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Politics Becomes the Law

4.1 Human Rights and the Differentiation of the Legal System

It is necessary to reformulate the inherited conceptual apparatus of democratic legitimacy. The elemental structure of democracy is no longer shaped by the translation of a political will, condensed around the practices of citizens, into legal form. Now, at a basic level, democracy is more usually shaped by the inner-legal projection of obligatory norms and concepts of legal validity, in which primary norm-setting functions are internalized, and recursively produced within the law. In fact, the structure of democracy is no longer founded in processes of norm formation that are discernibly political. Classically, democratic theory revolved around the assumption that a political system possesses distinctive reserves of collectively produced authority, which means that it has primacy *vis-à-vis* other systems in society. The political system is then defined by this primacy, which it invokes to create, to radiate and to enforce generalized norms across society. In contemporary democracy, however, the legal system has acquired clear primacy in relation to interactions classically identified as political.

To understand contemporary democracy, it is essential to approach democratic institutional formation not as a collectively acceded process of political organization, but as the result of the global differentiation of the legal system, which assimilates many classical political functions. To understand modern democracy, we need to abandon ancient antinomies in constructing the foundations of democracy, and we need to observe not societal conflict mediation or will formation, but *legal auto-genesis*, as the origin of democratic law, democratic politics, and democratic integration. In its central normative dimensions, democracy is produced as the secondary political consequence of occurrences within the law, in which classical modes of political agency and norm construction have reduced significance.

The relation between legal-systemic differentiation and democratic formation is visible in the patterns of transnational norm formation

examined above. As discussed, the laws of democratic political systems are now widely authorized by concepts and procedures created through the balancing of existing legal norms. At a primary level, democratic law making is framed by a process in which judicial institutions align and connect principles (usually based on human rights) contained in different dimensions of the global legal system. On this foundation, the basic reference of the national political system – the citizen – evolves as a construction of global law, and this construction underpins the legislative acts of national democracies. This pattern of democracy is not simply a reality, in which domestic state institutions act in accordance with international rule-of-law principles. Rather, it reflects a reality in which the global legal system demonstrates and intensifies its own autonomy, and produces democratic norms for national political systems as it does so. Of course, in most national legal systems it remains the case that single actors with judicial duties will show some deference for decisions of a classically political nature, made by classical political branches of government. Such actors may even formally subscribe to some variant on a political-question doctrine, showing restraint in the control of executive decision in some areas of policy making.[1] In fact, it remains that case that, in some societies, national judiciaries are subservient to, or even more reactionary than, executive bodies. An important example of this is contemporary Brazil. In Brazil, the judiciary originally played an important role in aiding the transition to democracy in the 1980s, but it has recently been weak in its support of democratically mandated government.[2] In fact, certain peculiarities in Brazilian constitutional law limit the openness of the domestic legal system to international law.[3] Moreover, it remains the case, with variations from polity to polity, that judges will reject the use of international norms in national legal interpretation.[4] When we talk of the global legal system, therefore, we are not simply talking about an aggregate of judicial

[1] See, in the USA *Williams* v. *Suffolk Insurance Company*, 38 U.S. 13 Pet. 415 415 (1839); *Luther* v. *Borden* 48 U.S. 1 (1849); *Pacific States Tel. & Tel. Co.* v. *Oregon* 223 U.S. 118 (1912); *Colegrove* v. *Green*, 328 U.S. 549 (1946). See Frankfurter's classical expression of this doctrine in *Dennis* v. *United States*, 341 U.S. 494 (1951). See the refutation of this doctrine in *Baker* v. *Carr* 369 U.S. 186 (1962), and *Reynolds* v. *Sims*, 377 U.S. 533 (1964).

[2] See, Brazilian Supreme Federal Court, Mandado de segurança Nº 34448/DF – Distrito Federal 0058751-32.2016.1.00.0000. Relator: Ministro Roberto Barroso. Judgment: 10 October 2016.

[3] In Brazil, only a small number of actors and organizations can initiate constitutional litigation, and litigation on pure human rights grounds is infrequent. See for discussion Costa and Benvindo (2014: 63, 72).

[4] See pp. 227, 398 below.

figures. The global legal system is constituted as a mass of legal/normative exchanges, based primarily on human rights, which are able to generate authoritative law without political support, and which, outside national borders, connect and encompass different tiers of global society. This mass of norms exists in independence of the decisions of particular judicial actors, and, as discussed, its impact inside national societies is very diffuse. As discussed below, in fact, even where domestic use of international norms is not pronounced or consistent, these norms infiltrate national law in numerous ways.

The correlation between the rights-based differentiation of the global legal system and the stabilization of democracy is not only visible in the *conceptual* apparatus of global law. This correlation is also observable at a more *structural-systemic* or even *concrete-institutional* level. The link between global legal differentiation and the institutional solidification of democracy can be captured in more empirical institutional analysis, focused on the historical formation of different national systems of government. In many national societies, the deepening of democratic government has been driven by a process in which the global differentiation of the legal system has heightened the internal differentiation of the national legal system, and this in turn has acquired formative implications for the development of national democracy as a whole. In such instances, the citizen constructed under international law has often demonstrably facilitated the structural adaption of national political systems, and it acts as a foundation on which they extend their integrational reach into national societies, and complete the process of democratic inclusion and institution building. Although the citizen of international law was projected specifically as a reaction to interwar authoritarianism, it also evolved as a structural norm around which, in a broad range of settings, democracy could be consolidated, and very different impediments to democratic consolidation could be removed. Indeed, the interlocking between global law and national law is the most common precondition for the effective construction of democratic institutions at a national level. Of central importance in this regard is the fact that global law instils a concept of the citizen in national law, so that citizens act as citizens of global law and national law at the same time, and *the global citizen, distinct from the national citizen in its historical construction, forms the foundation for the national citizen*. In many societies, national democracy has only acquired institutional form around the figure of the global citizen, configured within the global legal system. In many settings, this correlation between national and global citizenship facilitates historically precarious processes of democratic

legitimacy production and institution building. In fact, most national democracies only obtained stable political institutions, able to reach deep into national societies, as they cemented these systems around global law, and as they constructed their legitimacy around global models of citizenship.

Vital in this connection, first, is the fact that in many societies the global legal system has created a sustainable and generalized model of democratic citizenship in settings where this process, for different sociological reasons, encountered historical obstruction. In particular, second, the global legal system has achieved this, across a range of very different societies and trajectories of democratization, where the 'political' branches of government have not been capable of performing fully inclusive legislative functions. In many societies, classical political institutions have directly impeded the formation of democracy, and they have, for inner-structural reasons, obviated the sustainable construction of the agent from which they extract their own legitimacy – the national citizen. In most cases, the construction of the citizen was a process that could only be initiated, yet not concluded, under national political institutions, and it presupposed the articulation between national and global law for its full realization.

Modern democracy revolves around the paradox that, from the eighteenth century onward, the figure of the citizen opened the national political system to distinctive processes of societal politicization, legitimization and rights attribution, which we associate with democracy. As discussed, the basic legitimacy of modern society was deeply correlated with inclusion of the citizen. Yet, the national-inclusionary claims inherent in these processes only came to conclusion, nationally, as national legal norms were determined by global legal norms – as the citizen became an object of external legal construction.

The sections below address a number of cases in which the correlation between global legal differentiation and the consolidation of national democracy becomes visible, showing how the growth of democracy was prevented by institutions based solely in national citizenship, such that it relied for its completion on global citizenship norms. Each case examined below illuminates this correlation in a distinct setting. For example, the analysis below of the USA and the UK show how the correlation between global law and democracy is visible in societies with a long history of partial, but enduringly selective, democratic institutional formation. The study of the FRG shows how this correlation is visible in democracies, which were created anew in the wave of transitions after 1945. The study of Russia shows how this correlation is visible in societies that are, at present,

only partly constructed as democracies. The study of Colombia shows how this correlation is visible in societies in which democratization has been obstructed by weak institutionalization, by low elite commitment to governance and by high levels of social violence. The study of Kenya shows how this correlation is visible in societies in which democratization has necessitated the overcoming of ethnic antagonisms. Overall, the case studies below are designed to illuminate the general correlation between democratic formation and global legal differentiation, covering societies in which democratization occurred in different historical periods, and in which democratic institutions have assumed very different features, on different points of a spectrum between full democracy and authoritarianism. These studies are intended to examine the growth of democracy in societies marked by very different structural resistances to democracy, and the societies that they examine are selected on that basis. These studies do not claim to be exhaustive, but they cover a broad range of patterns of democratization and a broad range of factors that usually impede democratization. Moreover, in different ways, they illustrate how purely national systems of political representation contain attributes that have prevented the stabilization of national democracy, and how, in part, this has been remedied by the impact of global law. Of course, this does not mean that institutionalized procedures for popular representation and political participation have, in these societies, become incidental to democracy. In each case, however, such procedures were not able, without an external global reference, to produce democracy.

Some historians and sociologists have examined the emergence of democracy and democratic citizenship as a relatively general continuous process, building on patterns of political representation that existed quite commonly in pre-modern Europe. For example, Reinhard Bendix describes the 'over-all similarity of the Western European experience' of democratization, in which, he argues, the estate assemblies of the Middle Ages formed a basis for 'the development of modern parliaments and for the conception of a right to representation which was gradually extended to previously unrepresented sections of the population' (1996 [1964]: 122). More typically, however, historians and historical sociologists make sharp distinctions between emerging patterns of democratic citizenship in different societies, often accentuating differences between nineteenth-century states with an authoritarian bias and nineteenth-century states with a democratic emphasis (see Brubaker 1992: 1). Notably, some of the most important historical-sociological research is concerned with the inner-societal forces that gave rise to, or did not give rise to, democratic

formation.[5] Moreover, many theorists have reflected on the varying preconditions for the ongoing maintenance of democracy.[6] Using such approaches, many historical accounts of modern democracy have stressed the importance of embedded variations in processes of democratization (Janoski 1998: 174–5). This has even led both historians and sociologists to claim that some national populations, especially in Europe, had an original propensity either for democracy or for authoritarianism,[7] which decisively influenced the formation of democratic government in these societies. Indeed, it is widely claimed that some national societies have been forced by their socially entrenched propensities for authoritarianism onto special paths – *Sonderwege* – towards the construction of democratic institutions (see Wehler 1970: 14; Martin 1987: 37; Kocka 1988). Of course, it was for a long period a sociological commonplace that democracy was an artefact of Western Europe, and other countries in its sphere of influence (Markoff 1996: 79). Some interpreters argue that entire continents have experienced quite distinct, and distinctively troubled patterns of democracy building (Forrest 1988: 423–4; Neves 1992: 108; O'Donnell 1993; Bates 2008: 43).

[5] Classical examples include the following: Lipset (1963: 21), stressing the role of values in supporting democracy; Przeworski (2008: 308), stressing the threat of revolution as impetus for democracy; Tilly (2004: 132; 2007: 33), stressing the importance of contentious movements; Moore (1973 [1966]: 413–52), sketching out alternative paths, democratic and authoritarianism, towards modern societal formation; Downing (1988), stressing importance of early constitutional institutions as conducive to democratization; Downing (1992: 239) seeing protracted warfare as a factor that impeded the rise of constitutional democracy; Luebbert (1987), accentuating the early integration of labour movements as a core part of the path to democratic stability; Rueschemeyer, Stephens and Stephens (1992: 272), claiming that democracy depends on a collaborative middle-class posture; and Markoff (1996: 45), linking democracy to the early prominence of social movements. One influential account has argued that 'transitions from authoritarian rule and immediate prospects for political democracy' were primarily explicable 'in terms of national forces and calculations' (Schmitter 1986: 5).

[6] One common assertion is that democracies presuppose relative affluence amongst citizens (Lipset 1959; Huntington 1991). For a classical cultural explanation of democratic stabilization see Almond and Verba (1989 [1963]). For an account placing emphasis on the importance for democracy of a densely organized civil society see Rueschemeyer, Stephens and Stephens (1992: 215). For an account of civic culture as a precondition of democracy see Putnam et al. (1993: 115). See for syntheses of the literature Beetham (1994); Diamond (1999: 64–116).

[7] For sociological variants on this claim see Parsons (1954: 104–6; 1964: 353); Dahrendorf (1965: 26); Lipset (1960: 138); Fraenkel (1964: 30). Münch is more accurate in identifying different national histories as marked by varying obstructions to the realization of democracy (1984: 194–5). For different positions in historical analysis of this question, see, for example, Winkler (1979: 23; 2000: 648); Martin (1987).

Generally, however, it is difficult to see either deep continuities connecting modern democracy to historical/political conditions or deep causal or cultural variations in the national experiences of democratization. Contrary to established lines of historical sociology, the analyses below claim that the preconditions for democratization and citizenship formation, across the globe, are not to be found within national society. Therefore, the structural propensities of national societies do not allow us to assess the probable success of democratization processes. Democratization has almost invariably resulted from the incursion of global norms within national society, leading to a deep rupture between national and global patterns of norm formation. This does not mean, naturally, there are no regional or socio-structural particularities in the emergence of democracy. But what is striking in this process is not the structurally determined diversity, but the relative uniformity of different histories of democratic integration. Before 1914, many states, especially in Europe, followed variable pathways of nationalization and rudimentary democratization, centred around the construction of national citizenship.[8] Then, after 1918, most states collapsed in face of the pressures induced by the two trajectories (nationalization and democratization) by which their own formation had been accompanied and determined. Before 1945, very few societies had established secure democratic institutions, and very few states had reliably enfranchised their populations. In fact, very few societies had assumed a fully nationalized political form. However, after 1945, most societies, albeit gradually, became democracies. In virtually every case, the establishment of democracy was not induced by processes occurring within national societies, and it is only partially explicable through comparative sociological analysis. It is difficult to explain the formation of democratic systems through the historical-sociological analysis of separate national societies. Instead, a global sociology of democracy is required, which places the origins of democracy in global focus, and which observes democracy as constructed by forces outside national society, gaining intensity after 1945, penetrating into the national legal-political structure, and transfiguring national institutions through global norms.

Globally, the establishment of democracy was linked, most vitally, to the deep interaction between national and international normative systems,

[8] Caramani argues that at the time of World War I most societies had reached the endpoint of a process of political nationalization and de-territorialization, caused by urbanization, state formation and communication technology, and reflected in greater political homogeneity and the establishment of organs of mass democracy (2005: 320).

mediated through human rights law, which instilled a set of practices reflecting a *world model of citizenship* within national societies. In virtually every case of democratic formation, the construction of the citizen, which, at a primary and final level, holds together and legitimates national democracy, has been extracted from the global legal system, and it reflects a relatively autonomous interaction between different spheres of global law. Indeed, in nearly every case of democracy building, the reliance of national law on global law is evident at two different levels. First, as discussed, global law constructs the basic legal-normative form of the citizen. Second, global law constructs the national institutional structure in which democratic citizenship is exercisable, facilitating the effective penetration of the political system of society. Consequently in most polities, both the democratization of the political system and the nationalization of society have relied on global norms.

Central to this social phenomenon is the fact that, after 1945, law-making institutions were able to extract some legitimacy for their actions from a construction of the citizen extracted from global law, which meant that they were not required to generate authority for their decisions by mobilizing the will of the people in factually concretized national form. After 1945, gradually, the citizen, to which the national polity owed its legitimacy, was turned outward towards international law, and it was configured around rights defined in international law. This meant that laws applied within national societies could be legitimated without a deep transmission of social antagonisms from society, through the citizen, and then into the institutions of government. In fact, this meant that the global citizen could be imposed onto the national citizen, and the national political system could presume a more stable, controlled form of citizenship around which to order its inclusionary and legitimational functions. The political system thus generated its legitimacy increasingly through outward compliance, and decreasingly through internal conflict management. As a result, the political system became less prone to destabilization through conflicts between its own citizens, and it adopted a model of the citizen as legitimational figure that was more statically constructed, and less inclined to produce and politicize deep-lying societal contests. In this process, notably, legislative institutions lost some of their importance as sources of legitimate will formation. Historically, as discussed, the construction of citizenship was primarily articulated through legislatures. However, in most cases, legislatures on their own proved incapable of galvanizing a generally inclusive idea of the citizen, and they stabilized citizenship around separate group prerogatives. Indeed, in most cases,

legislatures were marked by the twofold paradox that, although defined as the institutional fulcrum of democracies, they promoted generalized models of citizenship that could not easily incorporate minorities, and they attached immovable legislative power to the prerogatives of leading social groups. It was only as the acts of legislatures were pre-formed by global citizenship norms that national citizenship, incorporating all society, yet not bound to dominant interests, became possible. In this process, further, the concept of the citizen underlying the legitimacy of the democratic political system was produced *within the legal system*. The citizen first emerged as a figure that politicized society by translating distinct social claims into legal rights. Ultimately, however, it was the fact that international human rights separated the citizen from concrete positional struggles in society that, across variations between national societies, formed the cornerstone of democratic inclusion.

4.2 Global Human Rights and the Construction of the National Citizen

4.2.1 Global Human Rights and National Democracy 1: The USA

The impact of the global legal system on democratic institution building in national societies is strikingly evident in the post-1945 history of the USA.

For a number of reasons, this claim may appear counterintuitive.

First, for example, the USA has a long history of domestic civil rights jurisprudence, and a long history of partial democratic representation. In fact, in the USA, the growth of democracy and the growth of basic civil rights were always very closely connected. The early rise of American democracy, and American national society more widely, were clearly shaped by the enforcement of constitutional rights by federal courts.[9] Indeed, most epochal stages in the long process of nation building in the USA, from the Founding, to the Civil War, to Reconstruction, to the New Deal, to the counter-mobilization of the 1950s and 1960s, were connected to a deepening societal solidification of constitutional rights in American society.[10] Second, the period before and after 1945 is usually seen as a period in which the federal courts enjoyed rather diminished authority,

[9] See in particular *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87.

[10] Early documents of the American Revolution, including the resolutions of the Stamp Act Congress (1765) and the Continental Congress (1774), the Virginia Declaration of Rights (1776) and the Declaration of Independence (1776) were phrased in the diction of rights.

and in which they displayed heightened deference to Congress and the President (see Leuchtenburg 1995: 219). This is the result of the fact that in the 1930s the Supreme Court had initially obstructed the New Deal policies implemented during the presidency of Roosevelt,[11] which had presupposed a strengthening of executive power. Roosevelt reacted to this by appointing judges to the Court who were sympathetic to executive-led government, and less likely to veto policy making.[12] Third, more generally, the impact of international law never reached the same level in the American legal system as in other national legal systems, and American courts today still reject the use of international human rights law as determining grounds for decisions.[13] Indeed, it is a derisive commonplace that the USA advocates human rights for the global community, yet not for itself (Cohen 2006: 326). The attempt to comprehend democratic institution-making in the USA in the decades following 1945 as the consequence of a deep interaction between national law and global law can thus easily appear implausible.

Despite this, the years following 1945 in the USA can surely be seen, in part, as a period in which the national legal system slowly reached an unprecedented level of autonomy and authority. This was partly caused by the pervasive impact of international legal norms within the domestic legal system. This increasing autonomy of law had far-reaching implications for the structure of national democracy, in some cases causing a penetration of national-democratic norms, especially civil rights, into regions previously only tenuously connected to the federal legal/political order. In consequence, this process also established uniform concepts of citizenship to underpin the democratic order.

To explain this impact of global law on American law, first, it is vital to bear in mind that use of the term *democracy* to describe the mode of political institutionalization in the USA before the 1960s requires, at the very least, some qualification.

Many accounts claim that the 'notion of natural rights' was 'absolutely fundamental' to the American Founding, where it formed a 'Revolutionary Language' (Bradburn 2009: 27).

[11] See *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *United States* v. *Butler*, 297 U.S. 1 (1936).

[12] By 1945, judges appointed by Roosevelt constituted 67 per cent of the appellate branch and 59 per cent of the district branch (Irons 1982: 291).

[13] Famously, it was decided in a Circuit Court of Appeals that UN rulings could not prevail over federal laws: *Diggs* v. *Schultz* 555 F.2d 461 (DC Cir 1972). See the most emphatic expression of this law of domestic primacy in Rakin (2007). See Scalia's expression of 'fear' concerning the 'accelerating pace' of use of foreign law in the American Supreme Court (2004: 308).

As discussed in the introduction, the USA was originally founded in a spirit of popular democratic citizenship. This was reflected in particular in the first state constitutions created after 1776. However, the Federal Constitution of 1789 also provided for national representation on a broad electoral basis. Later, the Civil War, Reconstruction and the Constitutional Amendments passed at this time were intended to impose universal rights of citizenship across all parts of the polity (Gillette 1979: 25–6). One observer argues that the Civil Rights Act (1866) and the Reconstruction Act (1867) were designed 'to define in legislative terms the essence of freedom', consolidating democratic citizenship as a structural norm for the entire American polity (Foner 1988: 244).

However, from the Founding onwards, American citizenship was only partial and selective in its scope, and in many areas it was only fully accorded to ethnically privileged (white-skinned) social groups. Owing to the loosely coordinated federal system and the weak judicial enforcement of civil rights norms, the provisions for democratic rights guaranteed in the original Constitution of 1789/91 and the Civil War Amendments did not pierce deeply into the legal/political life of all federated states. After the rapid failure of Reconstruction in the southern states after the Civil War, in fact, State Congresses in a number of states successfully mobilized against the imposition of national constitutional law to preserve white political supremacy, often with the acquiescence of the federal judiciary and the presidency.[14] As a result, up to 1964, when the Civil Rights Act was passed, and, perhaps more importantly, to 1965, when the Voting Rights Act was passed, the USA only possessed a quasi-democratic political system. This system was based, to some degree, on an apartheid model, in which, in some regions, non-white population groups were routinely excluded from exercise of the civil rights constitutive of democracy.[15] In many

[14] See Gillette (1979: 45). The 'gutting' of the Civil War Amendments by the Supreme Court has of course been widely discussed. Notably, in *Williams* v. *Mississippi*, 170 U.S. 213 (1898), the Supreme Court condoned restrictions imposed on electoral participation of black voters in Mississippi. On judicial responsibility for the failure of Reconstruction see Kruger (1975: 50–83); Forbath (1999: 51); Kousser (1999: 53). Kruger states that by 1900 'the Supreme Court had nullified nearly every vestige of the federal protection that had been cast like a comforting cloak over the black man' (1975: 83). For an important revisionist appraisal of this view, however, see Brandwein (2011: 64, 98).

[15] After 1965, registration of black voters in Mississippi increased from 6.7 per cent to 59.8 per cent. For this analysis and discussion of the 'revolutionary' consequences of the Voting Rights Act of 1965, see Grofman et al. (1992: 16, 23). In agreement with my claim that the USA had not established full democratic suffrage until 1964/5, see the views in Steinfeld (1989: 336). The greatest rise in black electoral enrolment occurred in the years 1965–9

ex-Confederate states, the pre-1964 political system was based on comprehensive exclusion of members of the black population from electoral participation, either by constitutional or para-constitutional discrimination. One account explains that, before the 1960s, franchise restrictions in the south created a 'system which insured the absolute control of predominantly black counties by upper-class whites', effectively suppressing all organized political opposition to dominant social groups (Kousser 1974: 238).[16] 'Apartheid', as one great authority has explained, was, until the 1960s, a 'governing system that pervaded half the country' (Cover 1982: 1316).[17] A different, equally authoritative, commentator has claimed that, until the 1960s, the USA, like South Africa, could only be viewed as a partial democracy, centred on 'a unique socio-economic structure and a political apparatus which was simultaneously racist, stubbornly capitalist, and committed to a limited form of bourgeois democracy: a racist/capitalist state' (Marable 1991: 4). Only from the mid-1960s onwards was it clear that African Americans were to be classed as fully enfranchised citizens of the USA, and that equal inclusion of society was an invariable component of governmental legitimacy. In the USA, therefore, the 1960s were emphatically a period of *democratic transition*.[18]

(Lawson 1976: 334). For use of the term 'American apartheid' see Friedman (2002: 111, 285).

[16] On the Voting Rights Act as the most effective instrument for enforcing universal democracy see Lichtman (1969: 366); Friedman (2002: 300).

[17] On broader similarities between South Africa and the USA after 1945, see Plummer (1996: 192).

[18] Other authors apply the democratic transition paradigm to the USA under the Civil Rights Movement, explaining that this period led government from a non-democratic to a democratic condition. See most notably the outstanding analysis in Mickey (2015: 66). Mickey's account, in itself magnificently illuminating, applies the democratization paradigm to explain the transformation of the southern states alone, which are described as 'enclaves' of authoritarian rule that evaded incorporation in the democratic order of American society as a whole (13). Democratization thus appears to Mickey as the overcoming of 'subnational authoritarianism' (35). On my reading, as the southern states were at least notionally part of the USA, the democratization paradigm should be applied to the USA as a whole. On my account, the disfranchisement of large swathes of the black population after Reconstruction meant that the USA as a whole, having briefly become something close to a democracy in the 1860s, stopped being a democracy after Reconstruction had failed. For analysis that questions the perspective that weak democracy was localized in the USA, see King (2007: 205). One other excellent analysis of the Civil Rights Movement describes the 'exceptional nature of America's development as political democracy', stating that 'no other democracy in the world has ever enfranchised a large group and then disenfranchised it' (Valelly 2004: 148). In this regard, however, the USA appears less than exceptional. Something similar happened repeatedly in France from 1789–1871 and also, recurrently, in Spain up to 1975. A different account argues that, up to the mid-1960s, the USA contained 'two different

The fact that national democracy was only partially evolved in the USA before 1964/65 was due, mainly, to the fact that the political system was not originally founded in a simple definition of citizenship, able to form a centre of normative consistency for the law. At one level, of course, the weak construction of the citizen was simply determined by discriminatory national policies in favour of white communities (see King 2000: 41–6, 124).[19] As early as 1790, Congress itself applied an exclusionary principle to citizenship questions, limiting naturalization to white aliens and restricting enrolment in militias to white citizens (Litwack 1961: 31). However, the weak construction of the citizen was also the result of the federal organization of American government, which led to variations between different federal states in the construction of political rights. This was linked to the founding doctrine of concurrent or even multiple sovereignty, which underpinned the original conception of the American constitution (see Lacroix 2010: 135). Ultimately, this system generated deep contradictions between conceptions of citizenship at state level and at federal level.

