retained a distinction between citizens and non-citizens. Yet, basic rights of national citizens were only formed through the admixture of global rights to national rights. In each respect, the institutional system of national democracy generally evolved as a *secondary constitution*, integrated within, and giving effect to, the *primary constitution* of global law.

[110] See pp. 402–3 below.

If viewed closely, the global rise of democracy after 1945 can be viewed as a process that occurred, in part, *within the law*, which, at that time, was beginning to evolve as an increasingly autonomous and differentiated system. As discussed, the classical doctrine of national democracy had suggested that the establishment of democracy is an eminently *political* process, reflecting the translation of a distinct political will into legally generalizable form. Ultimately, however, democracy eventually became a global factual reality, not as the expression of any political will or any aggregate of political practices, but rather as the objective articulation of principles already constituted and preserved within the global legal system. In the decades that followed 1945, democracy became more prevalent and more entrenched as more societies were locked into the global legal order, and as the global legal order, based on subjective human rights, pre-structured the production of law, the generation of legitimacy, and the practice of citizenship within national societies. By the 1990s, most national societies were integrated within a global legal system, and most national societies had acquired at least partially democratic institutions, pre-constituted by the normative order of global law. The slow penetration of the global legal system into national societies, and its resultant integration of national institutions within a global legal order, widely created the *constituent foundation* for national democracy. In this setting, global law became, of itself, the primary subject of democracy.

2.4 Global Democracy and the Sociology of Law

The global rise of democratic polities in the decades after 1945 displays three of the deepest paradoxes in the history of modern society.

First, this process demonstrates the paradox that, with few exceptions, modern national states were only institutionalized as such as they were integrated into a post-national legal order: the construction of nation states as stable political units, within effectively nationalized social systems, did not occur within a legal/political order created by nations, or their populations, themselves.

Second, this process demonstrates the paradox that democracy only became a globally enduring political form as it began to assume an institutional reality that was not centred on the people (the *demos*) as the dominant focus of political agency and norm formation. As discussed, after 1945, democracy was gradually established as a globally acknowledged and endorsed system of governance. However, by this time, the primary and most essential norms of democratic constitutionalism were no longer

solely extracted from the decisions of a particular people or the actions of particular citizens. The citizens of populations that experienced the growth of democracy, in fact, were defined a *priori* within an overarching system of public-legal norms, centred on human rights, and their demand for democracy was constructed as an element of international law. Through this process, essential functions of legitimacy production and legal norm construction classically imputed to national citizens were absorbed and reproduced *within* the global legal system.

In fact, third, this process demonstrates the paradox that most societies did not develop a stable, *political* system until domestic institutions coalesced with the global *legal* system. As discussed, the basic legitimational vocabulary of democratic politics was focused, not solely on establishing the democratic political system, but also, less manifestly, on abstracting a political system for society more generally. However, few societies achieved this on purely national political premises. Before 1945, most political systems were inherently unstable. Indeed, they were rendered unstable by the fact that they were democratic: by the fact that they were forced to incorporate complex, rival models of citizenship, which they were unable to sustain at a national level. In most cases, it was only as political exchanges were underpinned by, and even performed *as*, law that societies were able to consolidate and sustain stable political systems. The basic idea of classical democracy – namely, that democracy is the product of a democratic subject, acting pre-eminently, and in eminently political fashion, as a citizen – proved to be a fiction.

In sum, nations first became nations *after nationhood*. Likewise, democracy first became democracy *after the demos*. Polities became political *after politics*.

The factual formation of democracy after 1945 relates in complex manner to the approaches to democracy found in classical legal sociology.