Famously, for example, the early formative period of the American Republic was dominated by the polarization between rival concepts of citizenship, in which Federalists and Democrats proposed models of the citizen that defined, respectively, the federal government or the state governments as primary foci of obligation (Smith 1997: 196). To be sure, the 1789 Constitution was called into life by a theoretical vision of a unified nation with normatively unified citizenship. In *Federalist 2*, John Jay argued that the USA was formed by 'one people' with 'each individual citizen everywhere enjoying the same national rights, privileges, and protection' (Madison, Hamilton and Jay 1987 [1787–8]: 91–2). In reality, however, the constitution did not contain a secure construct of the national citizen (see Bickel 1973: 370), and laws were proportioned to multiple, overlapping, but at times highly fragmented, ideas of the citizen, which

democracies', separated by divergent attitudes to slavery (Wilentz 2005: 705). If we assume that the USA was, at least legally, a nation after 1789, the coexistence of two democracies cannot be possible: it either *was*, or (more plausibly) *was not* a democracy. Notably, one expert contemporary observer argued that the southern states were marked by a 'struggle against democracy' by 'legal and extralegal restrictions of the right to vote' (Schattschneider 1988: 99). Using standard measurements for the quality of democracy, the USA before 1964 the USA did not meet a core test of democracy, which is not satisfied 'if one or more segments of all adult citizens are excluded from the civil right of universal suffrage' (Merkel 2004: 49).

[19] See, indicatively, the restrictive ruling on non-white naturalization in *Takao Ozawa* v. *United States*, 260 U.S. 178 (1922).

were located at different points in the national political system. Indeed, the idea of national citizenship in revolutionary America was intrinsically weak – the collective people of the nation were always distinct from the collective peoples in the separate states (Hulsebosch 2005: 229; Fritz 2008: 196). As a result, the Constitution sanctioned a system of dual citizenship, in which the national government and the states exercised sovereignty in different social spheres, which meant that in different parts of national society national citizenship was institutionalized in different ways. This naturally meant that the universal implications of national citizenship were subject to limitation by the states, and states could moderate citizenship in accordance with their own prerogatives, often on ethnic grounds, such that the basic egalitarian implications of national citizenship often fell short of including non-white population groups.

Acceptance of divergent patterns of citizenship, entailing divergent obligations and uneven calibration of inclusionary entitlements, was reflected in early rulings of the Supreme Court.

In some early rulings, the Supreme Court was inclined to identify national citizenship as having primacy over citizenship based in the separate states.[20] This line of reasoning was not uniform, as, in some cases, the Court upheld a concept of twofold citizenship, in which social agents were subject to some obligations as citizens of states and some obligations as citizens of the America Republic.[21] However, the more federalist line of reasoning peaked in *McCulloch* v. *Maryland* (1819).[22] Indeed, very notably, the early Supreme Court tied its federalist stance to an enthusiasm for international law, and international norms were deployed to expand both the reach and the consistency of federal law in relation to the states.[23] As Chief Justice of the Supreme Court, John Marshall argued for the unrestricted territorial sovereignty of the nation, and he defined the 'jurisdiction of courts' as a 'branch of that which is possessed by the nation as an independent sovereign power'.[24] At the same time, he stated that 'the Court is bound by the law of nations which is part of the law of the land'.[25] In some of the most important cases decided by Marshall, notably *Murray* v. *Schooner Charming Betsy* (1804), *Rose* v. *Himely* (1808) and *Brown* v. *United States* (1814), affirmative reference was made to foreign and

[20] *Chisholm* v. *Georgia*, 2 U.S. 419 (1793)
[21] *United States* v. *Worrall*. 2 U.S. 384(1798).
[22] *McCulloch* v. *Maryland*, 17 U.S. 4 Wheat. 316 316 (1819).
[23] For background see Lenner (1996: 73).
[24] *The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, (1812).*
[25] The Nereide, 13 U.S. (9 Cranch) 388 (1815).

international law as the basis for final ruling.[26] National citizenship and international law, consequently, were closely connected from an early stage, and the authority of international law provided a normative basis for the expansion of federal authority and federal citizenship.

By the 1830s, however, the Supreme Court became more protective of the rights of states, ruling that constitutional rights were not enforceable against the states.[27] In *Dred Scott*, most notoriously, the Taney Court asserted the primacy of state citizenship over federal citizenship. Taney used this principle to institutionalize a caste-like hierarchy of citizens, in which people of colour could not be classed as citizens under the federal Constitution.[28] Subsequently, after Reconstruction, the Court again opted for an extremely constrained view of national citizenship (Smith 1999: 332). The Fourteenth Amendment, introduced after the Civil War, declared reasonably clearly that state citizenship should be secondary, or at least closely aligned, to citizenship of the United States.[29] The Fifteenth Amendment gave reality to these principles by establishing universal (male) black suffrage. After this, however, the Supreme Court declared in The *Slaughterhouse Cases* 'that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend

[26] For comment on these cases see Calabresi and Zimdahl (2005: 763–71).

[27] *Barron* v. *Baltimore*, 32 U.S. (7 Pet.) 243 (1833),

[28] See the following argument in *Dred Scott*, which still bears repetition as an exercise in stimulating moral revulsion:

> The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty and who hold the power and conduct the Government through their representatives. They are what we familiarly call the 'sovereign people', and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

Dred Scott v. *Sandford* 60 U.S. 393 (1857)

[29] On the primacy of US-citizenship implied by the Fourteenth Amendment see D. Smith (1997: 800). On this aspect of the Civil War legislation more generally see Oakes (2013: 358–9).

upon different characteristics or circumstances in the individual'. Notably, in ruling this, the Court declined to enumerate those rights, privileges and immunities that all citizens of the USA held as inviolable.[30] The principle of divided citizenship was also expressed in cases concerning voting rights for minority populations.[31] This was not a fully consistent line of reasoning; in other cases the Supreme Court argued for a more encompassing notion of citizenship.[32] Yet, these rulings meant that policies to promote national citizenship after the Civil War were weakened, and civil rights norms were not incorporated across all states of the Union. As a result, the consolidation of the single rights-based model of the citizen was postponed;[33] full nationalization of society did not occur until the 1960s.

This splitting of the citizen into partly separate state-based and federal components permitted the persistence of a racist model of citizenship in the USA, and it impeded the full formation of a democratic system, based on a single national democratic people (see Allen 2006: 120–5). Major historical caesura, notably the Civil War, Reconstruction, the New Deal and the Civil Rights Movement reflected politically volatile, essentially revolutionary contestations over the construct of the citizen, attempting to spread, or – conversely – to counteract the spread, of a unifying idea of citizenship to all members of the national community.[34] In such moments, it became clear that the ideals of democratic popular sovereignty declared in the Founding era were not correlated with any socio-material reality, and, especially in the Civil War, the democratic people had to be created through acts of violence. In this respect, importantly, in the Civil War, Reconstruction and the aftermath of World War II, the widening of the reach of black citizenship was strongly linked to experiences of military mobilization, through which black soldiers were reinforced in their demands for the classical rights of political citizenship.[35] Up to the 1960s,

[30] The Slaughter-House Cases, 83 U.S. 36 (1873). See also *United States* v. *Cruikshank*, 92 U.S. 542 (1875).

[31] *Giles* v. *Harris*, 189 U.S. 475 (1903).

[32] Ex parte Siebold, 100 U.S. 371 (1879); Ex parte Yarbrough, 110 U.S. 651 (1884).

[33] This of course remained a critical point in American constitutionalism. Eventually, the idea was expressed in the Supreme Court that 'citizens would have two political capacities, one state and one federal, each protected from incursion by the other', but that the national government 'owes its existence to the act of the whole people who created it': *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779 (1995) (Kennedy).

[34] See for discussion Bradburn (2009: 295). Tellingly, James Garfield described the Civil War and Reconstruction as a 'gigantic revolution', greater even than 1776 (Wang 1997: 140).

[35] Black military service for the Union army in the Civil War had played an important role in propelling the movement for full citizenship (see Foner 1987: 864; Oakes 2013: 378–9).

however, laws shaping different life-contexts were not typically justified through reference to shared rights, to a unified concept of citizenship or to a unified concept of democracy. Up to this point, the American political system can only be characterized as a democracy if a racist definition of democracy is accepted. Democracy needed to be built, incrementally, through the social extension of civil rights, and, as discussed below, this was not established in classical political fashion.

To explain the significance of global law for American democracy, second, it should be noted that, although the composition of the Supreme Court after 1945 was determined by Roosevelt's personal nominations, Roosevelt had generally appointed judges who were sympathetic both to liberal reformism and to the (closely related) widening of federal government. Above all, he had appointed judges who viewed the generalized enforcement of human rights norms (that is, *rights-centred Liberalism*) as a strategy for expanding the power of the federal state across society (Tushnet 1994: 70; McMahon 2004: 25, 73). Tellingly, Roosevelt had argued that the southern states were still dominated by conventional or customary patterns of authority, which resembled the legal order of feudal Europe (McMahon 2004: 17). Like the anti-feudal revolutionaries of the late Enlightenment, therefore, he promoted policies designed, from within the federal government, to impose uniform legal rights across society, especially in social legislation, as a means to construct society in more inclusive fashion, and to extend the basic structure of a national legal system across society in its entirety.[36] After Roosevelt's death, by consequence, the Supreme Court was staffed with judges who were generally committed to the extension of federal power, and who saw the broadened solidification of civil rights across American society as a vital social and political necessity. Notably, before 1945, the Supreme Court had already begun to endorse rigorous intervention in cases of political discrimination against racial minorities.[37] The post-1945 period then saw a deepening shift in the Supreme Court from concern

Truman's military desegregation laws (Executive Order 9981, 1948) after World War II had central importance in the background to the Civil Rights Movement in the 1960s.

[36] However, note the argument that racism was not only institutionalized in the states – it was also fundamentally embedded in Federal government (see King 2007: 16).

[37] See the famous footnote 4 in *United States* v. *Carolene Products Co*. 304 U.S. 144 (1938), in which Justice Stone considered 'whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry'. As stated in this footnote, laws restricting political citizenship for black people had already been struck down in *Nixon* v. *Herndon*, 273 U.S. 536 (1927) and *Nixon* v. *Condon*, 286 U.S. 73 (1932). One outstanding

with single monetary rights to concern with civil and political rights as the core pillars of American nationhood (Leuchtenburg 1995: 235).

In the process of democratization in the 1960s, notably, leading actors in the American judiciary, who had traditionally been Conservative, outpaced the Presidency in promoting civil rights.[38] Indeed, the judicial system obtained great significance in the extension of rights-based democracy. After World War II, first, the Supreme Court gained a reputation for activism and autonomy, which eventually culminated under the Chief Justiceship of Earl Warren (Barkow 2002: 266). By the early 1960s, certain commonplaces of American jurisprudence had been unsettled by the increasingly activist jurisprudence of the Supreme Court. For example, the Supreme Court launched an attack on the previously entrenched doctrine, supported by Roosevelt's judges,[39] that certain legal questions had political status, falling solely under the powers of Congress and not amenable to control by the courts.[40] In some rulings, the Supreme Court dictated the principle of equal voting rights as a political basis for society.[41] Moreover, the Supreme Court placed restrictions on traditional balances between state rights and national government, and it showed great willingness to issue rulings that extended federal power. Many decisions in the Warren court entailed an intensification of federal authority, at times against the express wishes of the incumbent President.[42] In some cases,

observer describes this footnote as both 'a precursor and a precondition' of the Second Reconstruction (Kousser 1999: 68).

[38] Eisenhower was notoriously unsupportive of civil rights cases (see Lichtman 1969: 349). One interpreter claims that he 'refused to show public support' for the ruling in *Brown* v. *Board of Education*, and he regretted the damage done by this case to the cause of Southern Republicanism (Luders 2010: 153). A different account states that he was 'lukewarm if not hostile to Negro aspirations' (Lawson 1976: 140). Further, civil rights legislation often encountered deep resistance in Congress – so it cannot be assumed that these laws expressed a broad popular political will (see Graham 1990: 147, 152).

[39] For this see *Colegrove* v. *Green*, 328 U.S. 549 (1946). See Brandeis's classical statement of judicial reticence in 1936: 'The Court will not pass upon the constitutionality of legislation in a friendly, nonadversary, proceeding, declining because to decide such questions is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act'. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 (1936).

[40] See *Baker* v. *Carr*, 369 U.S. 186 (1962): 'The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority'.

[41] *Wesberry* v. *Sanders*, 376 U.S. 1 (1964); *Reynolds* v. *Sims*, 377 U.S. 533 (1964).

[42] Note Eisenhower's opposition to the Supreme Court's position in questions of intrastate transportation (Burk 1984: 170).

federal courts identified instances of egregious unconstitutional behaviour within particular states, and they imposed federal remedies directly to rectify this.[43] For example, the Supreme Court handed down rulings that declared unconstitutional discriminatory practices, notably school and other educational segregation, institutionalized in the wake of *Plessy* v. *Ferguson*, and restricted voting, institutionalized in state constitutions and by Supreme Court rulings.[44] The centrepieces of this process were the rulings in *Brown* v. *Board of Education* (1954) and *Cooper* v. *Aaron* (1958). However, later cases, affirming the primacy of constitutional amendments and congressional civil rights legislation over state rights, also played an important role in this broadening of federal power.[45] Eventually, the elevation of the status of constitutionally guaranteed rights made it possible for federal courts and federal legislation to penetrate more deeply into the traditional jurisdiction of the states, and to ensure that constitutional rights were more fully incorporated in state law.[46] By the 1960s, state-level incorporation of federal civil rights was greatly augmented (Lewis and Trichter 1981: 217). Under the Warren Court, clearly, federal courts began to oversee functions of state-level regulatory agencies, such as education providers, and to scrutinize their adherence to federal court rulings. Increased judicial activism and civil rights enforcement also resulted in the increased imposition of federal norms on state courts.[47] It also led to the creation of new standards on use of evidence in state tribunals.[48] Moreover, heightened protection was established for persons suffering violations of civil rights by public bodies.[49] These developments tightened lines of control between national and state governments, effectively promoting the more complete nationalization of society.

In each of these respects, the mass of legal institutions in American society clearly acquired an unprecedented autonomy in the years after 1945, and they assumed powers that significantly exceeded their traditional

[43] *Holt* v. *Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970).

[44] *Giles* v. *Harris*, 189 U.S. 475 (1903).

[45] See for example *Heart of Atlanta Motel Inc.* v. *United States*, 379 U.S. 241 (1964); *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966).

[46] See notably *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), See discussion of the theory of incorporation developed by Hugo Black in Hockett (1996: 113). See historical analysis in Casper (1972: 39).

[47] *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965).

[48] See for example *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). On the increased availability of federal habeas corpus in this era see the excellent account in Glennon (1994: 905).

[49] See for example *Monroe* v. *Pape*, 365 U.S. 167 (1961) see also the district court ruling *Holt* v. *Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970).

constitutional limits. In important ways, actors within the legal system constructed the foundation for a more inclusive system of democracy, using civil rights jurisprudence to link diffuse parts of society to the national government (see McMahon 2004: 3).[50] Through these processes, above all, the national legal system obtained greater presence and immediacy across different spheres of society, and judges applied civil rights as principles that underscored the societal immediacy of national constitutional law. Ultimately, the consolidation of federal government through judicial practice proved a core precondition for the relative success of the Civil Rights Movement in the 1950s and early 1960s. The fact that the government had extended rights quite broadly across American society meant that, by the 1950s, it possessed sufficient infrastructural power to ensure that southern states could not, as had been the case after Reconstruction, continue to flout constitutional obligations regarding the civil rights of African Americans.[51] Civil rights, in other words, were both the building blocks and effective indicators of national governmental power.

In addition, third, it is widely accepted that, at least at federal level, the American legal system has shown only limited openness to international norms.[52] This is of course true in a restricted sense, as few cases in the American Supreme Court have been decided using international law.[53] However, the years after 1945 witnessed a number of processes, some direct and some more oblique, in which international legal presumptions gained unprecedented authority in the USA, and in which legal procedures were deeply shaped by principles of international law. International law in fact played a core role in the expansion of national democracy, and it acquired distinctive importance in cases with implications for racial exclusion, helping to remedy shortfalls in democratic legitimacy.

The legal order of American democracy underwent a process of redirection after 1945, in part, because of the international rise of human rights

[50] This claim has been forcefully disputed in Rosenberg (1991: 343). However, even if Rosenberg's call for a more restrictive view of the power of courts is heeded, it remains the case that the vocabulary of rights (a judicially constructed vocabulary) formed the basis for the general legal/political register of democratization in the USA.

[51] In agreement see Valelly (2004: 1–2).

[52] One account claims that a 'deep strain of U.S. political thought portrays international law as an illegitimate attempt by democratically unaccountable foreigners to interfere with the legit mate self-governance of democratic majorities at home' (Goldsmith and Levinson 2009: 1793). At most, it is argued elsewhere, the American courts may employ international law as 'one element of a complex inquiry into constitutional meaning' (Neuman 2004: 90).

[53] However, see important exceptions in *Lawrence* v. *Texas*, 539 U.S. 558 (2003) and *Roper* v. *Simmons*, 543 U.S. 551 (2005).

law, triggered by global horror at the experiences of European fascism. Before the USA entered the World War II, notably, the Supreme Court had already shown implicit awareness of authoritarian practices in societies in Central Europe, and it insisted that American public agents should be held to account by rigid normative standards.[54] Later, Eleanor Roosevelt's role in creating the human rights instruments of the UN, in which prevention of racial discrimination was a deep motivation, gave growing salience to human rights norms in American society.[55] Clearly, this was shaped by the fact that World War II had been inextricably linked to race and racism, and, despite their own openly racist policies, the victorious powers were ideologically committed to the stigmatization of racism.[56] Early Supreme Court rulings after World War II cited the UN Charter in cases concerning discriminatory laws within the USA.[57] Some state courts also began to cite directly from the human rights laws of the UN in cases concerning racial discrimination.[58] Moreover, although judges of the Supreme Court rarely based decisions on international norms, it is well documented that, in hearing civil rights cases, they were attentive to concerns in the international legal community, and that they received amicus curiae briefs, which referred to the UN Charter (see Lockwood 1984: 916, 948).[59] In leading anti-discrimination cases, petitioners brought arguments articulating principles informed by the UN Charter, and the Court expanded protection against discrimination on grounds partly borrowed from international law.[60] In the 1950s, Civil Rights groups also saw growing acceptance of

[54] See the analysis of instruments used by 'tyrannical governments' in *Chambers* v. *Florida*, 309 U.S. 227 (1940). Moreover, the experience of authoritarianism in Europe affected academic perceptions of police practice in the USA, and prominent publications drew parallels between law enforcement in the USA and in interwar Germany (see Hall 1953: 140). Famously, during world war 2 Gunnar Myrdal asked the question: 'Is the South Fascist?' (1944: 458). He decided it was not fascist, not because of insufficient racism, but because it 'lacked the centralized organization of a fascist state'.

[55] Representatives of black civil rights organizations were invited observers at the San Francisco Conference, which gave rise to the UN Charter (see Plummer 1996: 132).

[56] On the symbolic connections between American perceptions of the Nazi holocaust and perceptions of victims of racial violence in the USA see Bradley (2016: 70, 87). After 1945, in promoting democracy in Germany, American troops questioned Germans about their perceptions of black people as a means to measuring the persistence of Nazism (Merritt 1995: 95–6, 258). Perhaps, in so doing, some Americans perceived similarities between themselves and their adversaries, and drew conclusions from this.

[57] *Oyama* v. *California* 332 U.S. 633 (1948).

[58] *Perez* v. *Sharp*, 32 Cal.2d 711; *Kenji Namba* v. *McCourt*, (185 Ore. 579, 204 P. 2d. 569).

[59] *Henderson* v. *United States*, 339 U.S. 816 (1950); *Bolling* v. *Sharpe* 347 U.S. 497 (1954).

[60] See *Shelley* v. *Kraemer*, 334 US 1 (1948). This case, one of the most important of all race-related cases, was strongly influenced by the UN human rights instruments.

international human rights law as a factor that provided openings for protest and strategic agitation, and different groups petitioned the UN to bring Jim Crow laws to an end, once on grounds of genocide.[61] International law thus created a platform for legal activism, and this in turn reinforced the effect of international norms.

Importantly, further, broader international political conjunctures also played a role in ensuring that human rights law acquired increased impact in American society. It is often argued that the Cold War militated against the realization of the human rights ideals spelled out after 1945 (see Chesterman 2004: 34; Madsen 2014: 254). Within American society, however, the opposite is in some respects true, and the realities of the Cold War had far-reaching implications for the solidification of democracy (Lockwood 1984: 916; Borstelmann 2009: 3). Notably, media coverage of American politics in ideologically hostile countries after 1945 widely fixed on racial discrimination as a means of discrediting the USA, whose global international capital was strongly linked to democracy promotion. Moreover, the official support of the USA for decolonization in countries previously under the rule of European Empires sat uneasily with clear support for ethnic privileging within the USA itself (see Luard 1982: 58). Successive Presidents were clearly aware of the sensitivity of this fact. For example, Eisenhower expressed alarm that, owing to American apartheid, the USA could, by its enemies, be 'portrayed as a violator of those standards of conduct which the peoples of the world united to proclaim in the Charter of the United Nations' (Spiro 2003: 2016). Later, Kennedy promoted civil rights in domestic law as a means 'to restore America's relative strength as a free nation' and to regain 'leadership in a fast-changing world menaced by communism' (Brauer 1977: 42). In the proceedings in *Shelley* v. *Kraemer*, tellingly, the opinion was recorded that 'acts of discrimination taking place' in the USA were proving detrimental to 'the conduct of foreign relations' (Lauren 1983: 25). This meant that advocates promoting civil rights in the USA touched on matters that had great relevance for questions of national security and foreign policy, creating distinct opportunities for effective oppositional mobilization (Skrentny 1998: 242). Ultimately, Johnson's civil rights policies were clearly directed towards an international audience, and he appealed to global human rights norms as authority for legislation regarding civil rights (Jensen 2016: 114).

[61] See Martin (1997: 36). Yet, for a discussion of typical UN vacillation on such core issues see Anderson (2003: 82).

This bundle of international factors created a strong imperative for the hardening of civil and political rights for black communities, and for the general deepening of national democracy, in the USA. Political developments in the USA in the longer wake of 1945 are not easily explicable outside this international political constellation. One important account has even declared that the entire culture of minority rights which evolved in the USA in the 1960s resulted from national security concerns, linked to the USA's global exposure to criticism in light of the growing system of international human rights, which the American government had been instrumental in designing (Skrentny 2002: 7, 27). During this time, both legislative and judicial decisions increasingly reflected the emerging international consensus on human rights. Surely not by coincidence, the core pieces of legislation establishing democratic citizenship for all Americans, the Civil Rights Act (1964) and the Voting Rights Act (1965), were passed at the same time as the UN Convention on the Elimination of all Forms of Racial Discrimination (1965).[62] As discussed, in fact, this raft of legislation coincided with a growing tendency amongst international lawyers to view apartheid as a breach of *jus cogens*. This package of civil rights legislation also included important measures to liberalize immigration law, the Immigration and Nationality Act (1965), in which the previous race-based quota system was abolished.[63]

In some ways, the process of democratization in the USA after 1945 brought to conclusion a long process of rights-based nation building, societal transformation and legal citizenship construction.

Most evidently, the Civil War had been a war fought both about rights and about national unity, in which different visions of rights had traced out the fault lines between conflicting visions of nationhood and citizenship. Clearly, the causal background of the Civil War had been determined by the ruling in *Dred Scott*, which denied that black federal citizenship could exist, opening up a line of violent contestation connecting questions of rights, citizenship and federalism. The Civil War Amendments and Reconstruction were then implemented as programmes to create a constitutional reality of universal rights-holding citizenship, connecting

[62] In agreement, one excellent account explains that the USA opened the UN General Assembly debates in 1965 on the draft for the Convention on the Elimination of all Forms of Racial Discrimination, and the USA's recent domestic legislation on human rights was discussed extensively (Jensen 2016: 117).

[63] On the significance of this law as a 'civil rights triumph' see Chin (1996: 276). On the discriminatory nature of earlier legislation passed in the 1920s, and its implications for black people in the USA, see King (2000: 164, 224).

and binding the states and the union in equal measure (see Kaczorowski 1987a: 210). One observer asserts, quite plausibly, that the 'United States might have had no true constitution until the Fourteenth Amendment was enacted' and that the constitution in its original form, 'built upon multiple, inconsistent foundations', was not really, in its social consequences, 'a constitution at all' (Eisgruber 1995: 73). In addition, the Civil War had implications for the reach of the judicial branch of government. One outcome of the Civil War amendments was that the Supreme Court was consolidated in its position as a guarantor of rights of federal subjects, and, under the Fourteenth Amendment, it was authorized to review the jurisprudence of state courts (Weinberg 1977: 1199). The Supreme Court was thus expected to distribute rights across state boundaries as a cornerstone of national unity and national citizenship. One analysis explains that this period saw the rise of a 'revolutionary legal theory', establishing the 'primacy of national civil rights' (Kaczorowski 2005: 1), and creating a condition in which the 'fundamental rights of citizens were nationalized' (Kaczoroski 1987b: 57). As late as the 1880s, judges on the Supreme Court insisted that the post-bellum civil rights legislation served 'to protect the citizen in the exercise of rights conferred by the Constitution of the United States, and it was essential to the healthy organization of the government itself.[64]

In the wake of the Civil War, however, the rights obtained through the constitutional amendments and subsequent civil rights legislation were not effectively implemented. These laws were partly blocked by state legislatures, partly allowed to fall into neglect by Congress and the President, partly undermined by the weak administrative capacities of the federal government, and partly stripped of substance by the Supreme Court.[65] Rejection of civil rights was at the centre of the backlash against Reconstruction, reflected in growing support for the Democrats across many states (Gillette 1979: 220–6).[66] As discussed, the Supreme Court played a leading role in such retrenchment, ruling in 1883 that constitutional rights did not offer protection from discriminatory acts of private individuals in the states.[67]

[64] Ex parte Yarbrough, 110 U.S. 651 (1884).

[65] The Civil Rights and Slaughterhouse cases are usually seen as exemplary of the Supreme Court's change of direction in applying federal rights provisions against the state. One account claims that in the period 1868–1911 the Supreme Court reached 604 rulings involving the Fourteenth Amendment, but upheld basic principles on only six occasions (see McAdam 1982: 71).