On one hand, democracy finally developed on a pattern that clearly verified the defining insights of legal sociology. As discussed, the insight into the absent subject of democratic politics had assumed great importance in sociological reflection on the initial development of democratic organizations. This insight clearly captured the contingency of early processes of democratic institution building. Then, as, after 1945, democracy became a factual reality, this founding sociological insight slowly began to acquire relevance for a deeper, more structurally enduring, problem of democratic formation, which early sociologists could not have begun to envision. What became clear through the long process of democratization in the twentieth century is that the classical sociological analysis

of democracy did not only comprehend the paradoxes underlying the first tentative emergence of national democracy in the nineteenth century – it also showed great prescience in intuiting the paradoxical form that democracy would eventually assume in the twentieth century. In focusing on the absence of the people as a core feature of democracy, classical sociology clearly anticipated, in unforeseen ways, the paradigm shift that underpinned the stabilization of democracy after 1945. Ultimately, the legal-sociological relativization of democracy was strongly substantiated by the fact that democracy emerged, globally, as part of a secondary constitution, in which the *displacement of the factual citizen* from the institutional focus of democratic governance was a pronounced, indeed *necessary* feature. The original sociological perception of the illusions of democracy, intimating that democracy could not be centred in any factual reality of collective human agency, was, therefore, fully corroborated. Democracy was established, globally, through a process, in which the actual, existing citizen was, not located at the centre of, but evacuated from the process of public norm production. The citizen was replaced by the socially abstracted form of global human rights. In this respect, as earlier sociologists had indicated, the law itself acted as the primary medium of democratic integration.

Early sociologists had argued repeatedly that the initial cult of democracy was founded in chimerical constructions of human agency and human legal subjectivity, which only managed to project authorship for law by relying on formal-metaphysical accounts of popular agency. After 1945, this claim was vindicated by the fact that national democracy was stabilized on abstracted normative foundations, in which national acts of self-legislation were strictly determined by a pre-stabilized, external constitutional system. The primary constitution of international law, within which national democratic constitutional systems eventually evolved, formed an intensified analogue to the metaphysical constitution of rational law, posited by early theorists of popular government in the Enlightenment and then criticized by sociologists. This constitution translated the uncertain figure of popular sovereignty into an entirely fictionalized idea of the citizen: the citizen was projected as a formal holder of rights, defined within a global legal order, positioned outside objective spheres of social interaction. Indicatively, in fact, theorists of international law, who played a role in creating the international legal order after 1945, often conceived of international human rights on foundations derived from the classical tradition of natural-legal philosophy (see Lauterpacht 1945: 25). This was not an invariable attitude, and some architects of the international legal order

after 1945 were sceptical about the renewal of interest in 'the doctrine of natural law' (Kelsen 1962: 319). National democracy, however, was widely realized on a model that formally admitted the fictionality of the people, and which translated the will of the people into a formatively structured normative domain. Indeed, democracy was established within a global order that specifically acknowledged that the democratic subject could only be substantiated in a fictitious design. In this process, international law expressly *stood in for*, *supplanted*, and *evaded the conflicts inherent in* the patterns of political subjectivity constructed in national societies.

On the other hand, however, the factual development of democracy also contradicted some basic analyses of early legal sociologists, and it provided evidence that demanded a revision of some core legal-sociological claims. As discussed, earlier legal sociology had showed a deep unwillingness to accept the implications of the paradoxes that it identified in democracy. Leading classical legal sociologists had remained intent on explaining democratic legitimacy as a condition in which the political system reposes on deeply embedded political-volitional substructures. In fact, sociologists commonly persisted in looking for the people as a subject of democracy, and they imagined that democracy could only obtain legitimacy if the volitional motivations of the people could be identified at its core.

Notable in this respect is the fact that classical proponents of legal sociology had tended to be dismissive of international law, which they often saw as a normative order constructed outside the realm of everyday socio-legal practice and motivation, such that it could not be viewed as an objective source of legal or political obligation. For many early legal sociologists, international law appeared as a particularly implausible outgrowth of rationalist or formalistic conceptions of legal validity, and as an extreme example of the forgetfulness of society in the legal traditions resulting from the Enlightenment: some leading early sociologists of law simply denied that international law could be seen as law (Ehrlich 1989 [1913]: 19; Weber 1921/2: 221). In the interwar years, then, many legal-sociological observers claimed that the inherent fragmentational tendencies in mass democracy were greatly exacerbated by the fact that, during their transition to mass-democracy, democratic states had ascribed increasing authority to international norms, and, in some of their functions, they accepted the jurisdiction of international organizations. At this time, it was increasingly claimed amongst sociological theorists that the slowly growing force of the international legal order, focused from 1920 on the League of Nations and the Permanent Court of International Justice (PCIJ), obstructed the formation of political systems based on national self-legislation. Amongst

legal theorists concerned with domestic democratic processes, the gradual rise of international law was often viewed as a process that fractured the presence of the people at the centre of government, and at the centre of national law-making processes. Indeed, amongst interwar constitutional theorists with strong sociological sensibilities, it was widely asserted that international law, at least insofar as it constrained domestic institutions, was not easily compatible with national statehood and national self-legislation.[111] Paradigmatically for this critique, Carl Schmitt set out the sociological claim that 'the people, not humanity, is the central concept of democracy', and the factual interests of the people could not sublimated into a set of external norms (1928: 160). Across different lines of earlier legal-sociological analysis, therefore, the first rise of international law was perceived as one of the primary challenges to democracy.

In this respect, however, early sociological analyses were clearly inaccurate, and their insistence on finding a real political subject to support democracy led them onto stray paths. Democracy, as it finally emerged, did not need to be centred on the people: it was centred on international human rights law precisely because this law intruded on the national material life of the people. Although derided by sociologists, Kelsen's claim that democracy presupposed, not an actively engaged people, but a pure system of norms, proved more sociologically accurate than the common sociological critique of positivism. In fact, long before 1945, Kelsen had clearly foreseen the necessary primacy of international law in the legal systems of democratic states (1920: 215). Democracy, in short, took hold as it replaced the people with an abstracted concept of humanity as its central point of reference.

Overall, the actual globalization of democracy after 1945 both substantiated and contradicted certain basic insights of legal sociology at the same time. Classical legal sociologists had clearly observed that democratic government was not underpinned by a real political subject. This view was eventually corroborated by the factual shape of democracy. Yet, the ultimate global form of democracy also underlined the inability of sociology to accept the implications of its founding insights. Classical sociologists had been right in their critical reflections on the paradoxical fictions of popular sovereignty. But they had been wrong in thinking that real democracy

[111] Notably, Schmitt deplored the imposition of international-legal constraints on national states. In his more polemical moments, however, he saw international norms, not as an apolitical system, but as the results of highly political acts, backed by extensive resources of physical violence (1932a: 77).

necessitated foundations deeper than this paradox. Democracy ultimately struck root as an abstracted figure of popular sovereignty, which early sociologists diagnosed, rejected and endeavoured to reconfigure, was formally institutionalized as the basis of government. The formation of the subject of democracy within international law implied that fictitious constructions of legal authority were necessary and inevitable preconditions for democracy. Without such fictions, there was no democracy.

After 1945, in consequence, legal sociology found itself confronted with a position similar to that which it addressed in the wake of the Enlightenment. At this juncture, legal sociological reflection was once again confronted with democracies with no manifest subjects from which to claim authority, reliant on metaphysically abstracted constructions of their sovereign peoples. Indeed, the period of democratic re-orientation after 1945 can be seen as a period of *second Enlightenment*, in which the rise of global democracy was flanked by the promotion of universal normative principles, defined, now not on openly metaphysical foundations, but on the basis of international law. After 1945, indicatively, the main assumptions of classical Liberalism once again became commonplace, and many of the formalist principles of early Liberalism – especially regarding the essentialist foundation of rights, the universal-rational basis of legal obligations, and the natural-legal origin of democracy – were re-established as orthodox perspectives in legal and political theory. This was expressly stated in the constitution-making processes in both FRG and India, both of which were paradigmatic for later constitutional acts. In both cases, ideals of natural law were expressly debated during the writing of the constitution.[112]

After 1945, however, legal sociology once again struggled to accept the implications of its own basic insights, and it re-commenced its attempt to discover a distinctively political source of authority for the increasingly globalized system of democracy. As discussed, at this time, the reaction amongst sociological theorists of law to the *second Enlightenment* differed from their reactions to the *first Enlightenment*. Whereas sociological theorists who reacted to the first Enlightenment had approached the normative construction of democracy with scepticism, sociological theorists who reacted to the second Enlightenment assumed a stance that was more

[112] Lauterpacht's influence was felt in the Indian Constituent Assembly (Chaube 2000: 159). Early decisions of the Constitutional Court in the FRG argued that the moral basis of the Constitution could be traced, among other sources, to the 'great philosophers of state in the Enlightenment' (BVerfGE 5, 85 (85) 1). On the importance of ius-natural ideals amongst drafters of the *Grundgesetz* see Otto (1971: 199–200).