[66] Tellingly, Gillette (1979: 379) argues that after the Civil War 'the nation was reunited, but there had been no national settlement'.

[67] Civil Rights Cases, 109 U.S. 3 (1883).

It was only in the 1960s, a period close to a second national Civil War, in which rival visions of American nationhood again confronted each other in rival visions of civil rights, that a national citizenship took shape, providing substance for a fully national democracy.[68] At this time, the war over rights, citizenship, nation building and judicial power that took place in the 1860s re-emerged in a second war over rights, citizenship, nation making and judicial power. However, this war approached an end because of the impact of global norms, and because a national model of the rights-holding citizen was configured around global norms. Parsons himself provided deeply penetrating commentary on this process. Although he failed to notice the international dimension of American nation-building, he clearly observed that the universal circulation of civil rights in American society played a key role in the final consolidation of the USA as a comprehensively nationalized society.[69]

Of course, the completion of American democracy in the 1960s was not exclusively a legal process. At this time, clearly, the legal system did not disconnect itself from other branches of government, and the courts on their own did not have the capacity to transform the structure of democracy.[70] Democratization in the 1960s was evidently marked both by a process of liberalization in the Presidency and by a liberalization in the Supreme Court. Therefore, the rise of judicial activism was a partly political, partly legal process, reflecting a deep tidal change in social

[68] One influential account sees the Civil Rights Movement as a 'Second Reconstruction' (Woodward 1957: 240). Given its nation-building implications, I am more inclined to see the Civil Rights Movement as a Second Civil War.

[69] See both Parsons (1970: 15) and the general argument in Parsons (1965). To support this association between civil rights and national societal formation, see Pole (1978: 264, 289, 326).

[70] Different perspectives in the literature on the role of the Supreme Court place varying emphasis on the importance of its role in transforming inter-ethnic relations in the USA. Most enthusiastic is the claim that the Civil Rights struggle was 'sired', 'succored' and 'defended' by the Supreme Court in Williamson (1979: 3). Similarly one author claims that civil rights litigants played a 'pivotal role in the growth of federal court power', helping federal institutions to 'power-grab from state courts' (Francis 2014: 8). A different account, amidst more reserved pronouncements, states that from the 1950s the courts were 'the most accessible and, often, the most effective instruments of government for bringing about the changes in public policy sought by social protest movements' (Neier 1982: 9). On the limits of judicial power in the Civil Rights era see Tushnet (1994: 231). More cautious about the capacity of litigation for effecting wholesale social change is the analysis in Scheingold (1974: 95); Handler (1978: 232–3); McCann (1986: 26); Klarman (1996; 6, 2004: 457–9); Patterson (2001: 118). See also the more trenchantly critical discussion of the political limitations of courts in Rosenberg (1991: 343); Brown-Nagin (2005: 1439, 1489).

value orientations.[71] Moreover, rights-based legal engagement was only one focus of the Civil Rights Movement as a whole. The legal arm of the movement, the National Association for the Advancement of Colored People (NAACP), although initially the pioneering organization, did not always enjoy an uncomplicated relation with other movement actors and organizations.[72] Very clearly, further, the rights cemented in national society were linked to wider changes in political culture. These rights were galvanized by a new cultural background, in which the cross-cultural spread of radio, jazz and rock and roll had already created equal, radically enfranchised communities through racially integrated aesthetic practices (see Ward 2004: 123; Hale 2011: 49). The promotion of civil rights for black people was thus partly driven by the wider emergence of elective counter-culture patterns of contested citizenship, which also extended demands for rights to other disfranchised minorities, such as women and homosexuals. Importantly, in addition, the inner-societal expansion of democracy took place as Americans perceived themselves, nationally, as a militarized community, engaged externally in war in Vietnam. As in other cases, in the USA in the 1960s, national citizenship was fundamentally redesigned and broadened through the experience of war, and the radicalization of different anti-military protest groups traced out new patterns of citizenship in an as yet not fully unified nation.[73]

Overall, the 1960s witnessed a number of multi-layered nation-building processes, marked by distinct patterns of mobilization, cultural intercutting and unified citizenship construction, articulated through claims about different sets of rights. Through this, the USA finally evolved into a basically nationalized society, with a broadly inclusive national democratic government. Indicatively, this process was flanked by a massive growth in the administrative capacities of federal government and with a rapid expansion of its fiscal requirements.[74]

Nonetheless, these political processes were clearly underpinned by the rising authority and autonomy of the law, and it is debatable whether they could have been accomplished by conventional political means. On one hand, access to law was vital to the Civil Rights Movement, and its impact was inseparable from mobilization through the courts. Different important

[71] See excellent analysis of this point in Zolberg (2006: 302); Balkin (2009: 576, 597)

[72] On these different points see Morris (1984: 14–15, 125).

[73] For reflections on these points see Anderson (1995: 130, 337).

[74] On increases in fiscal increases in the 1960s and the general expansion of the administrative state see Graham (1990: 463).

analyses have noted how the broad construction of civil rights in the courts created new opportunities for social mobilization, building resonance across different sectors (Tarrow 1994: 128), and eventually leading to an increase of state capacity in law enforcement (Pedriana and Stryker 2004: 718, 752).[75] Moreover, this process always possessed an international dimension. It may be exaggerated to see this as a dominant factor in the Civil Rights Movement. Yet, the growing power of international human rights surely formed a core aspect of its societal context. Clearly, moreover, civil rights could not be easily established by sitting legislatures, as these legislatures, especially at state level, had resolutely introduced policies to withhold them. This was the main reason why political agency was displaced into the courts (Tushnet 1994: 99).

Broadly, the growing salience of global human rights after 1945 created a legal-political diction, shared by different branches of American government, which galvanized, promoted and contributed to the efficacy of, socio-political mobilization in the name of equal democratic rights. Such mobilization was not restricted to the judiciary, but the authorship of the diction of transformation was, to a substantial degree, of diffuse inner-legal origin.[76] Indeed, concerns about loss of electoral support in the southern states had repeatedly impeded purely political – that is, presidential or congressional – solutions for the diminished citizenship of some minorities. In consequence, it was only as global citizenship norms infiltrated national society that the national citizen was established. In the USA, uniform national citizenship was not a construction of the national political system, and its realization under purely national constitutional law was only fitful.

Through these dynamics, judicial institutions in the USA began to assume a position in which they were able not only to strengthen their power in relation to other political organs, but effectively to create new constitutional principles. In fact, the authority that the courts extracted from their revitalized construction of civil rights laws meant that they were able both substantially to expand existing rights, and even, in some cases, to generate quite distinct constitutional rights, to be applied across all parts of society. This was clear enough in the desegregation cases of the 1950s, in which the Supreme Court, to all intents and purposes,

[75] One account has construed the basic growth of federal power and the rise in legal mobilization as closely correlated processes (Tobias 1989: 277).

[76] Importantly, the NAACP, the torch bearer for the early Civil Rights Movement, specifically identified litigation as a means of franchise extension (Lawson 1976: 22).

established rights of equal treatment not expressly foreseen in the constitution. Indeed, one observer has implied that the desegregation cases formulated a *right not to be humiliated* as a basic point of American law (Ackerman 2014: 154). Later, the Supreme Court opted for a very broad reading of the 1964 Civil Rights Act, which prohibited actions by employers with discriminatory results for minority groups. In this respect, the Court moved beyond the original construction of discrimination as a matter of *intent*.[77] Further, under Warren, the Supreme Court expanded its civil rights jurisprudence to impute new rights to other groups. For example, in *Griswold* v. *Connecticut* the Court discovered 'penumbral rights' hidden in the constitution.[78] This allowed it to widen given rights of privacy to establish rights concerning sexual preference, and ultimately of bodily integrity and reproductive choice, which added substantially new rights to the constitutional fabric of society. Perhaps most notably of all, the expansion of existing rights under the Warren Court culminated, in *Miranda* v. *Arizona*, in an interpretation of the Fifth Amendment that was designed to ensure procedures against self-incrimination.[79] Tellingly, subsequent cases referred to *Miranda* as a ruling with a *de facto* constitutional standing – as a case that created 'a constitutional rule that Congress may not supersede legislatively'.[80]

As a result of these developments, the high judiciary in the USA was extricated from its habitual position in society, in which, at least from Reconstruction to the new deal, it had tended to obstruct the growth of the power of the federal government. Instead, it began to premise its authority on its ability to define, dictate and construct a system of democratic rights, which widened the national political order as a whole, even in regions and questions not traditionally subject to government control. Of course, after the 1960s, the judiciary eventually retreated, to some degree, from its initial pro-rights and pro-government jurisprudence.[81] The limits to judicial autonomy and judicial democratic consolidation in the USA, therefore,

[77] *Griggs* v. *Duke Power Co*, 401 US 424 (1971).
[78] *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).
[79] *Miranda* v. *Arizona* 384 U.S. 436 (1966).
[80] *Dickerson* v. *United States* 530 U.S. 428 (2000).
[81] See excellent early analysis in Weinberg (1977: 1203). In fact, fundamental rights doctrine was limited by the Burger Court as early as 1973, in *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973). State rights were defended in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). For description of the 'assault on prevailing civil rights policies and constitutional doctrine' under the Reagan administration see Neier (1982: 78); Yarbrough (2000: x).

have become quite apparent. Nonetheless, in the decades after 1945, the legal system of the USA as a whole became centred on rights, partly because of its intensified interaction with the emergent global legal system and the acceptance of global constructions of rights-based citizenship (Layton 2000: 8; Skrentny 2002: 7). Both the legal system and the political system of the USA derived a large share of their legitimacy, both publicly and inter-institutionally, from the inner-societal application of civil rights norms, proportioned to an increasingly salient construction of the citizen as a general rights holder. Once centred on the circulation of rights, then, the legal system began to extend and reproduce itself at an elevated level of autonomy. Litigation over civil rights became an almost self-generative basis for American democracy, and the successes of civil rights litigation led to the proliferation of legal activism in other areas.[82] This led to rising rights-based litigation and a consonant expansion of rights consciousness, in which different persons across society increasingly phrased their relations to government in the register of rights.[83] Once centred on rights, in fact, the legal system acquired a high degree of autonomy *vis-à-vis* other departments of the polity, and it absorbed some functions of primary law making (especially in the production of new rights) originally assigned to the political branches.

The USA is not an exception to the general pattern of democratic formation through the interaction of national and global law. In the USA, in fact, the model of the democratic citizen was created and cemented across national society within the law, as the legal system was attached more firmly to the global legal system. An idea of national democratic citizenship was inchoately implied in the original constitutional order of the USA (see Farber 2003: 38). But it required external impetus from the global

[82] One account argues that the spread of legal activism in the 1960s and 1970s, carried forward by the Civil Rights Movement, was an 'expression of American exceptionalism', utilizing new techniques to leverage social transformation (Cummings and Trubeck 2008: 8–9).

[83] On the lessons learned from the Civil Rights Movement by other marginal groups, including women, students, farm workers and native Americans, see Morris (1984: 287). See, emblematically, the penetration of constitutional rights into prisons in the district court case *Holt* v. *Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970). As one analysis has explained, there was a 'causal' link between the spread of rights in race-related cases and the spread of rights in prison-related cases, and both types of case brought a great extension of federal power (Feeley and Rubin 1998: 159, 175). As a proportion of the total number of cases heard by the Supreme Court, civil rights cases increased exponentially between the mid-1960s and the mid-1970s, sinking then up to the mid-1980s, but by the mid-1990s reaching a higher level than the peak in the mid-1970s (see Cichowski and Stone Sweet 2003: 199).

legal system to become real. Global law triggered an intensified interaction between domestic legal agents and domestic constitutional rights, and this led, finally, to the completion of the democracy-building project that had commenced in the late eighteenth century.

4.2.2 Global Human Rights and National Democracy 2: Federal Republic of Germany (FRG)

The connection between the rise of global human rights law, the differentiation of the legal system, and the institutionalization of democratic citizenship is equally, if not more clearly, evident in the new democratic political system formed in the FRG, in the years following 1945. Like the USA, the FRG can be seen as polity, which, from its initial foundation in 1871 within Imperial Germany, was marked by a highly uncertain definition of the basic source of its authority. Historically, the modern German political system extracted its legitimacy from multiple patterns of citizenship, and it was marked by deeply paradoxical, often unsettling processes of national inclusion, national legitimation and inter-normative conflict. Ultimately, the construct of the global citizen played a core role in resolving these conflicts.

First, the governmental system of Imperial Germany was primarily created not through the acts of a popular sovereign, but through the expansion of Prussian authority across other German territories, which were assimilated in the German Empire (*Reich*) with varying degrees of willingness. Moreover, the essential constitutional order of Imperial Germany was written in peremptory fashion. The constitution of the *Reich* was actually, in basic structure, the constitution of the short-lived North German Federation, which had been written by Bismarck, while on vacation in late 1866, and was carried over onto the *Reich* in 1870–1. For this reason, the originating source of the modern German state was hardly located in a generalized process of legitimation or a uniform articulation of national citizenship.

Second, after the creation of the *Reich*, German citizenship was only weakly nationalized, and the political system did not originally penetrate deeply into society. In observing this, to be sure, we should not be drawn into the trap of assuming that Germany was utterly atypical in this respect, or that its features reflected a wider exceptionalism in its formation as state. In fact, it needs to be noted, as a corrective to some analyses, that, in some respects, the national political system of Imperial Germany permitted a greater degree of socio-political integration than was evident in

other major European states.[84] At the level of the *Reich*, manhood suffrage was established in 1871. Importantly, this led to an institutionalization – at least intermittent – of class politics, a vital indicator of political-systemic nationalization more generally. The national political system in Imperial Germany did not impede class-based party-political activism, as was the case, for example, in Britain, and it fostered national citizenship practices across class divisions.[85] Although the SPD was legally suppressed from 1878 to 1890, the Imperial political system clearly enabled the active politicization of particular class interests and class antagonisms, and it promoted robust institutionalization of the SPD in the *Reich* (Nipperdey 1961: 90).[86] As one important account has noted, the electorate of late nineteenth-century Germany, at a national level, was fully politicized, and the universal (male) franchise meant that there occurred a 'penetration of conflictual politics into the state and municipalities': i.e. the government's exposure to political contests of national importance, typically reflecting

[84] Despite the claims of influential observers (see pp. 327 below), Imperial Germany was not an authoritarian state. In some respects, strikingly, the political system was constructed in manner that exposed the governmental executive to certain intense political risks, such as the open politicization of class conflict, which were obviated through franchise restrictions in supposedly more 'liberal' countries, such as the UK. Of course, Imperial Germany had some authoritarian features, but this was not distinctive.

[85] One of the most brilliant interpreters of British labour politics has posed himself the question why the German SPD was historically stronger than the British Labour Party. He observes:

> British working-classes had not suffered active persecution, nor seen their Party driven underground, as the Germans had done. This was a political trauma that shaped the personality of the German labour movement. It welded the German working classes together, probably heightened their political consciousness, and certainly made the SPD the focus for emotional loyalties that the British Labour Party had never received. (McKibbin 1974: 246)

McKibbin's views invariably demand great respect. Yet, it seems to me that the German SPD was more powerful than the British Labour Party for the simple reason that, from the foundation of the *Reich* onward, the SPD was not as adversely affected by restrictive electoral laws as the Labour Party, and it was not forced into the soft but debilitating embrace of an existing Liberal Party. I agree with the (intentionally revisionist – but plainly accurate) claim that Bismarck's introduction of manhood suffrage between 1867 and 1871 was 'far more daring' than simultaneous franchise reforms in Britain (Anderson 2000: 5).

[86] On the connection between suffrage expansion and nationalization of political parties see Caramani (1996: 215). Some theorists have contributed to the broad *Sonderweg* debate by arguing that in Germany political parties had a distinctive position, in that they were weakly institutionalized owing to the fact that they were 'built into the institutional framework' of government as an afterthought (Ritter 1976: 114). This may be true. But German political parties were no more weakly institutionalized than in other countries; in fact, parties of the Left were much more robustly institutionalized.

divergent class prerogatives, was not mitigated by franchise restrictions (Suval 1985: 243). Accordingly, by about 1900, the German SPD was by some distance the most powerful party of the European labour movement, and has been very reasonably described as the 'very model of a mass political party' (Sperber 1997: 19). As early as the 1880s, some major cities in Germany were primarily represented by the SPD in the Imperial parliament (*Reichstag*) (Müller 1925: 79–82).

Nonetheless, Imperial Germany possessed a number of features that militated against systemic nationalization and the full consolidation of national citizenship. Significantly, the competences of the *Reichstag* were limited by the fact that the ministerial executive was not directly accountable to elected politicians, and the organizational force of political parties was reduced by the fact that they could not directly assume occupancy of governmental office (see Weber 1921: 351). The *Reichstag* did not create the government, and its power in shaping government policy was always limited. Moreover, the single states within the *Reich* retained their own state institutions, performing many core political functions. As a result, the *Reich* contained multiple political systems, with multiple electoral regimes, and multiple patterns of representation within the different states, sitting alongside the system of representation institutionalized at the level of the *Reich*. Tellingly, Prussia, by far the largest state, retained a distinctive three-class franchise, in which electoral citizenship was determined in accordance with fiscal contribution, a fact that obviated the political mobilization of working-class constituencies within Prussia. Partly as a result of its composite features, further, the statehood of the *Reich* was fragile and ill-determined, and, at the national level, some systemic characteristics of statehood only evolved very gradually. Notably, a national high court was not created until 1879, a uniform code of civil law was not implemented until 1900, and, vitally, the fiscal system was not fully nationalized until after the collapse of the *Reich*.[87]

In addition, importantly, the basic legal question of citizenship in Germany was historically deeply vexed. The nationalization of citizenship in the *Reich* naturally only took shape after 1870/1. The 1871 Constitution provided a brief definition of legal entitlements ascribed to all Germans, and it established the primacy of Imperial law over regional law in some aspects of citizenship. This was expressed in Article 3 of the constitution, which allowed freedom of movement, employment and acquisition of property across lines between different states. Owing to the complex

[87] See expert analysis in Witt (1970).

population of the Empire, however, it was difficult to produce a categorical definition of the preconditions for German citizenship, and to establish in neat categories to whom rights of citizenship should be accorded. In fact, concepts of rights generally had limited importance in the 1871 Constitution, which did not contain a separate catalogue of rights. Legislation was passed in 1913 to give further clarity to the definition of national citizenship. This law has been famously described as an expression of a highly exclusionary, even militarized, model of citizenship, as it linked rights of citizenship to familial membership and military service.[88] However, this law did not distinctively sanction ethnically constructed ideas of citizenship.[89] Indeed, it permitted the naturalization of non-German children, and it clearly combined ethnic and residential criteria to determine citizenship claims. Placed in the broader context of German history, it appears more as a document that testifies to the technical difficulties in defining German citizenship, after the exclusion of Austria from, and the absorption of the smaller German states and former immediate territories of the Holy Roman Empire into, the German nation state.

Eventually, the construction of political citizenship in Germany was further complicated by the fact that the Weimar Republic, founded in 1918–19, was deeply marked by the conviction that Imperial Germany had not been fully consolidated as a nation state. The founders of the Weimar Republic sought to devise quite new models of citizenship, which were strong enough to cement a conclusively nationalized socio-political order in German society. Accordingly, the Weimar Republic was based on the conviction that national (still called *Imperial*) laws had primacy over regional laws. Indeed, in the constitution of 1919, and it was expressly stated that the highest executive functions of the government related immediately to citizens in the single states, and such citizens always owed higher obligation to Imperial laws than to regional laws.[90] Moreover, the 1919 Constitution was designed to restrict the power of Prussia within the Reich, and to ensure that regional counterweights to national government were removed.[91] This nationalizing strategy behind the 1919 Constitution

[88] See the famous expression of this view in Brubaker (1992).

[89] I agree with Jan Palmowski's claim that the 1913 law did not reflect a distinctively 'ethno-cultural concept of belonging' (2008: 560).

[90] Notably, Article 48 of the Constitution stated that the categorical and binding source of law, which becomes visible in states of political emergency, is located in the *Reich*. In extreme situations, thus, the citizen of the *Reich* could claim higher normative status than the citizen of the separate states.

[91] Leading architects of the Weimar Constitution despised Prussia, which they saw as responsible for obstructing, for 70 years, the formation both of a German democracy and of a

was flanked by a distinctive conception of the constitutional role to be ascribed to basic rights. The catalogue of rights in the constitution, which included early provisions for socio-economic rights, was initially conceived as a type of national catechism,[92] to bind together different social groups and educate them in the exercise of citizenship (Spael 1985: 198–9). In this respect, the constitution of the Weimar Republic added very distinctive dimensions to standard models of citizenship, and it was shaped by the assumption that laws require authorization by citizens both as political agents and as material agents: it was based on a construct of the citizen as a participant in both the political and the economic dimensions of the national political order. At this time, in consequence, governmental legitimacy was expressly attached to a post-traditional concept of the citizen, founded in the idea that the simultaneous exercise of political and social rights by the citizen could create a fully nationalized, class-transcendent bedrock of legitimacy for the political system.[93]

Ultimately, German citizenship was redefined after 1933, on premises that were simultaneously radically inclusive and radically exclusive. By 1935, an ethnic, expressly racialized model of citizenship was promoted, which incorporated all ethnic Germans. This was flanked by a wider tendency amongst legal ideologues of the National Socialists to replace classical legal concepts of citizenship with a passive construction of legal entitlement, based not on formal rights, but on objective national-historical membership.[94] However, the ethnicization of citizenship under Adolf Hitler actually led to a fragmentation of citizenship, in which, as in premodern societies, different social and ethnic groups acquired calibrated rights of inclusion. As discussed, the political system in the 1930s underwent a deep regionalization, in which, beneath the loud proclamations

German national state (Preuß 1897: 96, 105). Hugo Preuß argued that the 'basic idea in the Weimar Constitution' was to enable the 'self-determination of the unified German people', and, thus, to eradicate all 'rights of Prussian hegemony' (1926: 435, 437).

[92] The main author of the basic rights section in the constitution, Friedrich Naumann, tried to translate constitutional rights into a popular vernacular to make them intelligible to all members of society (1919: 156–7).

[93] The Weimar Republic was rooted in the social constitutionalism of Hugo Preuß, whose theory was based on the claim that the state should be seen as 'an organic totality of constituent persons' (1902: 115–16). Later, Preuß saw his organic model of the state realized in the associational structure of the Weimar Republic, which he viewed as 'state formation through comradeship' (1926: 489).

[94] The principle of citizenship was replaced in the 1930s by the principle of national comradeship (*Volksgenossenschaft*) as the source of legal entitlement and obligation (Larenz 1935: 21).

of national unity, local power again became very important.[95] Moreover, the 1930s saw an expulsion of the unifying material elements from the concept of citizenship which had evolved in the Weimar era. This process of national fragmentation was perpetuated under the post-1945 military occupation, as citizenship in occupied Germany, as far it was legally defined, dissolved into a patchwork of externally controlled administrative zones (Gosewinkel 2001: 421).

Overall, the accelerated emergence of German national statehood from 1870 to the 1930s reflected a sequence of rapidly shifting, often conflicting constructions of the citizen, or, indeed, the national people, as the source and focus of law. These shifts were determined, at core, by the fact that Germany was not fully formed as a nation state, and basic integrative features of statehood were not formally solidified. Since 1945, it has become commonplace for even the most educated Germans to observe pre-1945 or even pre-1990 German history as overshadowed by a deep propensity for authoritarianism, and low political engagement (Winkler 1978: 83). Indeed, this seems to be part of the legitimational myth of contemporary Germany, in the same way that (for no obvious reason) British citizens have constructed a legitimational myth of their country as defined by long-standing commitment to democracy.[96] In the period 1930/1933–45, to be sure, Germany's political trajectory deviated dramatically from that of many other states. This deviation is manifest not in the authoritarianism that developed at this time, which marked an extreme point on a quite general spectrum, but in the genocidal nature of the government that developed under Hitler. Otherwise, however, Germany is defined by the same process of incomplete democratization as other societies, and the absence of a solid tradition of political citizenship is not distinctive. Most crucially, the similarity between Germany and other states is evident in the fact that democracy was only secured, at least in the FRG, after 1945, and it was secured on a pattern that confirms the general principle that national citizenship and national political-systemic formation were only stabilized

[95] See pp. 149–50 above.

[96] See Eley (1995: 90); Anderson (2000: 6–8). To illustrate this, see the (to my mind utterly unsubstantiated) claim in one of the most famous books on the sociology of democratic behaviour: '[W]hereas the development of political democracy in Britain has had a long history and has added a significant degree of citizen competence to subject competence, political democracy has had a far less orderly and successful development in Germany. While in the nineteenth century the British middle class, followed by the working class, was demanding and receiving political influence over the government, the German middle class accepted the law and order of the German Rechtsstaat, under which it might prosper but have no political influence' (Almond and Verba 1989 [1963]: 182–3).

on the basis of global norms. As in other settings, the institutional design of the democracy created in the FRG after 1945 was defined by a strategic centration of the legal/political system around human rights law, partly of international provenance, by the rapidly growing autonomy of the legal system, and by the supplanting of inner-national legal norms by international legal principles. This played key role in articulating a foundation for the law, and in constructing a model of the citizen around which the political system could finally be stabilized.

First, of course, the institutional arrangements supporting the FRG were partly imposed by occupying military forces, who provided instructions regarding the content of the new constitution of 1949 (*Grundgesetz*). In fact, in overseeing the writing of the *Grundgesetz*, the Allies supressed some elements of public law based on more traditional German constitutional models.[97] As a result, the *Grundgesetz* did not initially enjoy broad-based recognition. It was not created by primary acts of citizenship, and, like the constitution of 1871, it was conceived in perfunctory fashion, as a solution to immediate administrative problems. In fact, it was widely viewed as an imposed, provisional document, lacking organic foundations in society and structural linkage with the national people, and it was only very gradually that it came to be perceived as a permanent normative substructure for the FRG.[98]

Second, constitutional experts in the Parliamentary Council, which drafted the *Grundgesetz* in 1948–9, declared that the new constitution would contain robust guarantees for basic rights, as required by the allied powers. Indeed, it was expected that international human rights law would assume vital importance in the constitutional order of the new German democracy. In particular, constitutionalists attached to the SPD, especially Carlo Schmid and Ludwig Bergsträsser, argued that human rights should be constitutionally entrenched at a higher level than dictated by the occupying forces. The argument in favour of basic rights in the Parliamentary Council was very strongly founded in international law, and draft human rights provisions for the *Grundgesetz* were modelled, in part, on human

[97] Between 1945 and 1949, the trade unions in some areas occupied by the Western Allies had pressed for a reconsolidation of concepts of economic democracy promoted in the 1920s, but this had been suppressed by the Allies (see Schmidt 1975: 61–623, 221). The Allies also refused to give effect to some constitutional provisions in the *Länder* constitutions because of their collectivist emphasis (see Rütten 1996: 156).

[98] It was argued by Carlo Schmid in the Parliamentary Council that the *Grundgesetz* would immediately lose validity once a constitution had been approved by a 'freely elected, autonomous national assembly, representing the entire German people' (Feldkamp 1998: 99).

rights norms endorsed by the UN.[99] Very importantly, Schmid stated that the *Grundgesetz* should provide for immediate domestic application of international human rights. He declared that it was vital 'to move away from the previous doctrine of international law, in which international law only addresses states, and not single individuals'. He emphatically rejected the idea of a dualistic constitutional order in which 'the individual person is only bound by provisions of international law, and only obtains rights from them, when norms of international law are transformed into domestic law by national legislators'. Consequently, he demanded, in 1948, that the FRG should be the first country in which international law directly conditions 'domestic legal life' and 'addresses the individual German immediately, imposing rights and obligations' (1949: 65). Very importantly, Schmid's emphasis on international law as a foundation for the state was not solely shaped by humanitarian ideals. It also had its origins in German theories of international law after 1918, which viewed the imputation of high authority to international law as a means of strengthening the German national state.[100] Ultimately, partly because of Schmid's interventions, the *Grundgesetz* had the distinctive feature that it prescribed openness to general international law as an overriding feature of constitutional law (Article 25).

Once constructed, the democratic system in the FRG developed a normative structure, in which, to a greater extent even than in the USA, legal institutions were able to act autonomously in relation to other political institutions. Indeed, owing to American influence, the founders of the *Grundgesetz* were committed to establishing a Constitutional Court, standing separately from the regular judiciary (Laufer 1968: 40). A primary function of this court was to assess the validity of legislation, on referral either from lower courts or from members of the legislature, and to ensure that laws had been passed in procedurally appropriate fashion, and that, substantively, they reflected the provisions for basic human rights contained within the constitution. Progressively, the Constitutional Court was able to consolidate its competence within a governance system in unforeseen manner, and it was able to acquire expansive authority through its position as interpreter and guarantor of basic rights.

In the early years of its operation, the Constitutional Court, which heard its first case in 1951, gradually widened its powers in relation to other

[99] For references in the Parliamentary Council to the UN Declaration and to English, American and French legal traditions see Pikart and Werner (1993: 9–10, 11–12).

[100] See the illuminating discussion in Weber (1996: 62).

branches of government.[101] To be sure, such innovations were initially rather tentative. Nonetheless, in one of the first rulings after 1951, the court emphasized that it had authority to define the constitutional parameters for all organs of government.[102] By the later 1950s, leading judges on the Court defined it unreservedly as the 'guardian of the Constitution', with supreme entitlement to interpret the Constitution, and possessing a constitutional status not inferior to other organs of state, including the parliamentary legislature (*Bundestag*) and the President (Leibholz 1957: 11–12).[103] By the late 1950s, the authority of the Constitutional Court was partly reflected in its willingness to strike down legislation. It was partly reflected in its involvement in politically sensitive cases.[104] It was partly reflected in its assertion of primacy over other courts, insisting *inter alia* that constitutional norms, especially basic rights, should be applied in the sphere of private law.[105] Importantly, its authority was also reflected in the fact that the Court elaborated a theory of balancing or proportionality, which implied a high weighting for protective rights. In developing this doctrine, the Court projected a constitutional order in which both legislature and judiciary were obliged actively to promote and dictate rights across society, so that state actions were pre-defined by protective constitutional rights.[106] Eventually, by the 1970s, the Court was able to declare that it possessed a distinctive interpretive power, allowing it to establish meanings for law that exceeded the manifest intentions of the authors of the Constitution.[107] In each respect, the Constitutional Court used the basic rights provisions in the Constitution to cement its independent position within the architecture of the state, producing norms for all legislation. One leading commentary has observed how this enforcement of fundamental rights altered the form of the state itself, such that the Court's responsibility for the 'concretization of fundamental rights' meant that it increasingly functioned as a 'political organ' of state, revising classical

[101] Chancellor Adenauer himself expressed alarm and surprise at the growing power of the Constitutional Court (see Vorländer 2006: 9).

[102] BVerfG 1, 208 (1952) – 7, 5% Sperrklausel.

[103] This idea was in fact already established in the founding conception of the Constitutional Court.

[104] See Elfes-Urteil (BVerfGE 6, 32).

[105] BVerfGE 7, 198 – Lüth.

[106] BVerfGE 7, 198 – Lüth. For expert analysis of the implications of this, see Ladeur (2004: 10).

[107] The Court thus declared: 'The law can in fact be smarter than the fathers of the law': BVerfGE 36, 342 – Niedersächsisches Landesbesoldungsgesetz.

provisions for the separation of powers in favour of a 'jurisdictional state' (Böckenförde 1990: 25, 29).

The expansive power of the Constitutional Court in the early FRG was closely linked to the importance of international law. In some respects, to be clear, the eventual standing of international law within the legal system of the FRG remained controversial and ambiguous. Some Articles of the *Grundgesetz*, in particular Article 25, implied that the FRG possessed a monist legal system. Ultimately, however, the interaction between the Constitutional Court and the system of international law did not establish monism as a leading principle in domestic jurisprudence. Some earlier rulings of the Constitutional Court subscribed to lines of reasoning close to classical dualist analysis.[108] Progressively, then, the Constitutional Court developed a line of jurisprudence that accorded high significance to international treaties and acknowledged principles of *jus cogens*, especially in relation to ordinary domestic laws, yet which insisted on the sovereignty of the constitution as the final point of legal attribution.[109] Through this process, the constitution evolved on a hybrid dualist–monist model. International law did not acquire direct supreme authority in

[108] In BVerfGE 6, 290 – Washingtoner Abkommen (1957) it was decided that, because treaties generate rights and duties in domestic law, they are subject to control by the Constitutional Court, and do not have direct effect. On this basis, the Court subscribed to the essential dualistic principle that treaties can be binding between states without having binding effect in domestic law, implying that domestic law and international law have different normative foundations and sources of validity. In a further early ruling, BVerfGE 6, 309 – Reichskonkordat, the Court declared that general rules of international law can have effect in domestic law without any statutory act of transformation, but they remain inferior to provisions of the constitution. For dualist interpretations of the Constitutional Court's jurisprudence see Amrhein-Hofmann (2003: 264); Ohler (2015: 40–1). For more balanced general comment see Schorkopf (2010).

[109] On one hand, in examining the status of international treaties and international human rights law in domestic law, the Court argued that treaties have 'constitutional significance'. This was based on the 'fact that the *Grundgesetz* is friendly towards international law', stipulating that 'the exercise of national sovereignty' should be conducted 'through the international law of treaties and international cooperation' and that conflicts between domestic law and international law should be avoided. However, the Court also argued that the 'opening for international-legal obligations' envisaged by the *Grundgesetz* was not unlimited and that it was 'based in the classical conception' that national law and international law pertain 'to separate legal domains', such that international law cannot claim 'the rank of constitutional law'. On this basis, the principle was set out that the *Grundgesetz* aims to promote the 'integration of Germany in the legal community of free states', but that this does not entail renunciation of the 'sovereignty residing in the German constitution': BVerfGE 111, 307 (2004). On these controversies see Partsch (1964: 41). On the position of global *jus cogens* as part of German public law see Kadelbach (1992: 341).

domestic law. However, the Constitutional Court developed patterns of reasoning designed to integrate international law through its own jurisprudence, and to ensure that international human rights law was given clear domestic recognition.[110] Openness to international law thus formed a key regulatory principle, guiding interpretation of domestic constitutional law.[111] Over a longer period, in fact, the Constitutional Court began to make more expansive declarations about the standing of international law. It arrived at the principle that, although the legal system was essentially dualist, the obligation to 'friendliness to international law' expressed in the *Grundgesetz* promoted 'the integration of general rules of international law'. Consequently, acts of constitutional interpretation should be conducted so as to avoid 'conflict with obligations under international law'.[112] Most significantly, however, basic rights initially defined at an international level were given such strong protection in domestic law that the Constitutional Court of the FRG did not need to develop a formally monist legal system in order to constitutionalize the hard normative core of the international human rights order. Central to the constitutional model of the FRG was the principle articulated by Schmid in the Parliamentary Council – namely, that the Constitution of the FRG should give higher protection to internationally defined basic rights than other states. In many respects, the protection of domestic human rights provisions by the Constitutional Court served to give effect to norms originating in international law.

The position of the Constitutional Court had a series of basic outcomes for the legal and social order of the FRG. First, as in the USA, the Court utilized human rights jurisprudence to establish a unified legal order across different parts of society, thus contributing to the normative nationalization of society as a whole. Notably, some early rulings of the Court had implications for sub-national government bodies, and they hardened the connections between the federal government and the *Länder*.[113] Second, the Court utilized human rights jurisprudence to create a basic order of citizenship for the FRG as a whole. As mentioned, in the early years of the FRG, the *Grundgesetz* was widely perceived as a provisional document, whose mobilizing force was limited.[114] However, the Court extracted a

[110] BVerfGE 75, 1.
[111] See BVerfGE 74, 358. See for comment Proelß (2014: 43, 51).
[112] BVerfGE 111, 307.
[113] BVerfGE 1, 208 – 7.5%Sperrklausel (1952).
[114] In opinion polls in the years after 1949 public identification with the democratic political system was low (Merritt 1995: 330).

rights-based legal order from the *Grundgesetz*, which gradually assumed pervasive force as a grammar of social motivation.[115]

Alongside these facts, as in the USA, the early human rights jurisprudence of the Constitutional Court of the FRG was marked by a tendency not only to consolidate existing rights, but to derive new normative principles from such rights. Indeed, the Court soon began to generate new rights, or new ways of applying rights, from provisions established in domestic law and international law. In the first instance, the Court began to express the presumption that the scope of the rights defined in the constitution should be widened beyond their classical restrictive application to vertical interactions between citizen and the state. On this basis, taking the protection of human dignity as a guiding value principle, the Court insisted that all relations in society, including relations traditionally covered by contract, should be bound by objective constitutional values based on human rights, and subject to the jurisdiction of the Court itself. In declaring this principle, the Court extended the purchase of fundamental constitutional rights to cover all areas of society, including lateral relations between private parties, determining that all human interactions should be regulated by legal norms defined as *essential for democracy*.[116] Indeed, the Court decided that basic rights were endowed with the power to radiate, normatively, through all social domains. This radiating effect of rights was promoted by an extensive use of proportionality reasoning, which was also applied to the sphere of private law (Jestaedt 1999: 53; Petersen 2015: 146). Increasingly, this expansive reading of constitutional rights created a foundation on which the Constitutional Court could elaborate further the substantive content of existing constitutional rights.[117] Notably, the court extracted from classical guarantees regarding personal inviolability a body of norms to protect private life and use of private information.[118] Ultimately, these rights were expanded to include rights

[115] By the 1980s, the Constitutional Court was amongst the most trusted institutions in the FRG. See Vorländer and Brodocz (2006).

[116] This notion was articulated in *Lüth* (1958) (1 BvR 400/51, BVerfGE 7, 198 – Lüth). See later expansion of this principle (in 1978) in BVerfGE 49, 89 (Kalkar I), stating that fundamental rights are 'objective-legal value decisions', which inform all areas of law and guide functions of government, including legislation, administration and justice. This principle was reinforced in Mülheim-Kärlich-Beschluss (BVerfGE 53, 30) where it was stated that the state had a positive obligation to protect individual persons from violations of their rights caused by third parties.

[117] On the Lüth ruling as an opening for the creation of other subsidiary rights, see Hornung (2015: 183).

[118] BVerfGE 35, 202 Lebach.

to confidentiality[119] and rights to data protection in electronic media.[120] In these rulings, the Court created a range of rights to protect the integrity of persons in the private sphere. Eventually, the Constitutional Court also recognized a right to basic levels of social welfare, which was also based on rights of personal dignity.[121]

In these respects, the Constitutional Court of the FRG imprinted a characteristic form both on the governance system, and on interactions between government and society, which was deeply configured by, and mediated through, human rights norms (Isensee 1976: 232; Aulehner 2011: 131). Progressively, the Court established a condition close to *total rights-based democracy* in the FRG, of which it itself acted as primary guarantor. Judicial actions projected a constitutionally defining model of the citizen, in relation to which the basic normative order of society was constructed. Indeed, by implication, the courts distilled a model of the *total citizen*, which dictated that all laws, in all social domains, obtained legitimacy to the degree that they were proportioned to a notion of the legal subject as a holder of basic rights. In each respect, the high judiciary of the FRG clearly obtained a position of pervasively influential autonomy, both in the political system and in society more widely. Indeed, in key respects, the courts of the FRG began to operate as bodies that were formally distinct from the rest of the political system, and which distributed constitutional norms through society on relatively autonomous, internally constructed principles, producing authoritative higher-order norms without reference to external acts or criteria. Through this process, society as a whole became more cohesively integrated into one normative order, and so more deeply nationalized.

Notable in the FRG is the fact that, as they consolidated the form of national democracy, judicial institutions were progressively integrated into a complex supranational legal system. In fact, the promotion of democracy was underpinned by a deep articulation between national and transnational judicial bodies. On one hand, the principle of openness to international law dictated by the *Grundgesetz* meant that, from the outset, the courts were expected to be receptive to rulings of UN bodies, in particular to those of the ICJ. Indeed, despite upholding a basic dualist stance, the Constitutional Court eventually concluded that it was a constitutional duty of the German courts to show regard for rulings of international

[119] BVerfGE 90, 255.
[120] BVerfG, 27.02.2008 – 1 BvR 370/07.
[121] See BVerfGE 125, 175 – Hartz IV.

courts with responsibility for Germany.[122] Increasingly, further, this meant that the courts of the FRG were required to construct a stable relation with the ECtHR, whose rulings acquired great normative significance, albeit not without restriction, for the German legal system.[123] More problematically, however, this meant that the FRG entered a distinctive relation with the judicial apparatus of the EU, in particular the ECJ, to which the government of the FRG was constitutionally connected by the *Grundgesetz* (revised Article 23).

In these linkages, gradually, the German courts began *de facto* to endorse a more general doctrine of *open statehood*. That is, the German governance system was progressively conceived, in distinctive post-classical fashion, as an aggregate of institutions within a wide supranational normative order, in which national and international institutions could interact freely, and in which some classical functions of national norm production could be transferred to external judicial institutions. Of course, a post-classical pattern of statehood first began to emerge in the FRG because, after 1949, the government did not possess full sovereignty, and, owing to its partition, uncertainties persisted as to its territorial limits. Notably, theorists of the early FRG, whose conception of the state was formed in the Weimar Republic, denied critically that the government of the FRG could even be perceived as a state. In 1963, for example, Carl Schmitt claimed pointedly, with a view to the FRG, that 'the age of statehood is approaching its end' (1963: 10). In 1971, Ernst Forsthoff observed that West Germany no longer possessed a state 'in the traditional sense of the word' (1971: 158). Progressively, however, the post-traditional form of the state was deliberately and positively fashioned to produce a theory of transnational inter-judicial or inter-institutional relations, in which national and international elements overlapped (see Häberle 1995: 306). In many respects, in fact, the German governance system only acquired features of national statehood, reflected in deep societal penetration, as it was modelled as an open state. Open statehood became a positive mode of state construction, which actively reinforced national institutions and consolidated national patterns of citizenship.

This process of open state formation had particular importance for the relation between the West German courts and the ECJ, whose rulings, by the early 1970s, were perceived as increasingly intrusive and as imposing unfounded limits on the autonomy of national institutions in the FRG.

[122] BVerfGE 08 July 2010 – 2 BvR 2485/07; 2 BvR 2513/07; 2 BvR 2548/07.
[123] BVerfGE 111, 307 (2004).

To determine its relation with the ECJ, notably, the Constitutional Court of the FRG spelled out a doctrine of transnational human rights observance. In particular, it declared that it would only endorse and accept compliance with the rulings of courts outside the domestic order *as long as* it was convinced that such courts were sufficiently protective of human rights norms to satisfy domestic standards and thresholds.[124] One immediate consequence of this was that the high judiciary of the FRG made its own authority insolubly contingent on the domestic protection of human rights law, and it defined application of human rights as the immovable foundation of the basic democratic order of the FRG. In projecting a robust grammar of constitutional rights for domestic society, then, the Constitutional Court also turned this grammar outwards, to establish its position in relation to international bodies. National sovereignty was expressly defined through the construction of basic rights, and the court assumed the power to protect the democratic will of West German citizens as *a right to protect rights*: national citizenship in the FRG became inseparable from the exercise of basic rights. As mentioned, this approach can easily be seen as a logical corollary of Carlo Schmid's observations in the Parliamentary Council, demanding that the government of the FRG should establish higher standards of human rights protection than those declared in other legal orders. A longer-term consequence of this was that the Constitutional Court of the FRG, acting in tandem with other national courts, began to promote a constitutional grammar of basic rights for the EU as a whole. In fact, the argument in the Constitutional Court of the FRG that its authority in relation to other courts was founded in its high protection of human rights meant that the ECJ began to support its own rulings with human rights norms, in order to gain acceptance for its rulings in the FRG.[125] As a result, both within and above the member states, the EU itself was defined, gradually, as a community of rights holders. In consequence of this, in fact, the ECHR ultimately became a foundation for public order in the EU, and it was increasingly used as a normative standard to justify decisions of the ECJ. In turn, this eventually meant that the Constitutional Court of the FRG became more willing to accept the jurisprudence of the ECJ, as long as it showed due regard for human rights norms.[126]

[124] BVerfGE 37, 271 2 Solange I.

[125] ECJ, *J Nold, Kohlen- und Baustoffgroßhandlung* v. *Commission of the European Communities* (Case 4/73) [1974] ECR 491.

[126] BVerfGE 73, 339 2 Solange II.

The construction of open statehood by the German Constitutional Court was not a linear process, and the Court at times linked its recognition of transnational human rights law to a more traditional defence of national sovereignty.[127] In key judgements, it made the extension of the authority of EU law contingent on the consent of the sovereign organs of national democracies.[128] At times, it advocated qualified enforcement of the ECHR.[129] Over a longer period of time, however, the strict human-rights orientation of the German Constitutional Court had the result that it projected a distinctive legal-democratic design for the German state. In this model, national and transnational institutions were ordered on a pattern of deferential (comity-based) human rights observance, with each institution occupying a distinct position within a human rights landscape and assuming competences, within clear normative constraints, for a particular set of functions.[130] In this model, moreover, legislation was enacted quite freely by actors at different points in a transnational legal order, on the precondition that such legislation was supported by adequate observance of human rights (see Calliess 2016:163). In this model, additionally, observance of human rights was necessarily exported to other actors in the transnational system, whose need for normative recognition in Germany heightened the protection that they gave to basic rights. The German state, centred on the Constitutional Court, thus locked itself into, and in turn, helped to consolidate, a transnational system of human rights. In this regard, territorial boundaries lost some importance as a basis of citizenship, and German citizens were envisioned as actors that are categorically bound by human rights, irrespective of physical location. Ultimately, the founding norms of domestic law were projected as obligatory for all

[127] In enumerating the types of review to which the Constitutional Court subjects EU law, see the analysis in Tuori, who explains that 'in fundamental rights review the Court appraises an EU measure in the light of national fundamental rights law' (2015: 90).

[128] See BVerfGE 123, 267 – Lissabon.

[129] See for example BVerfGE 111, 307

[130] As Tuori explains:

> With reference to the principle of conferral, the Court argued that the EU can only exercise such powers as Member States, in accordance with their national constitution, have transferred to it through the Treaties … The Member States remain Masters of the Treaties and possess ultimate jurisdiction over EU institutions acting within the confines of their transferred competences. The Court reiterated its readiness to exert ultra vires review when needed with regard to acts adopted by EU institutions. However, it also emphasized the ultima ratio nature of this review and announced that it will not be applied as long as – so lange – the EU's internal monitoring is able to prevent or correct excesses of competence (2015: 93).

German citizens, even when acting outside Germany's regular jurisdictional boundaries.[131] To be a German citizen meant, in effect, to be a bearer of transnational rights-based citizenship duties.

In sum, a model of democracy evolved in Germany in which domestic courts, acting either in consort or comity with inter- or supranational courts and norm providers, supplied the basic normative architecture for democratic governance (Voßkuhle 2010). This instilled a comprehensive model of the citizen into the structure of national society. Indeed, the architecture of domestic democracy was underpinned by the principle that the domestic political system as a whole possessed a fluid normative foundation, partly located within and partly located outside the limits of a determinately national legal domain. The classical distinction between national and international law partly disappeared in Germany, and German political institutions eventually came to position themselves within a wider transnational constitutional system. This system as a whole was stitched together through human rights law, and human rights law, originating in international law but constructively produced and controlled by the Constitutional Court, formed an ultimate foundation for all norms, whether national or transnational, creating binding obligations for all Germans and all German institutions. In each respect, German democracy was shaped by the fact that the legal order constructed itself at a high degree of autonomy. Interactions between different legal institutions, supported by the authority ascribed to human rights law, were fundamental to the production and authorization of democratic law, and of democracy more widely. Indeed, the transformative deepening of German democracy can be observed as a process of accelerated legal differentiation, beginning slowly in the 1950s, and gathering pace towards the end of the twentieth century. This process was not originally supported by a strong concept of citizenship; as discussed, the 1949 Constitution was externally imposed. In this process, however, the national legal system began autonomously to generate new inner-legal patterns of sovereign citizenship and national inclusion, partly founded in international norms, which eventually radiated outwards to configure transnational law and transnational citizenship. National citizenship in fact always co-implied transnational citizenship.

[131] See Verwaltungsgericht Köln, 3 K 5625/14 (27 May 2015). Arguably, this could also be applied to exchanges in the private-legal domain, which could be captured by the transnational extension of the horizontal effect of basic rights (see Ladeur and Viellechner 2008: 71).

4.2.3 Global Human Rights and National Democracy 3: United Kingdom

A very different, but still analogous, set of processes can be observed in the development of public law and political democracy in the UK. In this setting, the increasing autonomy of the global legal system, linked in part to the growth of human rights law, also contributed substantially to the elaboration of the basic order of democracy.

As in the case of the USA, the association of British democracy with the differentiation of global law may easily sound counterintuitive. Like the USA, the UK had a long tradition of at least partial democratic institutionalization before 1945. Some observers have even been prepared to see the UK as an old democracy, which 'made the transition to democracy' before 1900 (Huntington 1991: 17). Moreover, in the UK, the judicial application of international law is subject to substantial restrictions, and it was traditionally argued that international treaties could not create domestic rights unless enforced by an Act of Parliament.[132] Owing to the traditional sovereignty of the Westminster parliament, international law cannot typically gain direct entry into the domestic legal system. In addition, the constitutional doctrine of parliamentary sovereignty, stating that parliament can change all laws and is not bound by entrenched laws from previous parliaments, means that the power of the judiciary is historically weak (see Wade 1955: 174).[133] Indeed, the public-law functions of judicial institutions are not founded in a distinct system of norms, standing separate from parliament itself. As a result, formally entrenched constitutional rights do not easily fit into the constitutional order.

Despite these qualifications, however, the democratic form of the governance system in the UK has been deeply marked by the global process of legal-systemic differentiation. In this respect, the development of democracy in the UK closely reflects recent patterns of institution building in other countries. Arguably, in fact, the constitutional impact of international law in the UK has been greater than in societies whose constitutions are more programmatically open to interaction with external norm setters.

To explain this, it is vital to note – first – that the assumption that the UK is an old democracy is very questionable. In fact, it is simply not accurate. The account of the UK as an old democracy appears to have been caused by

[132] See the classical statement of this in *R* v. *Chief Immigration Officer, Heathrow Airport and another, ex parte Salamat Bibi* – [1976] 3 All ER 843.

[133] See also note 166 below.

the fact that the British polity had evolved some representative features by the nineteenth century, and by the later nineteenth century it had intensified the democratic element of electoral representation in its constitution. However, the fact that the UK had a number of democratic characteristics by the late nineteenth century does not mean that it was a democracy. In some respects, in fact, the relatively early elaboration of proto-democratic institutions in the British polity ultimately obstructed its conclusive formation as a democratic governance system. Until the middle of the twentieth century, the political system of the UK did not satisfy basic criteria for classification as a democracy.

In the UK, distinctively, democracy developed through a long process of democratic transition, in which the principle of full and equal political inclusion was introduced gradually into the political system, often in *ad hoc*, uncommitted fashion. This transition lasted from the Reform Act of 1832, the first step in a long line of franchise extensions, to the general elections of 1950, when a fully democratic, and evenly inclusive, electoral system was finally established.