overtly and sympathetically committed to promoting the global process of democratization. Indeed, whereas early legal sociology had responded to the first Enlightenment by focusing its gaze, critically, on the metaphysical content of democratic theory, sociological theory responded to the second Enlightenment by devoting itself to explaining how, in global society, real substance could be infused into the existing order of democracy. After 1945, sociological theorists gradually accepted that democracy had to be perceived as a global or transnational form, in which patterns of legitimation fused elements of national and global law. Sociological theory thus became centred, slowly, on the idea that the national people had lost their monopoly in the production of democratic legitimacy. In recognizing this, however, sociological theory persisted in its search for the democratic people, and it reacted to the increasingly global form of democracy after 1945 by attempting to explain how concepts of classical democracy, already fragile in purely national political systems, could be made to acquire meaning in the global legal order. Indeed, in the longer wake of 1945, legal-sociological accounts of democracy began to project ways in which the presence of the people, hard enough to find in national society, could be reconfigured in global society. Even as the people visibly faded from the centre of legal/political organization, sociological theorists tried to reconstruct new models of democracy in the global setting, attempting to place global institutions on a continuum with national democratic systems. At the centre of legal-sociological democratic theory after 1945, therefore, was a re-initiation of the earlier attempt to imagine the political content of democracy, and to reconnect the legal system of democracy with manifestly political motivations. But this approach was now framed within a much less sceptical account of democracy as governance system.

Such approaches to post-national democracy appear in an almost endless sequence of variations, and they cannot be exhaustively canvassed here. However, some theoretical positions have an exemplary quality in this regard.

Most obviously, the attempt to transfer the (absent) people of national democracy into global society is observable in cosmopolitan theories of democratic institutions. Such analysis is shaped by the sense that national democracies are part of a wider institutional order, in which national institutions interact formatively with global norm setters. In such theories, nonetheless, political institutions, both national and global, are expected to extract and to display legitimacy in much the same way as in classical democracies. Indeed, cosmopolitan theories generally seek to illustrate

how originally national patterns of self-legislation can be re-envisioned as the source of institutional legitimacy for global society as a whole.

At one level, this re-envisioning of the national people appears in the work of sociologically oriented cosmopolitan thinkers who argue that supra-national political systems, for example the UN and the European Union (EU), generate globally valid reserves of legitimacy. Underlying such theories is the claim that the sources of legitimacy required by transnational bodies are not discontinuous with national-democratic process of legitimate will formation. This is also reflected in lines of global sociology, which have begun to identify preliminary contours of world statehood in contemporary society (Schmalz-Bruns 1999: 237; Brunkhorst 2007: 101; Habermas 2012: 22–3; Albert 2014: 517).[113] This re-envisioning of the people is clearly manifest in more activist/pluralistic theories of cosmopolitanism, which claim that the rise of global society creates new modes of radical political agency, based on border-crossing legal norms.[114] It is also perceptible in the insistence, amongst some sociological theories of transnational law, that legal community, albeit constructed across geographical boundaries, remains the source of law's authority (Cotterrell 2008). Even cosmopolitan theories that are reluctant to claim that contemporary society contains fully global political institutions have accentuated the emergence of new forms of transnational citizenship, articulated around international legal norms (Benhabib 2009: 699; Cohen 2012: 217).

This re-imagining of the people is especially salient in the most refined theory of cosmopolitan democracy, that set out by Hauke Brunkhorst. Brunkhorst's theory of democracy hinges on the claim that there is a *co-evolutionary* relation between the legal norms that underpin national democracy and legal norms of a transnational, cosmopolitan nature. On this basis, he argues that national democracy and transnational norms, although historically separate, are always correlated with each other, and global institutions acting to protect democratic legal rights are inevitable consequences of the historical orientation towards democracy in national societies. To explain this, Brunkhorst asserts that national democracy is based on certain shared demands for self-legislation and freedom, which, in their essence, have an egalitarian content that reaches beyond national boundaries and beyond the confines of purely national citizenship laws, implying a process of legal inclusion and recognition that always exceeds the constraints of purely national politics (1994: 231). In this respect, he