To be sure, the first step in this process was modest. The Reform Act of 1832 did not create a system that we would now even begin to recognize as democratic. Indeed, it was not intended to incorporate new social actors in the system of representation, and it may even have reduced political participation for members of the working class (Gash 1977: 12). However, the Reform Act marked the beginning of a process, in which pre- or anti-democratic features were slowly eradicated from the political system, and, very gradually, the single person, in the form of a citizen, became the primary focus of political representation and legitimation.[134] After this early beginning, then, it was not until 1918 that the UK was substantially democratized. Before 1911, parliamentary legislation could be rejected by an unelected second chamber of parliament, comprising persons of inherited wealth and standing. This fact alone indicates that at this point the British political system could not be seen as democratic. Up to 1918, members of the elected chamber (House of Commons) of the UK parliament were placed in office, as mentioned above, by a franchise comprising about 30 per cent of the adult population (roughly 60 per cent of men, and no women), access to which was largely dictated by occupancy

[134] One account argues that the Great Reform Act of 1832 first articulated the principle – although surely not one reflected in practice – that 'the individual citizen' is the 'unit to be represented', instead of the 'community or interest' (Birch 1964: 24). Accordingly, a different account explains how an MP elected after 1832 'was exposed to greater pressures both from his constituents and from his party' than before 1832 (Gash 1989: 164).

of property.[135] Well into the twentieth century, the primary unit of political representation remained not the single person or the citizen, but the household, which meant that a property qualification, reflecting domestic authority, was at the centre of representative procedures and electoral participation. In fact, members of the House of Commons were actually elected by multiple distinct franchises, affiliation to which was essentially a matter of private membership and association, reflecting different interests, material qualifications and social positions.[136] Not surprisingly, one account has stated that, up to 1918 the right to vote in the UK was a 'limited and well controlled privilege' (Moorhouse 1973: 347).[137] Due to the role of privilege in regulating access to political rights, further, the political system was not strongly nationalized before 1918, and in many constituencies representatives had a personal monopoly of power, and elections were not competitively contested.[138] Most importantly, owing to the partial exclusion of the working-class vote, specific class-determined interests could not easily be articulated as decisive questions in general elections, and the politicization of class conflicts was not nationally pronounced.[139]

In these respects, a comparison between Britain and Germany is illuminating. Germany is of course widely associated with an authoritarian *Sonderweg* in its progression towards democracy, whereas Britain is sometimes perceived as having followed a characteristic liberal *Sonderweg* (see Blackbourn and Eley 1984: 7; Weisbrod 1990: 236).[140] This commonly proposed dichotomy between Britain and Germany in fact reflects long-standing preconceptions. During World War I, for example, Weber was able to lament, in telling fashion, that working-class servicemen from Prussia fighting at the front were exposed to the terrible injustice that they

[135] See excellent analysis in Blewett (1965: 347).

[136] See above at p. 135.

[137] A different account states that 'voting was a trust, not a right' (Kahan 2003: 23).

[138] One calculation claims that, as late as 1910, 25 per cent of parliamentary seats were not contested (Lubenow 1988: 26). On the long survival of local power in the UK see Pole (1966: 389).

[139] In agreement with my claims see Urwin (1982: 41, 43, 47). Like my account, Urwin argues that the nationalization of the British political system was only fully realized after 1945.

[140] This oppositional view is carried over, in much more nuanced form, into Ziblatt's recent account of unsettled democratization in Germany and settled democratization in the UK, stressing the vital democratizing importance of elite accommodation amongst Conservatives in the UK (2017: 10). For all its brilliance, this account overstates the degree of democratization in the UK before 1945. In my view, it also fails to acknowledge that, owing to franchise restrictions, British Conservatives were less threatened by a nationally organized labour movement than their German counterparts, and it was easier for them to be accommodating.

might return home to Berlin to find themselves still subject to a political system with a weighted franchise. As discussed, up to 1918, Prussia had a three-class franchise, so that Prussian citizens voted on state-level questions in an electoral system which greatly privileged people who paid higher taxes.[141] Like others, Weber viewed the existence of the weighted franchise as a fact that vividly underlined the authoritarian nature of the Prussian state (1921: 247). Like other observers, in fact, he viewed the weakness of the elected legislature at the *Reich* level as a sign of underevolved political culture, defined by *negative politics*, in Germany as a whole (1921: 251). Moreover, Weber himself seems to have considered Britain a relatively liberal society, possessing some features of an advanced rationalized party democracy (1921/2: 862). Important contemporaries of Weber expressly argued that England had followed a liberal special path into modernity (Hintze 1962: 50).

At this point, however, it becomes clear that the conventional contrast between Britain and Germany is very misleading. Tellingly, at the moment when Weber was expressing these claims in World War I, Britain itself still had plural voting, which, albeit not to the same degree as the weighted franchise in Prussia, systematically privileged the interests of wealthy Conservative voters.[142] More importantly, the universal male suffrage established at the level of the *Reich* in Germany in 1871 was not established in the UK until 1918, and then it still was incompletely realized. This means that approximately 50 per cent of the working-class servicemen fighting for Britain against Germany in World War I were not allowed to take part in voting at all (see Close 1977: 893). In fact, one interpreter has argued, quite correctly, that at the time of World War I, 'England (sic) had one of the least democratic national suffrages' amongst all European states (Bartolini 2000: 135). As significant background, moreover, by around 1910 the UK was far more industrialized and urbanized than Germany, and only 9 per cent of the working population were employed in agriculture (Rokkan 1970: 89; Mann 1987: 348). Conditions, thus, were

[141] The weighted, three-class franchise in Prussia was a counter-revolutionary constitution, based on the idea that persons paying more tax should have more heavily weighted votes. The franchise provisions were derived from local constitutional arrangements in the Rhineland and were introduced in Prussia as a whole in 1849 (Boberach 1959: 92, 149). Of course, the *Reich*, within which Prussia was situated, had manhood suffrage from 1871, albeit for a weak parliament.

[142] On similarities between plural voting and class-weighted franchises see Goldstein (1983: 11).

substantially more propitious for democratization than in Germany.[143] In fact, other conditions in the UK, such as early territorial unification, small geographical territory and relative confessional uniformity, also created a highly favourable basis for democratization. On balance, therefore, it is difficult to see why the epithet *authoritarian*, which is almost universally applied to Imperial Germany, is not also applied to the UK in the same historical period, and in fact beyond.[144] Britain may have differed from other societies in Europe in the earlier and middle part of the Twentieth Century in that it experienced relatively low levels of social violence, limited domestic militarization and relatively low levels of state repression and official criminality.[145] Yet, this does not amount to non-authoritarian governance. In fact, the generally less repressive nature of the British state

[143] On the usual connection between urbanization and working-class mobilization see Bartolini (2000: 122).

[144] Dahrendorf famously claimed simply: 'Imperial Germany was politically authoritarian' (1965: 73). In similar spirit, one of modern Germany's most eminent historians states that Germany became a democracy 'much later' than Britain. I would dispute this claim. On my account, by the 1870s Germany and Britain were both merely partial democracies, and both fell far short of democracy, albeit in very different ways. Germany had full male suffrage from 1871, but it had a weak parliament. The UK had a stronger parliament, although the elected chamber of parliament could be blocked by the House of Lords until 1911. Even after the franchise reforms of 1884, however, Britain only had about 60 per cent male suffrage – before 1867, it had only had about 10 per cent male suffrage. After 1919, Germany was, constitutionally, far more democratic than the UK; under the Weimar Constitution, Germany had universal male and female suffrage, whereas the UK had restricted female suffrage until 1928, and it retained plural voting. Only in the wake of the crisis of 1929/30, did Germany and the UK move in completely divergent directions. After 1933, of course, Hitler established a genocidal quasi-state in Germany. The UK also moved away from competitive democracy in 1931, but to a degree not remotely comparable with Germany. Both the UK and the FRG finally became full democracies within a year of each other, the FRG in 1949, and the UK in 1950. Very noteworthy in this comparison is the fact that Germany permitted mass voting for class interests at a much earlier stage than the government of the UK. This is one key indicator of societal commitment to democratic politics. This meant that in the interwar era working-class opposition parties were far more robustly institutionalized in Germany than in the UK. Representation of working-class interests in the UK was not cemented until Clement Attlee became Prime Minister. One reason for the fragility of German democracy after 1918 was that the political system was suddenly exposed to a highly mobilized Social Democratic Party, with a long history of organizational power. This did not happen in the UK, partly because after 1918 Liberals and Tories colluded to suppress the effective political mobilization of organized labour, and partly because full institutionalization of the Labour Party had been prevented by franchise restrictions before 1918. One important interpretation argues that from 1867 Germany 'consistently maintained its position in the first ranks' of countries allowing expansive suffrage (Bartolini 2000: 215).

[145] Note, however, the analysis of protest against the national government and related political repression in the 1930s, see Ewing and Gearty (2000: 215–75).

may easily have masked the fact that, from an electoral perspective, it was - at least intermittently – less democratic than most other European polities.

Overall, if we accept a fully inclusive definition of democracy, insisting that democracy implies a general subjective right for adults to participate, as equal citizens, in competitive elections, and to define the legitimacy of government, the UK should be seen as a late democracy.[146] Indeed, it should be seen as a democracy that developed late despite very advantageous preconditions for democratic institution building. Universal male suffrage was established in Britain in 1918, and universal female suffrage was established in 1928. However, it was only in the years 1948–50, during the implementation of the 1948 Representation of the People Act, that, after various attempts earlier in the century, the government finally abolished multiple franchise membership and plural voting. Consequently, Britain is the primary exception to Dieter Gosewinkel's claim that 'in all European states' the end of World War I brought 'general, equal male suffrage' (2016: 243). In fact, even if we see the extent of plural voting after 1918 as too slight to prevent the classification of the UK as a democracy, it also fell short of democracy on other counts. Before 1945, elections in the UK were typically not fully competitive, and, after 1928, when the universal franchise was created, Britain was only governed for a very short period (1929–31) by a government that had been elected in genuinely competitive elections. From 1931–45, British governments were created by elections that were, at best, only semi-competitive.[147]

[146] For claims in agreement, see Weir and Beetham (1999: 24).

[147] The National Government of 1931 marked a move away from democratic governance, and it effectively eliminated organized electoral opposition from the political system. This government was originally designed as an emergency executive, to last for a few weeks, after Ramsay Macdonald resigned as Labour Prime Minister to form a national government (see Searle 1995: 169; Smart 1999: 11–14). However, it lasted, with varying composition, until 1945. During this time, executive posts were not clearly tied to electoral outcomes, and the government drew its legitimacy primarily from the presumption of national emergency. Although less authoritarian and violent than its equivalents elsewhere, the National Government belongs to the family of supra-party anti-Socialist governments, able to co-opt the more reactionary or compliant elements of the labour movement, which became widespread in all Europe after the Wall Street Crash of 1929. Like its equivalents, it was designed to cut public expenditure and reduce salaries to shore up the public economy amidst the deep economic slump of the 1930s. Like the Brüning Cabinet in Germany, with which it had much in common, the National Government was created because of a fiscal crisis, it was sustained initially by support from the King (Brüning was installed as Chancellor by President Hindenburg in 1930), and it was based on a loose configuration of personalities, drawn from different parties – which were, in any case, not compactly institutionalized. On these points, see Pimlott (1977: 15); Thorpe (1991: 89, 257–8). Like other authoritarian regimes, the National Government also had corporatistic features (see Ritschel 1991: 57).

This means that the UK finally became a democracy after 1945, at approximately the same time as many supposedly 'late' European democracies, such as the FRG and Italy. This means, further, that the UK became a democracy at the same time as some post-colonial states, some of which, such as India, had been British colonies, and were supposedly educated toward democracy by representatives of the British government. This also means that the UK first held fully democratic elections in the same year (1950) that the British government signed the ECHR. The final construction of democratic citizenship in the UK was probably caused by the effects of World War II in promoting social solidarity in British society, reflected in the policies of the resultant Labour government under Clement Attlee.[148] However, it is reasonable to presume that Britain's promotion of democratization in post-1945 Germany and in some former colonies, especially India, and its willingness to support international human rights law, had the consequence that post-1945 governments felt an obligation to complete the process of democratic formation in the UK itself. In any case, it was only in 1948 that, in the UK, legislation was introduced to ensure compliance with Article 21 of the UDHR (also approved in 1948), which stipulated that government should be conducted 'by universal and equal suffrage'. In consequence, national democratic citizenship only began to

Very importantly, Neville Chamberlain described the National Government as a 'parliamentary dictatorship', in which all real opposition was incorporated in the government (Williamson 1992: 480). For a different account of the National Government as a 'Party Dictatorship' see Webb (1932: 3). Whether the National Government can be classified as a dictatorship depends on the definition of dictatorship. However, it clearly did create a *de facto* one-party state. Broadly, the British political system did not adjust to the rise of class voting, caused by the franchise reforms of 1918, until after 1945, and it struggled to establish a rhythm of consensual representation adjusted to a society defined by a range of politically organized socio-economic groups. Most British governments formed in the interwar era were based on cross-party collaboration, designed to keep the bulk, and the more radical elements, of the Labour Party out of power. This was clear enough in the Coupon Election of 1918, but it culminated in 1931 when MacDonald extracted himself from his own party to make the anti-Labour coalition, which was the National Government, complete. In my opinion, it was the belated enfranchisement of the working class that was primarily responsible for preventing Britain from assuming fully democratic form until after 1945.

[148] On the transformation of the ethics of citizenship in the UK during the World War II see Rose (2003: 22). This change in political outlook was partly caused by the fact that the Labour Party was incorporated more fully in government during the war. Popular attitudes were also shaped by international events, not least by the staggering military endeavours and sacrifices of the Soviet Union, which led to a more positive perception of Russia (Addison 1975: 138–41).

act as the dominant legitimational principle within the UK as the state was placed within a global legal order.[149]

The slow emergence of democracy in the UK was mirrored in the fact that the concept of the citizen was also solidified very slowly. Indeed, still today, the UK does not possess a fully secure concept of the citizen as a sovereign actor, supplying primary legitimacy for the public order. Instead, historically, the citizen was constructed as a participant in legislative acts through a sequence of electoral reform laws, which inserted provisions for citizenship practices into an existing order of state. The primary constitutional commitments to democracy are articulated in piecemeal form, in the Reform Acts of 1832, 1867, 1884, 1918, 1928 and 1948. Taken together, these Acts of Parliament do not present a strong constitutional definition of democratic citizenship as the legitimational bedrock of government, and they merely served incrementally to expand the popular component of the polity. Above all, however, the weaknesses underlying the construction of political citizenship in British public law are caused by two quite distinct factors, which are close to the core of British constitutional development. Indeed, certain underlying ambiguities in the conception of public authority in the UK obstructed the emergence of a clear, generalized idea of citizenship, and, as a result, they prevented the effective consolidation of democratic order.

For historical reasons, first, the British polity does not contain a strongly articulated concept of the state, defined under a clear corpus of public law. In the UK, bodies with public status evolved gradually, and they were not constructed by clear constitutional decisions, or determined by objectives of a clear public nature. The state has in fact grown out of the crown, which was, in origin, and – arguably – still remains, in essence, a private corporation.[150] In fact, the elected component of the state, the House of Commons, was first constructed as a corporation within a corporation, and its function was not to enact the will of citizens, but to assume a

[149] Notably, in parliamentary debates prior to the passing of the 1948 Representation of the People Act, it was stated that the Act was needed in order 'to complete the long evolution of Parliamentary democracy' (Peart, Labour). These debates contained extensive references to the international situation after 1945, showing determination to consolidate the UK's status as 'one of the few free democracies left in the world' (Boyd-Carpenter, Conservative). In this respect, the Act clearly reflected anti-Communist attitudes in the UN and later in the Council of Europe, and it was designed both to denounce the political systems of Eastern Europe and to protect the UK from unfavourable international comparison (HC Deb 23 June 1948).

[150] See the claim in the 1970s that the Crown should be seen as 'a corporation aggregate headed by the Queen'. *Town Investments Ltd* v. *Department of the Environment*. [1978] AC 359.

corporate consultative role in affairs of the crown.[151] In consequence, British public institutions were not originally proportioned to a general construction of the citizen, defined as publicly constitutive agent. This means that the structural correlation between the legitimacy of the state and the rights and obligations of citizens, which is central to other polities, was not fully elaborated in the UK (see Loughlin 1999: 76; Murkens 2009: 434).

At a more conceptual level, second, the concepts of legitimation which historically underpinned the emergence of British government prevented the formation of a clear idea of citizenship. Importantly, although it evolved only belatedly into a *representative democracy*, Britain possessed a system of *representative government* from an early stage. Indeed, before the nineteenth century, the British governance system was centred around a two-pronged constitutional concept of representation.

On one hand, British government was originally founded on the principle that, although very few people could actually vote as enfranchised citizens, interests in society at large were represented through the three organs of parliament (Lords, Commons and Monarch).[152] This principle implied that the legitimacy of government was sustained not by direct representation, election or delegation, but by the *virtual representation* of society through parliamentary members (see Pole 1966: 443). Indeed, as championed (rather implausibly) by Edmund Burke, the idea of virtual representation implied that each Member of Parliament represented the nation in its entirety,[153] and that parliament could speak as 'the abstracted quintessence of the whole community' (Goldsworthy 1999: 97). This doctrine gave rise to the second core principle of classical British constitutionalism – parliamentary sovereignty. On this basis, the principle developed that parliament itself was the sovereign focus of government, such that government was conducted through sovereign acts not of the people, but of parliament in its simple representative capacity, whose objective coincidence

[151] On the nature of the House of Commons as a 'corporate body' see Seymour (1915: 199).

[152] Parliamentary rule in the UK context clearly does not of itself imply democracy. It implies a balanced relation between three organs of state – Common, Lords, Monarch – none of which, prior to 1832, had any claim to democratic legitimacy. On the relation between the three constituent organs of parliament see Blackstone (1765: 149).

[153] Burke stated in 1774 that 'Parliament is a deliberative assembly of one nation, with one interest, that of the whole, where, not local purposes, not local prejudices ought to guide, but the general good, resulting from the general reason of the whole' (1854: 446–8). See discussion of the misleading nature of this principle in Langford (1988: 87).

with the people was not a factual precondition of its legitimacy.[154] On this basis, further, parliament acquired a high degree of legislative autonomy, and it was defined by the constitutional presumption that, at any given moment, it could directly transpose the will of society into legislative form. Parliament thus initially emerged as a formidably authoritative legislature, legitimated by its condensed corporate embodiment of societal interests, and able to introduce legislation, both statutory and constitutional, without higher normative restriction.

Many observers have seen great benefits in the British political system, and, historically, it was often viewed as a model for emulation. For example, the doctrine of parliamentary sovereignty meant that Britain was widely seen, throughout pre-democratic, and even nineteenth-century, Europe as possessing a highly evolved system of national representation, which many progressive thinkers in different countries wished to emulate (see Esmein 1903: 46–8; Israel 2006: 356–64). In some cases, this admiration lasted well into the twentieth century (see Hintze 1962: 49–51). In similar spirit, important recent commentators have argued that, in the later early modern era, Britain's parliamentary system established 'foundations for the transition from a monarch-subject relationship to a state-citizen relationship' (Heater 1999: 4). One of the most significant contemporary sociologists has argued that 'institutionalized rights of citizens' were established first in England (Münch 1984: 296).[155] In reality, however, the British system of virtual representation and parliamentary sovereignty had certain very damaging outcomes for the constitutional development of a democratic state, authorized by its citizens. The main tenets of British parliamentary doctrine stood obdurately in the path of the emergence of generalized patterns of citizenship, supporting the growth of democratic institutions, and British institutions persisted for centuries in a condition of half-privatized partial democracy.

First, for example, the British concept of virtual representation had the implication that government was not bound, for its legitimacy, to members of society as a whole. This meant that, beneath the veneer of universal parliamentary accountability, small sets of select interests were easily able to assume a privileged position in the system of political representation (see Pole 1966: 444–57). Indeed, the existence of multiple franchises,

[154] This theory was already set out by Blackstone (1765: 143). But see the classic formulation in Dicey (1915 [1885]: 406).

[155] This is also implied in the famous, but also excessively favourable, commentary in Habermas (1990 [1962]: 142).

which still defined the British polity through the nineteenth century, clearly reflected the fact that government was expected to represent the particular prerogatives of designated social groups and communities. Originally, electoral franchises in Britain were close in character to stakeholder groups, based on aggregated overlapping private interests, and they were specifically not engineered to articulate collectively structured obligations for government. Far from guaranteeing national representation, therefore, the doctrine of virtual representation imposed a condition of parcellation on British society, ensuring that society appeared in the political system not as a national collective, but as a series of segmentary interest blocs (Esmein 1903: 69; Pole 1966: 444, 452). The fracturing of society into discrete interests persisted well into the era of large-scale political enfranchisement. Even after 1867, electoral constituencies were expressly created to represent particular professions and particular social sectors (Bentley 1999: 178). The doctrine of virtual representation left a pervasive legacy of political privatism, which sat uneasily alongside the development of generalized concepts of citizenship.

Second, the deepest implication in the concept of parliamentary sovereignty, clearly and emphatically, is that the single citizen is not the primary focus of government, and governmental power is not normatively sustained by a general principle of popular-democratic citizenship.[156] Historically, the fact that parliament (Commons, Lords and Monarch) was defined as the sovereign organ of government restricted the space for the construction of the citizen as a political subject outside parliament. Indeed, the focusing of sovereignty around the corporate powers of parliament prevented citizens from laying claim to generalized political rights, separated from single legal enactments of parliamentary authority.[157] Under the parliamentary constitution, social agents can, through their representatives, claim and enact rights through individual acts of parliament. However, it is essential to the doctrine of parliamentary sovereignty that single acts of parliament create different sets of statutory rights, and they are not strongly shaped by an image of their addressee (the citizen) as a holder of rights, which all law must recognize. This is clearly reflected in the classical parliamentary doctrines that each parliament is sovereign and can repeal acts of previous parliaments, and that, accordingly, there is no relative entrenchment or hierarchy between statutes. This is

[156] For analysis close to mine on this point see Judge (1999: 17); Oliver (2009: 150).

[157] On the historical distinction of the English concept of the subject from the more obviously democratic concept of the citizen see Salmond (1902: 50); Price (1997: 88).

also reflected in the fact that, where rights guaranteed under one statute conflict with rights guaranteed under a different statute, the rights deriving from the most recent statute prevail.[158] On this basis, the rights of citizens in British public law cannot easily be seen as separable from single momentary pieces of parliamentary legislation, and statutory rights do not attach to the citizen *per se*, as a generally constructed political subject. Social agents cannot easily appear in the political system as citizens, uniformly implicated in legislation. Moreover, they cannot easily appear as sources of distinctively public legitimacy for the government, tying government to a clear image of its public origins and duties. In the concept of parliamentary sovereignty, the citizen appears, in essence, as an interested party, seeking to translate a particular momentary interest or a series of particular momentary interests into a piece or several pieces of legislation.[159] However, the citizen does not appear as a general source of public authority, possessing rights on whose recognition the legitimacy of the political system in its entirety categorically depends.

In classical British parliamentarism, to be sure, the common law provided some general rights for individual persons, which they were able, notionally, to hold as principles against the acts of government. Persons in society were able to articulate some constant rights in the environment of government. In some famous cases, it was stated that the common law was able to establish clear restrictions to curb the power of government agents.[160] Yet, such rights were traditionally of a private nature, and they lacked the force of statutory rights. Such rights could not provide strong protection for rights of a political nature, required for the consolidation of a modern democracy, especially in times when such rights came under duress (Ewing and Gearty 2000: 13, 20, 323).

[158] This is expressed in the rule of implied repeal, which states that 'if Parliament has enacted successive statutes which on the true construction of each of them make irreducibly inconsistent provisions, the earlier statute is impliedly repealed by the later': *Thoburn* v. *Sunderland City Council and other appeals* – [2002] All ER (D) 223 (Feb)

[159] One reason for this is that parliament was originally a judicial body, before which individual parties sought justice, remedy and redress. Until the seventeenth century, parliament was not finally distinct from a judicial institution, and it assumed its authority as the highest court of the realm, limiting the powers of the monarchy by applying the common law (MacKay 1924: 239; Gough 1955: 42; Goldsworthy 1999: 155). To some degree, the echo of this is still audible in parliament's contemporary features and functions.

[160] See Dr. Bonham's Case, 8 Co. Rep. 114 (Court of Common Pleas [1610]). But note that Coke, who ruled in this case, stated more doctrinally that 'all weighty matters in any parliament' 'ought to be determined, adjudged, and discussed by the course of the parliament, and not by the civill law, nor yet by the common law' (1797 [1628–44]: 14). See also *Entick* v. *Carrington* [1765] EWHC KB J98.

Overall, the political subject of British public law appeared, historically, in a form that was divided into two separate parts. The political subject existed as the holder of residual rights of an individual nature, which were protected at common law, but lacked constitutional authority. The political subject also emerged as the *electoral citizen*, who, if permitted, took part in popular elections, and then appeared as the addressee of single separate acts of parliament, whose authority was extracted from the representative functions of the parliamentary system, and which granted rights on that basis. In this dual form, the citizen was not formed as a participant in a stable, normatively cohesive political community, possessing generalized political rights and expectations. In both its dimensions, in fact, the political subject was essentially privatistic, holding separate sets of private rights. As a subject of parliament, the citizen always appeared in doubly privatistic fashion, only possessing political rights through isolated Acts of Parliament, recognizing citizens as momentary stakeholders, and endowed with only marginally relevant private rights to set against governmental encroachments.

The British parliamentary constitution has often been viewed as a markedly political constitution, distinct from the legally entrenched normative orders found in more codified constitutions.[161] In key respects, however, the British constitution is precisely not an eminently political constitution, based on a strict construction of public authority and a strict legitimation of public acts by publicly acceded principles. On the contrary, it is a privatized constitution, directed towards the easy transposition of private interests into legislative form. In fact, it is distinctive for the British parliamentary polity that its structure has militated against the construction of a sustained model of citizenship, it has prevented the establishment of public norms to sustain government functions and it allows the citizen recurrently to lapse into privatism.

In some ways, the weak articulation of the citizen in British public law was directly responsible for the fragmented formation of democracy, discussed above. The fact that governmental legitimacy did not presuppose a solid construct of the citizen was reflected in the emergence of multiple franchises. It was also reflected in the *ad hoc* expansion of the suffrage, and in the extraordinarily protracted persistence of plural voting. Each of these factors implies that the British polity defined its citizens, in essence, as private rights holders. However, the adverse impact of the under-formation of

[161] See varying formulations of this view in Griffith (1979: 16); Gee and Webber (2010: 288); Tomkins (2010: 2).

citizenship in British public law became especially acute through the long process of franchise reform, which gathered pace in the 1860s, in which rival interests were incorporated in the legislature. Through this process, the machinery of government became more complex, and the regulatory burdens directed towards the government necessitated production of a rapidly growing volume of law. In this setting, the classical principles of British public law proved singularly ill-suited to the conditions of mass democracy, and they struggled to generate a concept of legitimacy to support governmental functions.