[113] For examples of such claims see note 105 above.
[114] See the varying expressions of this theory in Sousa Santos (2002: 437, 2012: 19).

proceeds from the assumption that democratic citizenship is driven by experiences of *solidarity*, oriented towards collective liberty, and the normative content of solidarity, in principle, is universal. By definition, solidarity is not restricted to national fellow citizens, and it creates globally inclusive norms that, for their final realization, require global institutions for their realization and enforcement. Underlying this theory is an implied assumption that human social experience necessarily generates patterns of shared liberty and non-instrumental coexistence, and that solidarity is a *universal species quality*, articulated primarily in the normative foundation of citizenship (2017: 101–2). As a result, the citizen of a nation state and the citizen of the world are always situated in the same 'normative horizon' (2002: 110), and the rights claimed by national citizens are commensurate with, and they in fact objectively pre-construct, rights of a global nature, of global citizens.

Overall, for Brunkhorst, democracy inevitably contains both national and global elements, and claims to rights asserted at a national level often both co-imply and presuppose rights declared at a transnational level. In this formulation, however, the co-evolution of national and global democratic rights is phrased in essentially neo-classical terms, and the rise of global democratic institutions is examined as an extension of the original self-expressions of popular sovereign agency.[115] In this respect, Brunkhorst's theoretical gaze turns on the paradigmatic question of classical sociology, and he seeks to translate the normative political legacy of the French Revolution into an objectively meaningful contemporary reality. In this focus, the global citizen appears in the same form, articulating the same normative processes, as the national citizen, and the growth of transnational democracy brings to fruition the moral potentials that were always implicitly inherent, although often factually suppressed, in national democratic citizenship.[116] Importantly, for Brunkhorst, both nationally and transnationally, norms of freedom and equality are created and expressed through discursive practices of popular protest and moral contestation (2017: 119).

The sociological transposition of classical ideas of democratic governance onto the dimensions of global society is also evident, second, in proceduralist theories of democracy, which attempt to account for democratic legitimation processes at a transnational level. For example, Habermas's theory of procedural democracy was first conceived for national societies

[115] See the major statement of this theory in Brunkhorst (2014).
[116] See also Habermas (2005: 240).

and their institutions. Eventually, however, he arrived at the conclusion that the theory of democracy as a system of deliberative procedures can be translated to the transnational domain, and that, through this, the 'conceptual association of democratic legitimation with familiar state organizations' can be loosened (1998: 166).

The most important, and most conceptually challenging, attempt to construct a proceduralist theory of global patterns of democratic legitimation appears in the legal-sociological research of Gunther Teubner.

At one level, most obviously, Teubner turns away from any attachment to classical ideas of democracy, and he accentuates the core insight of legal sociology that the political system of society cannot simply extract authority for its functions from a given people, defined as a factual aggregate of citizens. He advances this argument, first, by arguing that contemporary globalized societies cannot be centred around national or international political institutions, in which collective agreements can be represented in stable, binding fashion. Globalization, for Teubner, is reflected in 'the worldwide realization of functional differentiation', one consequence of which is that classical political institutions no longer construct regulatory norms for all functional domains (2004: 14). One key outcome of global functional differentiation, thus, is that state institutions lose their primacy. He develops this analysis, second, by proposing a theory of societal constitutionalism, based on the claim that, in global society, individual functional sectors – for instance, media, health, sport, the economy – generate their own sources of constitutional and democratic agency, and they evolve constitutional norms, to regulate and create regime-like structures for their specific exchanges, in quite distinct, contingent ways (2011: 9). In particular, owing to the relative weakness of state authority, it is vital for modern society that different social spheres preserve capacities for 'inner constitutionalization' (2011: 51), or self-constitutionalization, especially in situations in which their communications collide with, or threaten to unsettle, communications in other systems (2011: 51, 2017: 333).

On Teubner's account, the constitutional order of global society is necessarily pluralistic and acentric, resulting from auto-constitutional potentials residing in different social spheres. In particular, the constitutional reality of society cannot be imputed to unifying acts of a given people: there is, in fact, no people – national or global – that can underlie and bring unity to different areas of institutional practice and law production. The most important norms that structure societal exchanges are produced, not by deliberate acts of single or collective actors, but by the inner reflexivity of different media of communication, and they are not articulated with

formal political processes of norm production (2012: 121). As a result, the normative order of each social sector retains a conclusively pluralistic character.

Self-evidently, Teubner's theory of global society and global law cannot be linked to more neo-classical attempts to press political institutions into an immediate relation to some single, originating, self-legislating people. Indeed, his work reflects a remarkable endeavour to articulate an irreducibly contingent model of legal/political order, especially in the global setting, and to comprehend patterns of legal construction without simplified reference to primary agents. At the core of Teubner's work is a deep attentiveness, closely continuous with the core insights of classical sociology, to the pluralistic form of social freedom. Despite this, however, he centres his theory around ideas of politics and proceduralization, in which, in some respects, a trace of more classical ideas of democracy is still perceptible.

On one hand, in the micro-sociological dimension of his theory, Teubner claims that, within the different sub-systems of society, constitutional norms are generated by the distinct exercise of constituent power, in which forces specific to a given social sector spontaneously generate constitutional norms. To be sure, the constituent power in this sense cannot be captured by any 'anthropomorphic identification' of such power with the strategic acts of a people, community, or collective. On the contrary, such power articulates the 'social potentials' and 'energies', or even the 'communicative power', which is formed in distinct sectors of society, and which gain expression in acts of sectoral self-constitutionalization (2012: 62–3). On this basis, Teubner concludes that different social sectors afford opportunities for distinct modes of democratic norm construction, in which 'decentralized collective actors' assume a role in shaping the normative order for a given social domain (2012: 122–3). Indeed, he is very clear that each sector of society possesses its own specific mode of politicality, and every partial system of society remains a realm of contest, in which different actors or stakeholders challenge each other to participate in structural formation or in the creation of 'regime rules' (2018). Nonetheless, he imputes a distinctive political content to such processes of self-constitutionalization and sectoral democratization, claiming that each transnational regime contains functionally specialized aggregates of contested agency. The self-contestation of transnational regimes thus supplants the political representation of national peoples as the core energy of democracy (2018). To account for the political substance of constitutional formation, then, he employs a dual concept of the political, implying that

different social sectors possess a political force that cannot be captured in conventional categories of institutional politics, and which is worked out through contextually embedded contests over the legal/structural form of different societal domains (2012: 121). Although shifting the politics of society onto highly contingent procedural foundations, therefore, the idea still endures in Teubner's thought that there are certain primary political-democratic substances in society. Albeit in delineated social sectors, the distillation of political energy in constitutional norms remains a core process in global society, and *political self-legislation* remains a distinctive emphasis of social agents. As implied, a core concern in Teubner's later work is to translate the dominant semantics of classical democratic politics into categories that can be identified in the plural regimes of global society. In this setting, the classical *demos* may be replaced by a range of actors, such as social movements, stakeholders, professional bodies, standard setters, all of whom contest the form of a particular regime. These actors, however, exist as remote equivalents to the classical *demos*.

On the other hand, in the more macro-sociological focus of his theory, Teubner argues that society as a whole is capable of obtaining an overarching normative balance, and even of securing reasonable freedoms that traverse different social sectors. In this respect, his work moves close to more classical pluralist claims, similar to arguments set out by Hegel, that even in the most differentiated societies highly particular modes of liberty can co-exist and generate complementary rationalities (2018). In his earlier work, he indicates that the legal system of society is able to institutionalize procedures through which different social systems can be sensibilized to each other, and in which adaptive learning processes can be stimulated in different social systems (1983: 28). In some cases, this means that destabilizing expansionary impulses in one social system that risk unsettling society as a whole can be checked by normative claims in other social systems, such that society as a whole preserves a political configuration adapted to the separate rationalities of different systems. This might mean, for example, that, faced with expansionary economic energies, political forms of agency in other systems (say, social movements, protest groups, professional associations) might instil their micro-political prerogatives into the normative structure of society as a whole. In his later work, this idea re-appears in the assertion that, from inside their own reflexive intelligence, the different sectoral constitutions of society can, and in fact necessarily must, construct 'principles of an *ordre public transnational*'. That is to say – different social sectors can articulate principles of a unified meta-constitution, in relation to which each social domain, in its own