First, the expansion of parliament's regulatory powers in Britain through the twentieth century meant that governmental functions were increasingly centred around the executive branch. In fact, although parliament had originally evolved as the nervous centre of government, by the early twentieth century many legislative functions of parliament migrated to the executive (see Parris 1969; 184; Marsh and Read 1988: 1–2; Daintith and Page 1999: 24). By World War II at the latest, the idea that the elected chamber of parliament might act as a sovereign organ of government was clearly implausible, and the cabinet had become the dominant element of the political system. However, because the political system as a whole was based on the notional primacy of the parliamentary legislature, giving unmediated expression to popular interests, it was not possible, normatively, to institutionalize strong checks on executive power; indeed, the political system was not capable of generating such normative checks. The fact that the government was designed for the momentary enactment of the parliamentary will meant that the norms required to constrain executive actors, which had arrogated parliamentary functions, were very weak (Birch 1964: 166; Woodhouse 1994: 17; Norton 2005: 62, 81).

Overall, this created a rather perverse institutional order. In this system, the legislature was supposed to represent the will of the people, and it was subject to only limited constraint because of its privileged claim to ensure representation of this will. In fact, however, legislative functions were largely performed by the executive, which, because of the lack of horizontal checks on legislative process, was able to function at a very high degree of autonomy. Paradoxically, the British parliament eventually proved to be a very weak legislature, whose function was merely to collaborate with the executive in the daily conduct of government. The underlying reason for this was that parliament obtained legitimacy not from its recognition of citizens as rights holders, but from its enactment of the particular momentary interests of parliamentary majorities.

As a result of this, second, the general system of public accountability in the UK was formed very slowly. Indeed, the weakness of British democracy was reflected in the fact that, for some time after 1945, the obligations of public bodies were imprecisely defined. As late as the 1970s, for example, a clear definition of public law had not been established in the UK,[162] and the basic legal norms governing exchanges between public bodies and citizens were only inchoately articulated. In fact, controversy persisted into the 1960s as to whether the UK actually possessed a system of administrative law, placing formalized checks on acts of public bodies, and ensuring that such bodies act in a fashion proportioned to rights of citizens.[163] This uncertainty was caused by the fact that the parliamentary constitution did not permit the enforcement of fully free-standing normative constraints on acts of government. Indeed, under the parliamentary constitution, courts, as far as they were authorized to regulate public bodies, were only able, in strict terms, to measure the legitimacy of public acts on expanded *ultra vires* grounds, by assessing the compliance of such acts with original momentary decisions of parliament.[164] Indicatively, the use of *ultra vires* as a concept for controlling public acts originated in legal rulings concerned with the scope of public contracts granted to corporations,[165] implying that public bodies and public agencies were perceived, residually, as corporations, and their relation to citizens was construed in analogy to a private legal arrangement.

The importance of *ultra vires* in UK public law meant that a comprehensive corpus of public law, centred in autonomously defined legal principles, was not deemed necessary, and it impeded the emergence of a system of formal and actionable rights to regulate use of public authority. In fact, judicial control of administrative acts developed in English public law as a function of the common law, without any clearly formalized constitutional

[162] See the following claims: 'The expressions "private law" and "public law" have recently been imported into the law of England from countries which, unlike our own, have separate systems concerning public law and private law. No doubt they are convenient expressions for descriptive purposes. In this country they must be used with caution, for, typically, English law fastens not on principles but on remedies'. *Davy* v. *Spelthorne Borough Council* – [1983] 3 All ER 278 (Wilberforce LJ). See arguments in agreement with this analysis, though claiming that a strict distinction between private and public law is not desirable, in Harlow (1980: 258).

[163] See discussion of this in *Ridge* v. *Baldwin and others* – [1963] 2 All ER 66.

[164] See discussion in Schwartz and Wade (1972: 210–11); Griffith and Street (1973: 211); Wade and Forsyth (2004: 35); Elliott (2001a: 23, 79).

[165] See *East Anglian Railways Co.* v. *The Eastern Counties Railway Co.*, (1851) 11 C. B. 775.

basis.[166] The essential objective of judicial review, initially, was to preserve a separation of powers arrangement within the governance system, and to make sure that executive bodies did not act beyond the powers bestowed by parliament. By the 1960s, to be sure, the courts had begun to flesh out a set of distinctively public-legal norms, applying free-standing principles to assess the legitimacy of public acts.[167] In fact, the courts had been left to craft a body of administrative law, instilling both general principles of natural justice and private- or common-law concepts of liability into a basic public-law doctrine of *ultra vires*.[168] Before the 1970s, nonetheless, the ability of the courts to impose normatively independent constraints on government remained limited. Tests for proper use of public authority were restricted to vague standards of natural fairness and reasonableness, and courts were not easily able to articulate substantive criteria to assess the use of governmental power.[169] The late twentieth century saw a dramatic expansion of government functions, reflecting the rise of a modern welfare state. Yet, this was not flanked by the emergence of a strict normative order to determine relations between citizens and government, and,

[166] See the judicial claim that 'judicial review was an artefact of the common law whose object was to maintain the rule of law' in *R (on the application of Cart)* v. *Upper Tribunal*; *R (on the application of MR (Pakistan))* v. *Upper Tribunal (Immigration and Asylum Chamber) and another* – [2011] All ER (D) 149 (Jun). On the common-law foundations of judicial review see Schwartz and Wade (1972: 209); Craig (1998: 90).

[167] See the constitutional construction of rules of 'natural justice' in *Ridge* v. *Baldwin and others* – [1963] 2 All ER 66. See the expanded definition of 'lawfulness' in *Padfield and Others* v. *Minister of Agriculture Fisheries and Food and Others* – [1968] 1 All ER 694.

[168] On the role of the courts in creating a public-law doctrine of accountability see the claim that 'ultra vires has replaced the civil law concept of negligence as the test of the legality, and consequently of the actionability, of acts or omissions of government departments or public authorities done in the exercise of a direction conferred on them by Parliament'. *Home Office* v. *Dorset Yacht Co Ltd* – [1970] 2 All ER 294 (Diplock LJ). On the implications of this see Hickman (2011: 13).

[169] See the following claim:

> [A]t a time when more and more cases involving the application of legislation which gives effect to policies that are the subject of bitter public and parliamentary controversy, it cannot be too strongly emphasised that the British Constitution, though largely unwritten, is firmly based on the separation of powers: Parliament makes the laws, the judiciary interpret them. When Parliament legislates to remedy what the majority of its members at the time perceive to be a defect or a lacuna in the existing law (whether it be the written law enacted by existing statutes or the unwritten common law as it has been expounded by the judges in decided cases), the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it

Duport Steels Ltd and others v. *Sirs and others* – [1980] 1 All ER 529 (Diplock LJ).

as reflected in the importance of *ultra vires*, the simple construct of the citizen as the electoral citizen, represented through single acts of parliament, remained the essential focus of public regulation.

Underneath the classical parliamentary constitution, in short, the British political system was not able to manufacture a concept of the citizen that was clearly separable from single acts of parliament, and that defined the publicly acceded obligations of government. This weak constitutionalization of rights attached to citizens under the British constitution meant, historically, that public law lacked an inherent normative unity. Public law was rooted in the concept of the citizen represented through parliamentary legislation, but it did not provide generalized parameters for the use of public power. The citizen could obtain separate rights under individual acts of legislation. Yet, few rights were implied across the legal/political system as a whole. Government could not be conclusively constructed in the image of the democratic citizen, and, in fact, a basic idea of the citizen could not be supplied to legitimate legislation or to control administrative acts. This was stated quite clearly in a case of the 1990s, where it was explained, fittingly, that in the UK: 'Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power'.[170] As mentioned, from the 1960s to the 1980s, the British courts established some free-standing norms to determine 'wrong' use of public power. However, this opinion implies that the legitimacy of public power is to be challenged, primarily, on separate, punctual grounds, depending ultimately on the interpretation of the powers granted under a particular statute.

From this relatively unpromising position, from the 1970s onwards, institutions in the legal system eventually conducted a far-reaching, although still only partial, reconstruction of public law in the UK. Through this process, persons subject to law were, to some degree, separated from momentary acts of parliament, and positioned as generalized legal addressees (citizens). This greatly hardened the restrictions on governmental agencies, and it significantly altered the inherited system of parliamentary-constitutional democracy. At this time, in addition, legal institutions in the UK began to articulate and to produce norms in increasingly autonomous fashion, and to insist on some norms as possessing a degree of normative force independent of parliamentary intention. Crucially, legal institutions began to implant an abstracted idea of the democratic citizen in UK public

[170] *R* v. *Somerset County Council and ARC Southern Ltd*, ex p Dixon (1997) 75 P & CR 175, [1997] NPC 61 (Sedley J).

law. This in turn led to a partial redefinition of democracy in the UK, in which the role of clearly public norms in dictating the conditions for use of governmental power was greatly increased.

In the 1970s, the emergence of new constitutional concepts was reflected, in particular, in the sphere of administrative law. By the 1970s, the courts had begun to formulate certain norms as possessing clearly binding status for public bodies. First, the courts began to develop the idea that there existed independent standards of legality, imposing obligations on all public agents.[171] Progressively, in fact, they began to suggest that there existed certain *constitutional rights*, which the courts were called upon to defend against encroachments of the legislative and executive branches. In so doing, the courts slowly elaborated the idea, very tentatively in the first instance, that the rights enshrined in common law were not entirely distinguishable from rights enshrined in general human rights law,[172] and that parliament was only allowed to encroach on formally held rights to the minimal necessary extent.[173] This meant that the authority of law could be defined and assessed not solely by its origin in parliament, but by its inner proportioning to the rights and interests of democratic citizens. The courts began to propose a supplementary construct of the citizen in public law, to sit alongside the electoral citizen expressed through the doctrine of parliamentary sovereignty. Indeed, the courts promoted the idea that there existed a constitutional idea of the citizen, holding certain relatively entrenched, even *fundamental rights*,[174] recognition of which would

[171] See notes 167–8 above.

[172] See the claim that rights that are 'deeply embedded in the common law' and now also 'embodied in the Universal Declaration of Human Rights (1949) (Cmd. 7662) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969)'. The implicit claim in this is that English law *got to rights first*. In any case, the presumption that the common law is a reservoir of basic rights gave rise to the statement that 'it is a firm rule of statutory construction that such construction shall not interfere with such freedoms unless expressly stated': *Wheeler* v. *Leicester City Council* [1985] AC 1054. See the later claim 'that in the field of freedom of speech there was no difference in principle between English law on the subject and art 10 of the convention': *Derbyshire County Council* v. *Times Newspapers Ltd and Others* – [1993] 1 ALL ER 1011 (Keith LJ).

[173] See *Morris* v. *Beardmore* – [1980] 2 All ER 753.

[174] See the growing diction of constitutional rights in the following argument: 'to hold a party up to public obloquy for exercising his constitutional right to have recourse to a court of law for the ascertainment and enforcement of his legal rights and obligations is calculated to prejudice the first requirement for the due administration of justice: the unhindered access of all citizens to the established courts of law'. *Attorney General* v. *Times Newspapers Ltd* – [1973] 3 All ER 54 (Diplock LJ). See use of the concept of the 'fundamental right of a citizen' in *R* v. *Samuel* – [1988] 2 All ER 135.

normally be taken as a primary principle of parliamentary legislation, and whose rights parliament would not violate without good cause and express justification. This did not amount to an obligation for parliament to give effect to the rights of citizens. However, it reflected the more residual principle that legislation should not contravene implied basic rights. On this premise, the courts projected a broad rights-based constitution for public agencies, based on an implied homology between core elements of common law and core elements of general human rights law.

Very indicative in this respect was the fact that the gradual rise of formal human rights in UK public law meant that the courts extended their control of public organs beyond classical questions of *ultra vires* (see Oliver 1987: 567). In particular, the courts began not only to use formal rights to limit functions exercised under statutory powers, but also to conduct review of the exercise of powers that did not originate in statutory provisions, including prerogative powers based on the common law.[175] Through these processes, elements of British public law began to assume the form of a free-standing constitutional order, by which all the functions of the political system, in a generalized sense, were bound. This process was based on the assumption that, with some qualifications, *all public acts* were subject to normative control, and that the original common-law role of courts in policing observance of parliamentary decisions required expansion if courts were effectively to regulate the exercise of power in the modern state, populated by democratic citizens. Indeed, the expansion of judicial review created a more solid definition of the basic characteristics of a public power and a public act. In subjecting prerogative powers to judicial review, the courts implied a concept of public authority as comprising all acts that affect persons (citizens) in their rights. On this basis, the idea was generated, albeit somewhat obliquely, that public agency is defined as such by its reference to citizens, and it acquires legitimacy if applied in a form that recognizes the general rights of citizens.[176] An essential citizen-based

[175] See the following claim: 'Seeing that the prerogative is a discretionary power to be exercised for the public good, it follows that its exercise can be examined by the courts just as any other discretionary power which is vested in the executive'. *Laker Airways Ltd* v. *Department of Trade* – [1977] 2 All ER 182. See also the famous analysis in *Council of Civil Service Unions and others* v. *Minister for the Civil Service* – [1984] 3 All ER 935. One account – quite correctly – sees this ruling as the end of strict *ultra vires* (Elliott 2001a: 5). A different account – quite correctly – sees this ruling as adding an element of constitutional review to the British constitution (Jacob 1996: 261).

[176] See the opinion expressed obiter that 'If the executive in pursuance of the statutory power does an act affecting the rights of the citizen, it is beyond question that in principle the

construction of public law thus appeared, primarily, through the evolution of administrative law.

During the 1970s, the impact of international human rights law on UK law still remained marginal.[177] Even the most effective international human rights convention, the ECHR, was only accorded a very restricted role in domestic public law. Indeed, as mentioned, it was commonly accepted that international norms could not directly penetrate into UK law.[178] However, this period saw a pronounced change not solely in the self-conception of the courts, but also in classical notions regarding the domestic constitutional authority of international law. The leading cases in which UK courts first extended and systematized their powers of legal control over public bodies were not substantially influenced by international law. Indeed, despite occasional intimations that the ECHR should inform acts of public officials,[179] there is little evidence in such cases to indicate that the courts deviated from classical dualist principles of UK public law. However, there are important cases in this line of reasoning in which judges clearly hardened rights defined at common law by supporting their arguments with reference to international instruments. In particular, it was increasingly argued during the solidification of British public law that common law rights and international human rights were closely related.[180] To a certain degree, therefore, the tentative concretization of a rights-defined constitution in the UK was linked to an increasingly porous or osmotic interaction between the UK legal system and the international legal system.

manner of the exercise of that power may today be challenged' in *Council of Civil Service Unions and others* v. *Minister for the Civil Service* – [1984] 3 All ER 935 (Roskill LJ).

[177] The classical dualist reading of the British constitution was tempered by some judges in the 1960s to the degree that it was presumed that 'there is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations'. On this basis, it was reasoned that 'if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred': *Salomon* v. *Commissioners of Customs and Excise* [1967] 2 QB 116 (Diplock LJ). See also opinions in *Corocraft* v. *Pan American Airways* (1969) 1 All E.R. 82.

[178] *R* v. *Chief Immigration Officer*, *Heathrow Airport and another, ex parte Salamat Bibi* – [1976] 3 All ER 843. But see the later claim that judges should 'should have regard to the provisions' of the ECHR in *Attorney General* v. *British Broadcasting Corporation* – [1980] 3 All ER 161. See excellent analysis of use of the ECHR in Feldman (1999: 543).

[179] See claims of Scarman in *Reg.* v. *Secretary of State for the Home Department*, *Ex parte Phansopkar* [1976] Q.B. 606.

[180] See for example Scarman's joint reading of *Entick* v. *Carrington* and the ECHR in *Morris* v. *Beardmore* – [1980] 2 All ER 753.

This correlation between domestic law and international human rights in British public law became more intense through the 1980s, when legal expectations linked to the implementation of the ECHR became important determinants in domestic legal procedure. At one level, the conviction still persisted into the 1990s that the ECHR was not an incorporated part of domestic law, and that the values and principles derived from the ECHR could not be applied by the courts to evaluate the acts of domestic public bodies. It was accepted that attempts by the courts to 'incorporate the convention' into domestic law would amount to a 'judicial usurpation of the legislative function'.[181] Remedies for violations of ECHR rights, thus, could only be obtained in Strasbourg. Nonetheless, it became a settled notion that 'in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the convention, the courts will presume that Parliament intended to legislate in conformity with the convention, not in conflict with it'.[182] Moreover, it became common practice in administrative law for courts to apply particularly exacting standards to assess acts of public bodies in cases in which rights recognized under international law, especially the ECHR, were affected. Judges began independently to accept that their scrutiny of public acts should be calibrated in accordance with the importance of the rights affected by the act under consideration.[183] As a result, they implicitly implemented a standard of proportionality, separate from *ultra vires* review, arguing that proportionately greater justification would be required for a public act that placed limits on core human rights.[184] To this degree, the courts began to assimilate both ECHR norms and norms of general international law into domestic law, and they began to promote a relative weighting for different rights and a more substantive evaluation

[181] *Brind and others* v. *Secretary of State for the Home Department* – [1991] 1 All ER 720 (Bridge LJ).

[182] Ibid.

[183] See the following principle 'The most fundamental of all human rights is the individual's right to life and, when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny'. *Bugdaycay* v. *Secretary of State for the Home Department and related appeals* – [1987] 1 All ER 940 (Bridge LJ). It was later argued in the Supreme Court that the effect of this was 'to expand the scope of rationality review so as to incorporate at common law significant elements of the principle of proportionality'. *Pham* v. *Secretary of State for the Home Department* [2015] UKSC 19.

[184] See discussion in *R* v. *Ministry of Defence*, *ex parte Smith and Grady* and *R* v. *Admiralty Board of the Defence Council*, *ex parte Beckett and Lustig-Prean*, [1996] QB 517 (CA).

of particular acts, in the scrutiny of government functions.[185] Indeed, even where they rejected the immediate applicability of the ECHR, the courts proposed themselves as custodians of generalized rights and generalized principles of citizenship.[186]

This constitutional interaction between UK courts and the European human rights system was intensified, finally, in a case in which courts encountered the limits of their powers, as defined under the parliamentary constitution. Confronted with a case filed by two homosexuals who claimed discrimination under the ECHR because of their expulsion from the UK military on the grounds of their sexual orientation, the Court of Appeal decided that the tests of public action available in UK public law could not provide for adequate adjudication of the rights implicated in the case, and they could not lead to adequate remedies for persons subject to discrimination in this way. As a result, the case was opened for challenge to the ECtHR. Ultimately, the Strasbourg court declared that persons affected in their convention rights by public decisions were entitled, under ECHR Article 6, to claim remedies not foreseen in more classical provisions for judicial review in UK public law. Effectively, therefore, the ECtHR decided that procedures for judicial review in the UK, classically based on *vires* concerns, did not in all circumstances provide a basis for an effective remedy. Accordingly, it declared that, in certain cases with human rights implications, proportionality review, entailing a substantive evaluation of the public act in question, should replace conventional patterns of judicial control.[187] In response to this, the UK courts established new principles for judicial review in domestic human rights cases, clearly abandoning the assumption that judicial control of administrative acts was limited to policing the separation of powers, on *vires* grounds.[188] The use of proportionality implied the existence of generalized citizens, possessing generalized rights, to be considered as implicated, and requiring recognition, in all public acts.

In these respects, the exchanges between the UK courts and bodies in the transnational legal domain, especially the ECtHR, meant that the

[185] In fact, a near-classical proportionality argument was used to protect rights of prisoners in *R* v. *Secretary of State for the Home Department*, *Ex p Leech* [1994] QB 198. Close to my reading see Hunt (1997: 220). For very extensive use of ECHR see *R* v. *Secretary of State for the Home Department*, *ex parte McQuillan* – [1995] 4 All ER 400, stressing proximity between ECHR and the common law.

[186] *Brind and others* v. *Secretary of State for the Home Department* – [1991] 1 All ER 720.

[187] *Smith and Grady* v. *UK* (1999) 29 EHRR 493.

[188] *R* v. *Secretary of State for the Home Department*, *ex parte Daly* – [2001] All ER (D) 280 (May).

national legal system assumed a certain degree of autonomy within the political structure of British domestic society. Over a longer period of time, in fact, courts were able to project and enforce conditions of constitutional control, and to define the legal form of democratic government more widely. This process produced a far-reaching reconstruction of constitutional democracy in the UK, and it gave near-constitutional authority to the presumption that acts of government could be assessed in light of fixed substantive norms, reflecting a hierarchy of human rights. Through the osmotic reception of the ECHR as a basis for judicial review, the higher courts in the UK increasingly perceived their functions in analogy to more conventional constitutional courts.[189] To some degree, in fact, this process served, for the first time, to condense a formal system of public law for the UK government.

On one hand, this process separated judicial control from the simple interpretation of parliamentary statutes; it detached judicial review from its original foundation in the common-law power of the courts, and it elevated judicial review to a position close to the rank of constitutional protection. As a result, the courts projected a separate, public-law construction of legitimacy to determine the limits of public authority, and the ends to which such authority could be used. On the other hand, this process established a series of rights-based norms and rights-based remedies not originally extracted from private law, according to which government functions could be measured, and it crystallized a system of increasingly generic public-law rights, by which public authorities were bound. Ultimately, this meant that the courts became more assertive in insisting that laws needed to be authorized by implied citizens, comprising relatively uniform aggregates of rights, standing separate from, and providing a basis for evaluation of, individual parliamentary acts. Notably, this reinforced the primary claim that any 'power conferred by Parliament' cannot be presumed 'to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen', unless the relevant Act of Parliament 'makes it clear that such was the intention of Parliament'.[190] Most importantly, this meant that the basic political subject of democracy

[189] *International Transport Roth GmbH & Ors* v. *Secretary of State For the Home Department* [2002] EWCA Civ 158 (22 February 2002) 71 (Laws LJ).

[190] *Pierson* v. *Secretary of State for the Home Department* – [1997] 3 All ER 577 (Browne-Wilkinson LJ). Note also the consideration of treaty obligations, especially in respect of human rights treaties, as authoritative guidance for interpreting the will of parliament in *R* v. *Secretary of State for the Home Department*, *ex parte Venables*; *R* v. *Secretary of State for the Home Department*, *ex parte Thompson* – [1997] 3 All ER 97 (Browne-Wilkinson LJ).

was detached from its expression through single parliamentary decisions, and it was distilled as a source of substantive democratic obligation for all acts of public bodies. This process instilled a democratic subject in society that was less immediately implicated in single acts of legislation, but which was more robustly generalized as the primary focus of legal legitimacy and public accountability.

Finally, this process of democratic redesign acquired a foundation in parliamentary authority, through which the normative construction of the democratic citizen was greatly reinforced. This occurred in the Human Rights Act (HRA) (1998), which solidified a number of already existing tendencies in British public law. This Act gave domestic effect to the ECHR as a framework for judicial interpretation of statutes and for regulation of administrative functions. It also led to the establishment of a special committee in parliament, the Joint Committee on Human Rights, to screen draft bills for compliance with the ECHR. Moreover, it translated into hard law the conventional principle that parliament could only legislate in contravention of ECHR rights if it expressly declared this intention (see Kavanagh 2009: 99).

After the entry into force of the HRA in 2000, first, the judicial imposition of constitutional constraints on government became more robust, although it still remained relatively tentative (see Dickson 2013: 16, 98). After 2000, courts routinely applied harder normative criteria to judge the legitimacy of administrative acts, including secondary legislation, in cases with human rights implications.[191] Moreover, courts showed some willingness to challenge primary legislation,[192] and to read new normative meanings into older statutes, to bring existing laws into line with international norms, and with current conceptions of citizenship.[193] In addition, courts began to extend their competence to address questions in the domain of international law and foreign policy.[194] In each respect, the British judiciary entered a closer relation to the ECtHR, as domestic judges increasingly founded their rulings in case law and jurisprudence emanating from

[191] Eventually, this established a system of review quite separate from ultra vires. See the following argument: 'The role of the court in human rights adjudication is quite different from the role of the court in an ordinary judicial review of administrative action. In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account'. *Belfast City Council* v. *Miss Behavin Ltd* – [2007] 1 WLR 1420 (Hale LJ).

[192] *A and others* v. *Secretary of State for the Home Department* [2004] UKHL 56.

[193] See *Ghaidan* v. *Godin-Mendoza* – [2004] All ER (D) 210 (Jun) (Nicholls LJ).

[194] *Bank Mellat* v. *HM Treasury* (No 2) – [2013] 4 All ER 533.

Strasbourg,[195] and they imported Strasbourg norms to articulate hardened constitutional checks on the sovereign power of parliament. In some cases, in fact, the courts decided that, as objective interpreters of legal rights, they could, conceivably, insist upon constitutional rights in order to block primary legislation and to strike down parliamentary acts.[196] In other words, courts perceived themselves as sources of constitutional law. In particular, some judges viewed the HRA as a statute that defied the traditional aversion to vertical privileging of statutes. They interpreted it both *de facto* as a constitutional statute, with transversal force, defining norms for the application of other statutes,[197] and as a statute that entrenches the power of the courts with regard to parliament (see Young 2009: 4). Through the HRA, therefore, the concept of the citizen in British public law was detached from the traditional punctual construction of the electoral citizen, and it was attached, at least in some interpretations, to a more generalized comprehension of law's public authority.

The linking of the UK courts to a supranational judicial order did not solely lead to the simple domestic reinforcement of already established international rights, and it did not mean that the courts became simple passive recipients of ECtHR decisions. On the contrary, this linkage meant that the domestic courts acquired a new spontaneity in the production of rights, and they reconfigured the normative architecture of government in a number of quite distinctive ways.[198] Most importantly, the UK courts began to extract new rights and new modes of rights formation from the substance of the ECHR. On one hand, the courts decided that the principle of proportionality, originally deemed in conflict with the basic principles of UK public law, should be interpreted as compatible with, or even integral to, common law; this significantly expanded the rights fabric of the common law, as far as it applied to public bodies.[199] Additionally, the courts decided that, although nominally bound to recognize Strasbourg rulings as authoritative declarations in human rights questions, they were not formally obliged to accept such rulings, and they could, of their own accord, constructively interpret the ECHR to produce distinctive rights.

[195] *R (on the application of Ullah)* v. *Special Adjudicator Do* v. *Secretary of State for the Home Department* – [2004] All ER (D) 153 (Jun).

[196] See the conjectural discussion of this in *R (on the application of Jackson and others)* v. *Attorney General* – [2005] All ER (D) 136 (Oct); *Moohan* v. *Lord Advocate* [2014] UKSC 67.

[197] *Wilson* v. *First County Trust* (No 2) [2003] UKHL 40.

[198] This is perfectly within the scope of the ECHR. See for comment Masterman (2005: 910).

[199] *Pham* v. *Secretary of State for the Home Department* [2015] UKSC 19.

In some cases, this had the result that UK courts were willing to go further than the Strasbourg court in the generation of protective rights and guarantees, and they sometimes established rights above the thresholds set by the ECtHR itself.[200] In this respect, to be sure, the UK courts retained some aspects of the tradition of judicial deference to the political branches.[201] However, they began to assume unprecedented levels of autonomy, and they constructed from international human rights norms a flexible premise for substantive control of government.

Overall, although still relatively closed to the influence of international legal norms, the public legal order of the UK has evolved, almost paradigmatically, through a process in which the domestic legal system has approached a heightened level of differentiation and self-authorization. This differentiation has been caused, in part, by the interaction between domestic courts and supranational institutions, and by the often diffuse entry of international human rights law into the substructure of national law and domestic jurisprudence. As in other cases, the courts emerged as actors with strongly enhanced abilities to create public law, in independence both of their own governments and of the supranational courts, by which they were supposedly determined. Indeed, although, by most reasonable definitions, the political system of the UK had evolved into a democracy by 1950, many normative features of democracy were only consolidated through constructive judicial reasoning, linked to the articulation between national and global law. This was most evident in the construction of principles of administrative accountability. However, this was also evident in the fact that courts compensated for the historically weak construction of the citizen, whose formation had been impeded by the underlying principles of parliamentary constitutionalism. It was only on the grounds of international human rights law that British public law internalized an image of the consistently formed citizen, to whom all acts of parliament owed recognition in similar ways, so that authorship of law was legitimated through a relatively consistent idea of its addressee.[202] In

[200] On provision of elevated rights in mental health cases see *Rabone and another* v. *Pennine Care NHS Foundation Trust* – [2012] All ER (D) 59 (Feb).

[201] *R (Lord Carlile of Berriew QC & Ors)* v. *Secretary of State for the Home Department* [2014] UKSC 60.

[202] See the idea of the HRA as allocating generalized rights, beyond the scope of a single statute, in *Wilson* v. *First County Trust (No 2)* [2003] UKHL 40. See the following construction of the prisoner as citizen in the context of a proportionality argument:

> Any custodial order inevitably curtails the enjoyment, by the person confined, of rights enjoyed by other citizens. He cannot move freely and choose

this respect, courts produced a clearly public construction of law's legitimacy, and they separated law from residually privatistic concepts representation that, classically, had dominated British constitutionalism. The new concept of the citizen brought a deep modification of democratic structure, countervailing the traditional dominance of the executive. Underlying this process was not simply a strategic elevation of the role of the judiciary, but rather a construction of the legal system as an autonomous domain of social practice, able to generate constitutional norms and rules of democratic governance on internal premises, without reference to classical political processes. Democratic citizenship was forged through relatively autonomous inner-legal acts, stimulated by the influx of global legal norms.

Self-evidently, this does not mean that the entanglement between national and international law in the UK conferred fully secure democratic form on the British polity. The privatistic instability in the concept of the citizen in British public law remains evident in the fact there is diminishing confidence in the parliamentary constitution to create reliable mandates for government, and governments allow popular plebiscites, in which citizens revert to punctual acts of acclamation, to dictate higher-order constitutional norms. This again creates a deeply paradoxical constitutional situation, typical of the British parliamentary system. On one hand, parliament is supposed to be sovereign, and it cannot be constrained by higher norms. Yet, in matters of decisive importance, parliament's sovereignty is suspended, and higher law-making functions are ascribed to individual decisions of the people, in some cases leading to the abrogation, in one decision, of sets of rights generated through complex processes of citizenship formation.[203] In such features, the UK acts, for the sake of

> his associates as they are entitled to do. It is indeed an important objective of such an order to curtail such rights, whether to punish him or to protect other members of the public or both. But the order does not wholly deprive the person confined of all rights enjoyed by other citizens. Some rights, perhaps in an attenuated or qualified form, survive the making of the order. And it may well be that the importance of such surviving rights is enhanced by the loss or partial loss of other rights.

R v. *Secretary of State for the Home Department*, ex parte Daly – [2001] All ER (D) 280 (May). On the high symbolic status of the HRA see Feldman (1999: 178).

[203] Notably, in the leading legal judgement regarding the correct procedure for the UK to leave the EU, it was reasoned that EU Treaties had built up a complex store of rights in British law – 'they are a source of domestic legal rights many of which are inextricably linked with domestic law from other sources'. This informed the decision that distinctive legislative authorization was required to take the UK out of the EU: *R (on the application of Miller*

purported democracy, in rebellion against the process of incremental transnational legal construction that has actually brought democracy into its constitution.

4.2.4 Global Human Rights and National Democracy 4: Colombia

A particularly close correlation between the differentiation of the global legal system, the rising impact of international human rights, and the growth of democracy is observable in Colombia. In fact, Colombia can be seen, in a global perspective, as one of the leading examples of democratic consolidation caused by the systemic differentiation of global law and the systemic construction of the global citizen. Given the extreme obstacles to effective democratization in Colombia, it can be viewed as an extreme exemplification of ways in which global law overcomes structural resistance to effective democratic citizenship.

Examined in a formal perspective, Colombia had a stronger historical record of democratic consolidation than many Latin American countries, and it is sometimes viewed as an outlier amongst Latin American states with weak democratic traditions (see Murillo-Castaño 1999: 47). Notably, Colombia, in the form of Nueva Granada, had a broad male franchise as early as 1853. The Constitution of 1886 then established universal male suffrage at a local level, with literacy and property qualifications for national representation (Rojas 2008: 318). Moreover, in Colombia, pure dictatorship has been a rare phenomenon. Since the late 1950s, overt military involvement in Colombian politics has been rare, elections were held at regular intervals and rotation of governmental executive was partly institutionalized. One commentator observes that Colombia is distinct from other Latin American countries in that, since its first consolidation, it has possessed a 'surprising institutional continuity', and it has generally had 'popularly elected governments and an electoral and parliamentary history without discontinuities or ruptures' (Uribe de Hincapié 1998a: 14). In the 1980s, a leading external commentator observed that Colombia is one of the only countries in Latin America whose political order has had a democratic character, almost without interruption, for a century (Pécaut 1987: 15).

and another) v. *Secretary of State for Exiting the European Union*; Re Agnew and others' application for judicial review (reference by the Attorney General for Northern Ireland); Re McCord's application for judicial review (reference by the Court of Appeal (Northern Ireland)) – [2017] 1 All ER 593.

To be sure, such observations need to be assessed with certain qualifications, and Colombian democracy has invariably been marked by unusual features. Even during the period of greatest democratic stability, under the *Frente Nacional* (1958–74), elections in Colombia were not fully competitive. In this period, government took the form of a compacted alternation of executive functions between Presidents from different parties, tellingly described as a 'two-party alliance', with power effectively shared between historical adversaries (Plazas Vega 2011: 57). Moreover, it is widely noted that this system was underpinned by localized patronage networks – indeed, patronage was used both to pacify rival factions and to articulate the government with regional actors, in the absence of broad-based political participation (Leal Buitrago and Dávila Ladrón de Guevara 1990: 18; Martz 1997: 311; Dávila Ladrón de Guevara 1999: 67; Leal Buitrago 2016: 129). Nonetheless, formal governmental structures in Colombia have only rarely deviated categorically from democratic norms. Importantly, except for short interludes, Colombia did not have such a strongly evolved corporatist tradition as many other Latin American countries, and the structural intersection between government bodies and economic organizations was limited (Pécaut 1987: 135, 180). As a result, the corporatist hollowing out of democracy which afflicted many Latin American states was, although not absent, not strongly pronounced in Colombia.

Beneath the formal political arena, however, the governmental order of Colombia was shaped, historically, by a series of profound problems, which meant that national processes of democratic institution building were very precarious.

First, problems in defining basic principles of national citizenship affected the Colombian state from the start, before its final formation as a Republic in 1886. Most obviously, the rise of national citizenship was affected by the fact that Colombia contains a series of very different cultures: the Hispanic urban culture, the Andean culture, the Caribbean culture and the Amazonian culture being the most evident examples. In addition, the pacific region of Colombia contains large African-Colombian populations, comprising descendants of fugitives from the slave trade. After the collapse of the Spanish colonial administration in the early nineteenth century, moreover, the institutionalization of central government was undermined by the complex cultural order of society, which was often reflected in the solidification of local power structures (see Conde Calderón 2009: 271; Márquez Estrada 2011: 68). Initially, notably, definitions of Colombian citizenship in the nineteenth century were not strictly

separated from local authority, and local dignitaries acquired privileged rights of citizenship, such that access to the national political sphere was controlled at a local level. One consequence of this was that political coordination between centre and periphery was often dependent on the dispensing of patronage by local actors, who acted as intermediaries between local and national systemic positions (González González 2009: 192). In turn, this meant that the power of central government was restricted by local monopolies and corporate bodies, that national and local elites were not strongly articulated or unified, and that sub-national affiliations and local citizenships were strongly privileged and entrenched (González González 2014: 183, 535). This also meant that citizenship possessed a multi-centric quasi-familial character,[204] and there existed a deep disjuncture between the increasingly urgent demands for nationalized citizenship that became vocal in the middle of the nineteenth century and the factual design of society (Uribe de Hincapié 1998a: 37). For this reason, one important account describes early Colombian citizenship as 'hybrid citizenship', comprising elements of local, clientelistic and national obligation (Uribe de Hincapié 1996: 75). The legacy of this has remained visible into recent history, as clientelistic relations long retained force as important linkages between the political system and society, forming alternatives to popular representation, and political actors not able to dispense patronage still today possess limited mobilizing power.[205]

As a consequence of these factors, the societal penetration of the Colombian state was traditionally very low, and the ability of the government to perform political functions across society (i.e. to raise taxes, to enforce legal norms, to galvanize general support) was routinely obstructed by influential social elites and by the local dispersal of power.[206] In some respects, prominent economic actors in Colombia strategically opposed the emergence of a central government, based on national patterns of citizenship and collective obligation, able to dictate national law and national policy and to establish uniform conditions of entitlement, and they actively boycotted the process of national political institution-

[204] See discussion in Márquez Estrada (2012: 301).

[205] For discussion of the importance of clientelism in recent Colombian history, see Martz (1997: 40, 309); Uprimny (1989: 129); Dávila Ladrón de Guevara (1999: 74).

[206] The emergence of the Colombian state as a state with weak capacities was probably shaped by the fact that Colombian elites possessed private power and private security, and they did not want a strong state (see Pécaut 1987: 18; Uribe López 2013: 198). In Colombia, the tax-raising powers of municipal bodies are still variable and their governance capacity is low. See on this García Villegas et al. (2016: 44, 78).

alization (see Uribe López 2013: 145, 287). This meant that the evolution of a fully nationalized political system was always a fitful and deeply contested process, and, historically, the state lacked the capacities to exercise integrative control across society. To be sure, the Constitution of 1886 was, notionally, a very centralizing document, and it instituted a nationalized political and judicial order, to replace pre-existing federal arrangements (see Cajas Sarria 2015a: 64). Yet, the factual structure of society resisted nationalization, and it persisted in its multi-centric form (Leal Buitrago 2016: 115).

Most significantly, however, the obstruction to national democracy in Colombia was caused by the intermittently extremely high levels of social violence and civil conflict, often of a multi-polar nature, which ravaged Colombian society, and blocked societal penetration of state power. To a large degree, of course, social violence was the result of the historical mismatch between government and society that was inherited from the colonial period and was accentuated during the nineteenth century. Through the early period of state formation, the use of violence demonstrated, whether consciously or not, a contest over the conditions of systemic nationalization, elaborating rival accounts of national society and national citizenship, and contesting the terms under which the political arena extended into society.[207] To this degree, violence formed a mode of illegal political participation, alongside more institutionalized articulations between state and society (Leal Buitrago 2016: 137). More contingently, social, violence was exacerbated through the solidification of a strict two-party system of representation in the twentieth century, which led to an intermittently intense politicization of local and traditional conflicts and rivalries (González González 2014: 298). Moreover, violence resulted from the lack of institutional organs strong enough to resolve social conflicts at a national level, especially conflicts relating to agrarian production in rural areas.

Whatever its particular causes, the prevalence of extreme violence in Colombia necessarily weakened the power of the national political system, and it called into question the basic locus of political sovereignty in society (Uribe de Hincapié 1999: 30). This was clearly manifest in the period of acute civil conflict in the 1950s, when it appeared that hostile factions had effectively created separate Republics within the space notionally seen as Colombian national territory (Aguilera Peña 2014: 12–13). From the late 1960s onward, then, Colombia was again increasingly beset by such intense civil conflict, escalating into the 1980s and 1990s, that in some parts

[207] See outstanding analysis in Uribe de Hincapié (1998a: 45).

of society political power was not primarily vested in formally ordered state-like institutions. By the 1980s, a number of actors and organizations, including insurgent guerrillas, rightist paramilitaries and drug cartels, rivalled or even replaced state agencies in some regions. In fact, both guerrillas and paramilitaries established alternative modes of relatively cohesive sovereign organization in the particular regions over which they acquired control, even creating local judicial and fiscal systems,[208] thus acting as *de facto* micro-states. These factors meant that Colombian society as a whole was only unevenly centred around identifiably public institutions, and the political system as a whole assumed a highly polycratic form, containing many parallel modes of authority. In many instances, in fact, the formal state structure was not clearly distinct from bodies deploying more obviously privatized resources of violence, as the government had routinely co-opted paramilitaries in order to crack down on Communist militias. Moreover, even regular military forces were not securely under government control.[209]

Overall, until the 1990s, Colombian democracy was not based on a centralized or even coherently defined organizational system. Democratic government institutions were acutely undermined by the localization of power and the privatization of political institutions and by at times extreme levels of social and political violence. Although the Colombian political system was formally democratic, political institutions lacked the robustness and the institutional penetration needed to make democracy a socially meaningful condition, with secure foundations across different societal regions.

The most concerted attempt to remedy problems of state diffusion in Colombia began with the drafting of a new constitution, which entered force in 1991. At this point, the decision to write a new constitution was reached as part of a strategy to pacify society, and to establish institutions able to gain support amongst rival parties in the civil conflict. This was of course an intensely pressing necessity, reflecting the background of

[208] For analysis see Uribe de Hincapié (1999: 39–40); González, Bolívar and Vázquez (2003: 31, 198, 231, 250, 257). One deeply illuminating account sets out a periodization of this process, arguing that after 1985 guerrillas began to colonize municipal power in some areas (Aguilera Peña 2014: 129). This is seen as a continuation of the 'fragmentation of sovereignty' which occurred, in a different constellation, in the 1950s (Aguilera Peña 2014: 139). Notably, this policy of dominating municipal executive and legal functions was also pursued by paramilitary organizations (Aguilera Peña 2014: 377). The relation between paramilitaries and the regular state is more problematic, as in many regions the paramilitaries were an informal wing of the government (see Grajales 2017: 88–9).

[209] On these points see Bejarano (2011: 207, 296).

the rapidly escalating violence that marked the 1980s, exemplified in the assassination of leading judges in the Supreme Court in 1985. The 1991 Constitution was conceived as a focus for a wholesale process of political reorientation and even for national re-foundation. Although not a transitional constitution in the strict sense, it was intended to establish new institutional foundations for popular democratic government. Moreover, it was also conceived as a peace treaty, intended to reinforce government institutions by ending the civil war. Indicatively, the convocation of the Constituent Assembly charged with drafting the Constitution originated in an emergency presidential decree (Decree 927 of 1990), which stated that broad exercise of popular constitution-making power was required to solidify state institutions and to overcome the permanent destabilization of public order caused by civil violence. Unusually, in consequence, this Constitution resulted from a relatively open, socially pluralistic process of constitution making, which was not dominated by the historically dominant Liberal and Conservative parties. In fact, different parties in the civil conflict, alongside other social organizations, obtained a position in the Constituent Assembly. The earlier part of the constitution-making process was also influenced by a range of grass-roots initiatives, particularly the student movement, motivated by a commitment to long-term demilitarization.[210]

In its eventual written form, the 1991 Constitution of Colombia anticipated aspects of later constitutions in Bolivia and Ecuador, as it integrated an array of organizations in the political system, giving recognition to NGOs, human rights organizations and indigenous population groups as effective constitutional subjects. In this respect, the constitution was designed to extend the boundaries of the political system beyond the formal political arena, aiming to establish wide consensus across society for the newly founded democratic order. Accordingly, the constitution placed great emphasis on the importance of civil participation in government functions (especially Articles 40–1, 95(5), 103). Moreover, the constitution enacted a policy of partial decentralization, designed to reinforce municipal governments as important subsidiary pillars of the political system, and to increase engagement and participation in political functions at municipal and local levels.

Most notably, the 1991 Constitution accorded high symbolic status to human rights law as the basis for political reorientation. The doctrine of

[210] See the interviews regarding this point in Restrepo Yepes, Bocanument Arvelaez and Rojas Betancur (2014: 46, 54).

human rights had a very prominent place in the Constituent Assembly, and the commitment to human rights obligations assumed a rank close to a pre-constitutional law, informing and pre-structuring discussions in the Assembly.[211] Notably, human rights diction had assumed salience in Colombian society in the 1980s, as international organizations had become more involved in the Colombian conflict, and different domestic factions increasingly formulated their positions around human rights claims (Yates 2007: 129; Grajales 2017: 158–60). The constitution in fact strategically utilized human rights to separate the organs of government from previously dominant political stakeholders, and to project a common socio-political language, through which actors in different social formations were able to address and to engage with the state as common interlocutor (Lemaitre Ripoll 2009: 107, 216). In some respects, the Constitution promoted human rights as a unifying *normative* diction to replace the unifying *material* order established by the 1886 Constitution, whose centralizing dimensions had met with deep opposition. More generally, however, the Constitution was intended to rebuild the state through the use of human rights, and even to create a unified model of the citizen, to underpin the state, by borrowing constructs from human rights law. Indeed, a perception that state debility was correlated with a weak articulation of the citizen, which could be rectified through the consolidation of human rights, was pervasive through the constitution-making process.[212] In these respects, the Colombian Constitution of 1991 formed a prototype for later transformative constitutions, in which human rights law was utilized as a hard instrument for societal reconstruction, intensified intergroup articulation, and unified citizenship formation.

In conjunction with this, the 1991 Constitution of Colombia also had the distinction that it established a powerful Constitutional Court. To some degree, this aspect of the Constitution built on already existing elements of Colombian constitutionalism. Notably, before 1991, the Supreme Court had already acquired some features usually associated with a Constitutional Court. It already possessed a chamber with responsibility for constitutional review, which resulted from proposals in the late 1960s to create a Constitutional Court (Cajas Sarria 2015b: 99–104). As early as 1910, in fact, the Supreme Court had obtained the authority to

[211] See witness reports in Restrepo Yepes, Bocanument Arvelaez and Rojas Betancur (2014: 287, 304).

[212] For historical-sociological analysis of this three-way nexus in Colombia between weak statehood, weak construction of the citizen and the promotion of human rights, see Uribe de Hincapié (1999: 30–1).

exercise control of statutes (Cajas Sarria 2015a: 16). Then, in the 1970s, the Supreme Court declared some constitutional reforms and electoral laws unconstitutional (Cajas Sarria 2015b: 207, 214, 253). Moreover, the Supreme Court had played a role in creating the constitution-making situation in 1991, as, in face of congressional opposition, it had approved Decree 927 and Decree 1926 (1990), which ultimately authorized the Constituent Assembly to create a new Constitution, insisting that the people have a right to act as 'primary constituent' of the political order (Cajas Sarria 2015b: 406). After 1991, the Court quickly began to develop a very activist line of constitutional review, and it utilized its powers to establish robust lines of articulation between different societal groups and institutions in the governance system. Through this, the Court became a core actor in the promotion of an overarching structure of national citizenship.

After 1991, on one hand, the Constitutional Court strongly upheld the participatory dimensions of the Colombian Constitution. In its early rulings, the Court projected a strong ethic of participatory citizenship, emphasizing the claim that all people possessed a 'fundamental right to participation' in the 'exercise and regulation of political power', and stressing the obligation of the state to ensure the 'participation of the citizenry in the processes of taking decisions of relevance for collective destiny'.[213] Importantly, the Court also ruled that there exists a right to information, to facilitate the right to participate in shaping government decisions.[214] In these respects, the Court supported a classical model of the citizen as participatory political agent, implied in the constitution. Indeed, the Court evidently understood itself as a protagonist in the national endeavour to create strong institutions and to consolidate national support for government through the invigoration of citizenship practices.[215] In parallel to this, however, the Court used supplementary means to integrate societal actors into the political system, and it took particular steps to ensure that all persons in society were constructed in uniform categories of citizenship. The Court in fact devised a normative apparatus in which it could help to eradicate regional and social variations in access to legal inclusion, and to intensify the societal reach of government by cementing a stable legal order of citizenship.

To accomplish this, after 1991, the Constitutional Court began to promote very strong protection for human rights within Colombian society,

[213] C-180/94.
[214] C-891/02.
[215] See early discussion in T-479/92.

and it applied human rights as powerful elements in a system of normative integration. In this regard, the jurisprudence of the Court centred on the principle, borrowed from German constitutional law, that the protection of human dignity should be interpreted as a meta-norm in the Constitution, and that the Court had an obligation to 'enlarge' this value, to ensure its enforcement in all constitutional practices, and to give effect to it in the 'social dimension' of human life.[216] As a result, the Court extracted from this principle a commitment independently to expand the rights contained in the Constitution, and to increase enjoyment of rights amongst all social agents, placing particular emphasis on socio-economic rights and minority-group rights, to be protected equally across society.

In this strategy of rights expansion, the Colombian Constitutional Court often supported its rulings through reference to international human rights law. In fact, the growing power of the high judiciary in Colombia was closely linked to the rising authority of the IACtHR, and it clearly reflected a wider tendency towards the concretization of human rights law as a regional supra-national structure in Latin America.[217] Ultimately, the Constitutional Court assumed an unusually constructive approach in the domestic assimilation of international law, and it integrated many principles of international law, possessing varying degrees of formal authority, as binding norms of domestic legal order. As discussed, this was expressed at an early stage in the process of constitutional redirection, as the Court declared in 1992 that international norms with *jus cogens* rank, including international humanitarian law, should be subject to 'automatic incorporation' in the domestic legal order.[218] This was then elaborated in the doctrine of the block of constitutionality, through which the Constitutional Court established the norm that, at the insistence of the Court itself, international treaties could become constitutionally binding elements of domestic law.[219] Moreover, the Court ruled that judgements of the IACtHR should have direct domestic effect,[220] and that they form a 'hermeneutical criterion' for establishing basic rights in domestic law.[221]

[216] T-881/02.

[217] This was noted in Inter-American Commission on Human Rights (1993): 'The work being done by the new Constitutional Court, whose magistrates were sworn in as recently as March 1992, deserves a special word of recognition from the Inter-American Commission on Human Rights for the work it is doing to defend, strengthen and consolidate Colombia's constitutional system'.

[218] C-574/92.

[219] C-408/96.

[220] T-275/94.

[221] C-010/00.

Eventually, the Court stated that rulings of the IACtHR should be treated as part of the domestic block of constitutionality.[222]

In this approach, the Constitutional Court promoted a clearly constitutional interpretation of international human rights law, adopting international norms as the essential premise for the legitimacy of governmental acts. Through this, effectively, domestic citizens assumed immediate rights as citizens of international law, and, if so determined by the Court, government bodies were obligated directly to international law. Indeed, this approach was based on the express claim that the sovereignty of state institutions is strictly relativized by international human rights law – that human rights 'are too important for their protection to be left exclusively in the hands of states'.[223] As mentioned, this approach acquired particular importance in the sphere of socio-economic rights, as the Constitutional Court imposed strict obligations on the government for the satisfaction of material rights.[224] However, this approach was also reflected in questions more specific to Colombian society. The Court addressed many structural problems historically characteristic of Colombia in a framework provided by international norms. In particular, this became visible in the Court's jurisprudence in questions linked to problems caused by social violence. Very notably, as discussed below, international human rights norms were used, often in ways not anticipated in international instruments themselves, to construct a rights-based legal regime for internal refugees, to attribute responsibility for violence perpetrated by paramilitary groups, and to suppress regional disorders.[225] International law was thus deployed to attribute enhanced rights to the most vulnerable and marginalized groups in society, and it formed a core medium of societal inclusion and structural formation.

Especially important in the jurisprudence of the Colombian Constitutional Court is the fact that, through its overtly activist, outward orientation, it increasingly utilized international norms not only to impose constraints on, but also to dictate policies to, actors in other branches of the political system. In some cases, in fact, the Constitutional Court constructed international human rights law as a constitutional order in which it, of itself, assumed legislative responsibility, so that it

[222] T-1319/01.

[223] C-408/96.

[224] T-426/92.

[225] Notably, the Constitutional Court gave constitutional standing to soft-law norms of the UN concerning displaced populations, the Deng Principles and the Pinheiro Principles. See T-327/01; T-602/03.

could correct the actions or inactions of politically mandated legislators.[226] Owing to the historical weakness of the government, in fact, inaction of government agencies became a particularly frequent ground for judicial intervention. This activist strategy was developed by the Court across a range of different cases, including prison-law cases. However, this strategy ultimately assumed regular prominence as waves of persons displaced by internal violence in rural regions entered Bogotá in the years around 2000, confronting the urban population with the personal consequences of protracted civil conflict. During this period, the Court took a more interventionist stance towards the political branches, especially in cases in which government complicity in civil violence was suspected. In so doing, the Court assumed a highly unusual position in the political system, often demanding legislative authority by claiming that Congress was unable (or unwilling) to address the social problems with which it was confronted and that the Court was obliged to perform legislative functions to fill this gap.[227]

Initially, the Constitutional Court's attempts to control political institutions were mainly oppositional in nature, and the Court expressed harsh criticism of government policy. Over a longer period, however, the Constitutional Court slightly revised its terms of engagement with other governmental institutions, and it began to play a more constructive role in the development of Colombian democracy. Ultimately, the Court adopted a strategy in which it phrased its normative directives as manageable policy guidelines, designed to improve government performance and even to enhance state capacity through recognition of international legal norms.