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constitutional perspective, 'evaluates its own norms', and configures its norms with the meta-normative form of society as a whole (2017: 330). At no point, categorically, does this theory imply that society as a whole possess a unitary macro-constitution or unifying patterns of political agency, based on demands of socially encompassing subjects. However, residually, it holds out the possibility that conflicts between different constitutional orders might be balanced in a 'transnational meta-constitution', and that different sectoral constitutions might evolve internal conflict rules to avoid collision with other constitutions (2017: 329). In this respect, even in the most resolutely acentric analysis of modern society and its law, an echo is heard of a lament for overarching political rationality and trans-sectoral democratic norm formation.

In general, more contemporary legal sociology has opted for a view of democracy which is more immediately affirmative than that set out by classical sociologists, and which moves on a continuum with classical democratic theory. As discussed, classical legal sociology viewed democracy as inherently paradoxical. At the same time, however, legal-sociological theory widely internalized this paradox in its own conceptual structure. As a result, *legal sociology remained fixated on the people, defined as a collectively self-legislating agent, as a source of legitimacy, although it clearly explained that this people cannot be constructed as a source of legitimacy*. This legal-sociological paradox is commonly intensified in more recent analysis of the conditions of global democracy. In the realities of globalized democracy, in which the existence of a people as the basis for democratic political organization is difficult to identify, legal-sociological research has not been able fully to capitalize on the insights that were inherent in legal sociology in its classical years. Sociological analysis persistently looks for continuities between contemporary and classical democratic processes. Indeed, as the absence of the people (citizens) in democracy becomes an almost incontrovertible fact, sociological inquiry becomes increasingly resolute in its desire to find this people (citizens), and to locate the political agency of the people, in some form, at the centre of social life.

The remainder of this book is designed to demonstrate that, in order to understand democracy in contemporary society, we need more resolutely to follow the implications of classical legal-sociological arguments. As the requirement for a global sociology of legal formation becomes more pressing, the greater becomes the relevance of the primary insights of classical legal sociology into the fictionality of democratic subjectivity. Classical legal sociology contains two claims that profoundly illuminate the reality of contemporary democracy.

First, simply, classical legal sociology claimed that democracy was created without a people. In contemporary society, democracy now appears as a mode of political organization, which is specifically not centred around the people or the citizen, and whose evolution and legitimization are not dictated by specifically political patterns of normative agency. As a result, contemporary society fully reflects one core original claim of legal sociology. More tellingly, second, classical legal sociology claimed that democracy should be observed as the result of a process of *apersonal institutionalization*, and the conceptual forms of democracy underpin this process. In much early sociology, the societal expansion of democracy was attributed to the autonomous functions of the legal system in promoting social integration, often through the distribution of basic rights to individual agents. Using this insight, we can now see that, within national societies, the process of national-democratic institutionalization failed, and national democracies were not reliably stabilized around national constructs of citizenship. On this basis, we can see that democratic integration and institutionalization began to approach completion when the political citizen, to which the political system owes its legitimacy, became fully apersonal: when it was transferred from the national-political to the global-legal domain, so that the core legitimacy of political institutions was disarticulated from national constructs of political agency. Both central claims in the legal-sociological theory of democratic contingency contain a key to understanding democracy. To understand democracy, we need to move beyond the underlying paradox of legal sociology, we need renounce the search for the people or the political subject at the core of democratic law, and we need to observe the formation of democratic law as shaped by a fully contingent process of institutional construction.

It is an error to seek the origins of contemporary democracy in national democracy, national democratic subject formation, or even in distinctively political sources of agency. Democracy presupposes, not continuity with national citizenship practices, but *a deep and incisive rupture with more classical national democratic systems and more conventional patterns of political subject formation*. Explaining contemporary democracy means explaining the process through which external, global modes of norm production have supplanted more classical sources of political agency, and it demands that we renounce all attachment to conventional constructions of citizenship and political subjectivity. Explaining contemporary democracy means explaining the ways in which law's autonomy shapes democratic integration and legislation.