In the first instance, the Court assumed these remedial functions by aligning its rulings and recommendations to the case law of the IACtHR, which, in a number of cases, had sought to bring pressure to bear upon the Colombian government to avert civil violence. In some cases, the Constitutional Court supported the IACtHR in its criticism, and it deliberately reproduced the criticisms levelled at the national government by the IACtHR. Notable amongst these is the case, *Caballero Delgado and Santana*, heard by the IACtHR in 1995, which concerned the kidnapping and presumed murder of trade unionists by members of the national army and by citizens acting as soldiers (paramilitaries).[228] Initially,

[226] See below p. 364.

[227] On the dislike for Congress and the perception of Congress as corrupt amongst judges on the Colombian Constitutional Court, see Landau (2014: 1520).

[228] IACtHR, *Caballero Delgado and Santana* v. *Colombia*, Judgment of 8 December 1995.

the government of Colombia denied any responsibility for the kidnapping, dismissing evidence to prove that the kidnapping had been conducted by persons acting in a public capacity. This claim was disputed by the IACtHR, which ruled that the government had responsibility for such acts, and it was subject to indictment under the ACHR. In later cases, the IACtHR extended these arguments, stating that even when persons committing human rights violations were not acting under immediate colour of law, or where this was difficult to determine, the state could still be found in breach of its obligations under the ACHR.[229] In so doing, gradually, the IACtHR spelled out an increasingly strict principle of state liability to address problems of private violence in Colombia, insisting that the Colombian state was directly responsible for all acts of violence perpetrated within its territories. Progressively, then, the Colombian Constitutional Court began to replicate this approach, and it endorsed the attribution of political liability proposed by the IACtHR. As a result, it applied these principles to coordinate branches of government, claiming that the government was liable for shortcomings in its provision of protection for its subjects and in its preservation of law and order.[230] On this basis, the Court assumed authority to dictate policy in areas in which the state had proved deficient. This line of jurisprudence was shaped by the principle that the political branches had failed in some of their core functions, notably in territorial pacification and judicial control, such that the Court assumed a distinct duty to *correct state failure*.[231] In this respect, the Court began to construct transnational principles of government obligation in Colombia, and, it invoked international jurisprudence in order to intensify the constitutional structure in which the government was positioned, and its functions were exercised. Indeed, the Court utilized international directives to expand the government's responsibilities across society, and so effectively to build and to extend the national constitutional structure of the state.

Most notably, the Constitutional Court in Colombia gradually elaborated a line of reasoning to the effect that in certain situations, marked by egregious and systemic human rights violations, it was entitled to make a declaration against the executive or against Congress not only regarding one point of law or one particular violation of a right, but about an entire set of social circumstances. Such cases have usually arisen in *tutela*

[229] See Case of the *"Mapiripán Massacre"* v. *Colombia*. Judgment of 15 September 2005.

[230] See the classic examples C-370/2006 and C-334/13, responding to the IACtHR's findings against Colombia in Case of the *"Mapiripán Massacre"* v. *Colombia*.

[231] See below at pp. 365–6.

litigation. The *tutela* is a distinctive legal instrument in Colombia, established under Article 86 of the 1991 Constitution, and it is designed to enable challenge against public bodies for human rights violations, especially in circumstances in which other causes of action are not available. However, the submission of *tutelas* assumed unforeseen dimensions after the implementation of the 1991 Constitution, and rising use of *tutelas* created a situation in which, owing in part to the weakness of other branches of government, the courts were required to engage immediately with a range of persons, social actors and social movements (Lemaitre Ripoll 2009: 24). In *tutela* rulings, notably, individual proceedings against public bodies have often formed the basis for wholesale remedial measures, reaching far beyond the case at hand. Indeed, in such cases, the Constitutional Court has assumed authority to prescribe remedies that apply not only to the parties that had lodged an application, but to 'all persons placed in the same situation'.[232] This meant that, in some *tutelas*, the Court was able to issue rulings that introduced blanket, open-ended policies, designed to remedy massive systemic failures in public order. Such highly politicized jurisprudence was not unprecedented, and similar examples can be found in the USA in the 1960s.[233] However, this pattern of reasoning assumed great significance in the context of Colombian society, and the Court began to issue declarations that, in some circumstances, it was confronted with an 'unconstitutional state of affairs', which required remedies robust enough to reinstate comprehensive constitutional order. Early examples of declarations of an unconstitutional state of affairs often referred to systemically localized problems, such as social security provisions or prison regulation.[234] Eventually, such rulings were made in a number of critical situations, for example in large-scale environmental crises.[235] However, the primary rulings of this kind were made in situations in which large numbers of the population had been forcibly displaced as a result of guerrilla and paramilitary violence, usually in remote rural areas. In such circumstances, many population groups were exposed to depredation and

[232] T-025/04.

[233] See the precedent for this in *Holt* v. *Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970).

[234] See T-153/98. For the first declaration that an entire 'state of affairs', in this instance a complex of problems relating to educational administration, was 'openly unconstitutional' see SU-559/97.

[235] See T-622/16. In this case, pollution of the Atrato basin, near Quibco, caused by illegal mining operations, was seen as the cause of an unconstitutional state of affairs, leading to a violation *inter alia* of the right to life, of rights to a clean environment, rights to food security and rights of indigenous communities.

deprived of core rights, so that, in affected regions, normal legal/constitutional provisions had restricted effect.

In a series of rulings concerning internal displacement beginning in 1997, the Constitutional Court defined the conditions of displaced populations as characterized by the 'repeated and constant infringement of fundamental rights, affecting many people, whose solution necessitates the intervention of various entities to address problems of a structural character'. In such circumstances, the Court decided that it had authority to declare a state of *structural unconstitutionality*: that is, to claim that certain 'structural factors', not solely attributable to one entity or to one public authority, had led to a 'massive abuse' of human rights, resulting, quite generally, in 'an unconstitutional state of affairs'.[236] In such instances, the Court ruled that it was required to provide remedies affecting a number of bodies, not all of which were directly or causally implicated in the instant *tutela*.[237] On this basis, the Court was able to generalize quasi-legislative remedies across society, often claiming authority to do so through international human rights law. In addition, the Court decided that it had the power to monitor governmental implementation of remedies prescribed by the judiciary in situations of this kind. In such cases, therefore, the Constitutional Court sanctioned and encouraged processes of *structural litigation*, in which court cases were expected to produce remedies of broad structural importance, resolving problems of a general societal nature, and creating binding obligations for different government branches. In such cases, the Court declared that judges were obliged to display a 'special dynamism' in the type of decisions which they took.[238] Moreover, judges in lower regional courts identified such cases as containing instructions for their rulings in related or similar cases, such that principles set out by the Constitutional Court were replicated throughout the entire judicial system.[239]

The main ruling of this kind is T-025/2004, one of the most important decisions in the global history of modern public law. In this case, a *tutela* case filed on public-interest grounds, the Constitutional Court established a landmark ruling concerning the violation of the basic rights of large numbers of displaced persons caused by civil violence. In the reasoning

[236] T-025/04.
[237] T-153/98.
[238] A-385/10.
[239] For example, T-025/04 is cited in important land restitution cases in regional land courts. See Court for Restitution of Land (Quibdo), Interlocutory Appeal 0035 (24 April 2017); Interlocutory Appeal 006 (30 January 2013).

of the Court, this mass-displacement was taken to indicate the existence of an unconstitutional state of affairs in Colombian society. In response to this, the Court assumed competence to prescribe to responsible authorities a number of policy measures required to remove the unconstitutional state of affairs. Tellingly, the Court saw this power as founded in the principle of 'harmonious collaboration between the distinct branches of power', each of which had the obligation to 'ensure the fulfilment of the duty of effective protection of the rights of all residents in the national territory'.[240] Owing to the large proportion of the population affected, the ruling was accorded *inter comunis* effect, so that it was binding on all persons suffering human rights violations caused by displacement, and applicable to large numbers of people across society. In subsequent related rulings in fact, the Constitutional Court devised the concept of the 'passive subject' in cases of large-scale human rights violations, implying that parties affected by, and requiring remedies in, such cases did not need to be involved in court proceedings, and in fact did not need to have knowledge of them. The Court used this concept to categorize the personality of affected parties as broadly as possible, ensuring that the social extension of rulings with structural significance was maximized and judicial directives relating to egregious human rights violations could acquire the greatest possible resonance across society.[241]

In T-025/04, effectively, the Colombian Constitutional Court argued that, in light of mass displacement, the Colombian state had experienced a wholesale systemic failure, manifest in its inability to secure stability within its borders, and it assumed for itself direct responsibility for overcoming this condition.[242] The Court utilized human rights norms to make this argument, claiming that the deprivation of large swathes of the population of basic rights had proved that the state was not in a position to fulfil its duties as a state. In this respect, the Court used human rights law as an instrument to measure existing state capacity, suggesting that generalized non-fulfilment of human rights obligations was evidence of a broad political-institutional crisis. The Court actually formulated this strategy in consciously 'Weberian terms', arguing that protection of human rights was a means for the state to show its legitimacy by 'monopolizing the exercise of force' in society.[243] Accordingly, the Court concluded that the rising

[240] T-025/04.

[241] A-385/10.

[242] Quite correctly, one observer describes the political response to mass displacement as a 'breathtaking failure' (Landau 2012: 223).

[243] SU-1150/00.

crisis of the state could only be seen as resolved if society as a whole entered a condition in which each person was adequately protected as a rights holder, and where violation of human rights was no longer endemic. As a guarantor of human rights, thus, the Court claimed a particular competence to 'dictate the orders' that appeared 'necessary to secure the effective enjoyment of the human rights of the displaced population'.[244] In particular, the Court declared that the 'seriousness and complexity' of the circumstances brought before it, the 'frequency of the violation of rights', and the number of 'public authorities compromised', meant that judges were required to arrive at rulings that were sufficiently robust and conclusive to re-establish the structural/institutional efficacy of the political system, and to reinstate the population in their rights.[245] As a result, judges assumed authority to issue remedial declarations with full legislative force, giving immediate effect to constitutional law and international human rights law, and filling gaps in the regulatory orders imposed by the government.[246]

In T-025/04, the Colombian Constitutional Court devised a very distinctive line of jurisprudential argument, and it imposed a very distinctive set of obligations for implicated public agencies. First, the Court ordered that relevant authorities should take all necessary steps to improve the circumstances of persons affected by structural problems in society, and, additionally, they should implement programmes to rectify the *weaknesses in institutional capacity* that had led to the crisis.[247] Further, the Court stated that the ruling should form a wide framework for subsequent legislation and policy making. In fact, the verdict issued in T-025/04 was essentially defined as a higher directive, under which the Court reserved authority to introduce further judicial rulings, orders and injunctions on a rolling basis. Most importantly, after the ruling in T-025/2004, the Court issued a large number of subsequent declarations concerning matters incidentally related to the original case (*autos*), in which the Court evaluated the implementation of its directives, often making additional recommendations for their fulfilment. In some *autos*, the Court made provisions for organizing oral hearings between the government and affected parties and stakeholders, and it even insisted that national and international organizations should be co-opted to resolve structural problems.[248] In some *autos*,

[244] A-385/10.
[245] Ibid.
[246] Ibid.
[247] T-025/04.
[248] T-602/03.

the Court went as far as to recommend alterations to the national fiscal system, arguing that existing revenues were insufficient for the government to regain structural dominance in society and to put an end to the unconstitutional situation. Tellingly, the Court indicated that Congress had been ineffective in its budgetary and fiscal policies, and it implied that fiscal incompetence on the part of the Congress, leading to a basic debility of state structure in society, was a primary cause of human rights violations. Moreover, the Court requested the government to draw up 'indicators' to gauge satisfactory protection of the rights violated through the unconstitutional state of affairs,[249] and the government eventually established standards of compliance, based on international legal norms, by which the Court assessed implementation of its directives.[250] Although the Court's rulings clearly entailed harsh criticism of governmental failings, therefore, the Court also attempted to secure a workable collaboration with Congress. In however strained fashion, it established a basis of consensus between itself and other branches of government. Notably, these rulings and orders resulted in the passing of the *Victims' Law* of 2011 (Law 1448/2011), which placed some of the Court's ordinances on statutory foundations.

In these respects, the measures taken by the Colombian Constitutional Court were clearly focused on the construction of a national governance system, which was seen as a task that Congress itself had not accomplished, or Congress had not wished to accomplish.[251]

For example, one key point of emphasis in the *autos* issued by the Court subsequent to T-025/04 was that they were intended to establish greater coordination between national and regional entities, in addressing which the court aimed to solidify the national governance structure at different levels across society. As a result, human rights norms were implemented as instruments to extend the societal reach of the government. In fact, they were intended to impose a broad order of national citizenship on society, in which inclusion in the legal and political system was more robustly guaranteed. In one highly indicative declaration, the Court stated that the provision of remedies and the protection of human rights for displaced persons were being undermined by the weakness of local government bodies in regions affected by displacement and, above all, by

[249] A-266/06.

[250] A-109/07.

[251] See lengthy discussion of these processes in Rodríguez Garavito and Rodríguez Franco (2010: 51, 90, 276).

the 'inadequate co-ordination between the Nation and local government bodies'.[252] Accordingly, the Court announced that heightened cooperation between national government and regional or municipal authorities was required, and it prescribed measures to tighten lines of accountability between central government and the regions. One key claim in this *auto* was that the national government could not use the weakness of local bodies as an 'excuse or pretext' for its own failings in resolving human rights violations, and it was obliged to strengthen regional organs of administration in order to implement the rulings of the Court.[253] Human rights norms thus became, literally, a platform for national democratic institution building,[254] and human rights were used to form core elements in a material constitution, placing linked obligations on all public agencies, both central and local, and binding together different tiers of governance system.[255]

A further key point of focus in these *autos* was that the Court developed a differential theory regarding the implementation of its rulings. Over a longer sequence of declarations, the Court stated that human rights protection should be intensified for social groups whose vulnerability was disproportionately increased by violence and displacement; in particular, for women and indigenous persons (and for indigenous women most especially).[256] In so doing, the Court assumed heightened authority for monitoring government policies in cases in which groups marked by distinctive vulnerability were implicated, and it ordered a heightened degree of structural control – that is, in effect, affirmative action – in such circumstances, often most visible in remote regions.[257] Ultimately, the Court decided that the state had an obligation to use 'affirmative means' to ensure the 'real and effective equality' of persons affected by displacement.[258] In these respects, differential protection of the rights of marginal groups became a central part of a strategy of systemic consolidation and

[252] A-385/10.
[253] Ibid.
[254] These policies had limited effect in rural areas, but were successful in larger cities.
[255] See T-602/63; Auto 007/2009.
[256] See A-092/08 in which the Court ordered implementation of special policies to protect displaced women, especially indigenous women.
[257] The Court generally adopted a theory of differential protection. It declared, indicatively, that the 'right to urgent preferential treatment' is a core device for protecting persons in a state of 'defencelessness caused by internal forced displacement' (T-268/03). In the follow-up cases to T-025/04, it identified a number of groups as requiring differential protection. These included (A-004/09) indigenous communities and (A-092/08) women.
[258] T-267/11.

national integration. The Court strategically used human rights law to incorporate vulnerable social constituencies in the domain of state power, and to elevate the power of the state above 'other centres of military power' that existed in Colombian society.[259]

One outcome of these processes was that the Colombian government itself began to accept the principles of liability defined by the Constitutional Court and the IACtHR, and it increasingly acknowledged its responsibility under international law for crimes committed by persons acting in the extended peripheries of the formal governance system. In accepting these rulings, in fact, the government admitted deficiencies both in its constitutional structure and in its societal centrality, and it endeavoured to augment its responsibility across different parts of Colombian society. Notably, the government accepted responsibility for the actions of private persons perpetrating military violence, and it acknowledged that it had a duty to obviate the private assumption of coercive power.[260] To this degree, the government accepted that it had an obligation to improve standards of legal enforcement and legal remedy across different parts of domestic society, thus internalizing international obligations as a basis for its own legal functions.[261] Very significant in this regard is that many of the most important human rights rulings were handed down under the presidency of Uribe, whose commitment to constitutional rule was questionable, and whose vision of state consolidation was emphatically repressive. The fact that its rulings were accepted shows that the Court had acquired an unusual degree of political traction. Finally, it was noted, not lastly by the IACtHR, that standards of accountability increased sharply in Colombia, and that domestic provision for personal security was in some cases sufficient to obviate complaints to the IACtHR.[262]

[259] SU-1150/00.

[260] This recognition is reflected in a number of acts of the Colombian government, including acknowledgement of international responsibility, compliance with remedies, creation of permanent education programmes on human rights and international humanitarian law, and administration of criminal trials in response to the reparations ordered by the IACtHR.

[261] The creation of the 'Comisión Nacional de Reparación y Reconciliación' in Law 975/2005 (Ley de Justicia y Paz) and the institution of a domestic programme of integral reparation for victims of the internal armed conflict in Law 1448/2011 (Ley de Victimas) attest to domestic acceptance of international obligations.

[262] In the recent cases, *Case of the Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis)* v. *Colombia*, Judgment of 20 November 2013 and Case of *Yarce et al.* v. *Colombia*, Judgment 22 November 2016, the IACtHR took into account the existence of domestic reparation mechanisms in Colombia and allowed such mechanisms to fulfil some reparation requirements. For recent discussions of this topic see Lessard (2017); Sandoval (2017).

The most important outcome of these processes was that in the longer wake of the creation of the Constitution in 1991 the basic capacity of the Colombian state increased in tangible ways. Eventually, the strategies of human rights enforcement deployed by the Constitutional Court gave rise to a process of intensified structural formation and increasing legal/political institutionalization. At one level, the growing robustness of state institutions was reflected in certain basic indicators, such as the linkage between national and regional government organs, and in increasing the fiscal capacity of government.[263] However, the increasing robustness of state institutions was also reflected in the fact that government bodies were able to reach more deeply into society, and to build frameworks in which, even in remote areas, individuals and organizations could interact with the national government. This became visible in the fact that, from the earlier 1990s onwards, use of human rights petitions (*tutelas*) against public agencies became geographically widespread, bringing actors across society into a more even relation to central institutions.[264] In this respect, human rights became an important *inter-group vocabulary* of inclusion, establishing hard connections between different social groups, different institutions and different regions. Litigation in *tutelas* began to appear as a distinctive pattern of citizenship practice, and members of society were able both to gain societal integration and even to shape legislative processes through litigation. Indeed, human rights formed a normative web across society that linked social agents, especially those marginalized by class or violence, to governmental institutions. One reason for the promotion of human rights, of course, was that in many regions radical insurgents had created their own governance systems, emphasizing social equality, and human rights law allowed public bodies to mobilize an alternative legitimating register for their functions. In this respect, human rights formed a binding legal/constitutional structure for all persons in society, leading to a deep-reaching constitutionalization of everyday life and a

[263] The tax-raising capacity of the state increased by circa 100 per cent between 1970 and 2016. However, it remains very low at about 15 per cent of GDP. See García Villegas et al. (2016: 13).

[264] The geographical spread of *tutela* cases is quite broad, and it seems broadly to reflect the nature of the violations appealed. For example, in 2014, the highest density of *tutelas* regarding human dignity was found in Antioquia (circa 23 per cent), which is also the case for *tutelas* concerning economic, social and cultural rights (circa 42 per cent). The largest number of due process *tutelas* was heard in Bogotá (35 per cent). The greatest overall percentage increases were recorded in more remote areas, Putumayo (14,887 per cent) and Amazonas (4,481 per cent) (Defensoría del pueblo 2015: 75–6).

deep societal penetration of national citizenship, attaching persons across society to the national government.

The web of human rights created by the Constitutional Court intensified not only the geographical and functional penetration of the Colombian legal order, but also its penetration into different social domains. As discussed, the Constitutional Court used international law to create robust rights-based legal norms in order to regulate – or effectively to constitutionalize – different sectors of social exchange, including, in particular, health care,[265] education[266] and the environment.[267] The sectoral constitutions established in this way were not constructed in complete independence of each other, and they were sustained by the transversal value of human dignity, which the Court identified as the meta-normative value in the Constitution. In each domain, however, the Court promoted distinct patterns of *sectoral citizenship*, sustained by overlying values, to sit alongside the uniform patterns of national citizenship which it promoted in addressing outcomes of civil violence and national fragmentation. In some cases, in fact, constitutional formation extended beyond human subjects, and different natural entities, animate and inanimate, were constructed as constitutional subjects.[268] Overall, the Court adopted a two-level approach to citizenship formation, aiming to consolidate citizenship at a national level, but also to embed citizenship practices in different social domains.

The structurally formative role of human rights in Colombia became especially visible in the fact that it provided normative authority for decisions concerning societal conflicts of the most extreme intensity. This has been discussed in relation to mass displacement. This has also been discussed in relation to questions of mass brutality. In these instances, the insistence of the Constitutional Court, linked to rulings of the IACtHR, that the Colombian government should accept legal responsibility for all interactions in Colombian society hardened the material obligations of government in some parts of society. However, this role of human rights also became manifest in questions regarding the peace process that eventually terminated the long-standing civil war. In this context, the Constitutional Court applied international law in cases concerning the

[265] The Court established a fundamental right to health in T-760/08.

[266] The Court established a right to education in T-775/08.

[267] The Court argued that the rights to a clean environment belonged to the class of 'rights of constitutional rank' in T-760/07. It also argued that, as part of the environmental constitution, animals had certain constitutional rights. See C-666/10.

[268] For a ruling on the constitutional personality of rivers see T-622/16.

participation of political groups in post-conflict electoral processes,[269] and in cases concerning reparation, and transitional justice.[270] In each respect, the Court applied international law, and especially rulings of the IACtHR, as a basic framework for political inclusion.[271] Ultimately, the consensus engendered by the interaction between domestic actors and international norm providers galvanized different interests and factions in Colombian society, and it created a platform for eventual comprehensive demilitarization. Crucially, even the fact that the peace agreements between parties in the civil war were rejected by popular plebiscite in 2016 did not cause a crisis of the state. In fact, the Constitutional Court approved procedures for holding the plebiscite and for subsequent revision of the original peace agreements,[272] so that the process of peace building did not have to be abandoned.

In total, in the process of democratic consolidation that took place in Colombia after 1991, deep interactions between judicial bodies, situated in a differentiated normative domain between the national and the international sphere, established basic foundations – both normative and institutional – for national democracy. In this regard, it needs to be stated very clearly that the constitution was not initially successful in its transformative goals, and it did not immediately lead to a reinforcement of democratic structure. Excessively optimistic evaluation of the achievements of the 1991 Constitution and the Constitutional Court needs to be avoided. In fact, in the first decade after the constitution took effect, social violence reached unprecedented levels.[273] During this time, moreover, consolidation of private governance regimes became more entrenched (see Aguilera Peña 2014: 379). By other indicators, further, Colombia continued to fall short of the characteristics of a fully nationalized political order. Notably, electoral participation remained very low and regionally variable, and mobilization of the electorate often relied on patronage.[274] Over a longer period of time, however, the legal institutions established by the

[269] C-577/14.

[270] See the construction of a right to truth and reparation in C-715/12.

[271] See the Court's citation of the verdict of the IACtHR that there exists a 'strict relation between political participation, the rights that guarantee it, and the construction of a democratic society' (C-577/14).

[272] See C-379/16; C-699/16.

[273] One account argues that the 'greatest geographical expansion of the conflict' occurred in 2002 (González González 2014: 440).

[274] Electoral participation in Colombia is far lower than in Chile, Uruguay, Brazil and Argentina (see Flórez 2011: 173). Key popular votes, such as the elections to the Constituent Assembly in 1990 and the peace plebiscite in 2016, had very low turnout. One important

1991 Constitution assumed great importance in the gradual penetration of a democratic governance system into society, and in the resultant pacification of social antagonisms. In some respects, interactions between legal institutions compensated for the weakness of political institutions, and they played a key role in promoting a basic democratic order for national society.

First, most simply, interactions between legal institutions helped to create a generally enforceable body of constitutional norms, which the national government in Colombia, historically, had not successfully accomplished. Second, these interactions established a basic normative structure that was imposed by public bodies across previously unregulated domains in society. In addition, third, these interactions created a condition of inclusion for many social groups, differentiated in accordance with vulnerability. In each respect, the basic construction of the democratic citizen, as a holder of political, material and ethnic rights, was produced from within the legal system, and it was consolidated, to a large degree, through international human rights law. The model of the citizen around which national society eventually converged was stripped away from the factually existing citizens in the objective structure of society, and it in fact signalled a negation of the existing order of nationhood as a primary form of inclusion.[275] It is of great symbolic importance in Colombia that human rights norms were most emphatically applied to create uniform thresholds of citizenship amongst displaced persons – that is, amongst persons, often originating from historically marginalized areas, who had been deprived of all effective citizenship rights, and forced to inhabit the peripheries of legal citizenship. Tellingly, in one of its earlier cases concerning displacement, the Constitutional Court defined displacement as *absence of citizenship* – in which the affected person 'suffers a dramatic process of impoverishment, loss of liberties, damage to social rights, and deprivation of political participation'.[276] The role of the Constitutional Court in this respect appears as a symbolic response to the most exceptionalist problems of order, nationality and sovereignty in Colombian history, creating and giving effect to principles of citizenship, and so extending the societal reach of the political system, in otherwise normatively evacuated, alegal locations. In fact, in different situations, the Court was particularly attentive

account links the low levels of electoral participation to political apathy caused by clientelism (Leal Buitrago and Ladrón de Guevara 1990: 300–2).

[275] On the rejection of classical ideas of nationhood in this context and on the importance of the internationalization of human rights protection see Uribe de Hincapié (1998b: 36).

[276] T-602/03.

to questions of legal exceptionalism, and it insisted that, even under emergency conditions, basic norms of international human rights law had to be guaranteed.[277]

After 1991, the construction of the Colombian citizen was primarily promoted by legal actors, partly on the basis of international human rights law. This occurred in a societal constellation in which, historically, the formation of a unified idea of the citizen, in relation to which public acts could be robustly legitimated, had proved impossible. The national citizen was only formed through the global legal system, and it emerged as a figure that stood directly at the intersection between national and international law. Ultimately, this transnational construct of the citizen reached deep into the recesses of national society, and it acquired emblematic expression in the figure of the domestic refugee, translated by global law into a subject of national legal inclusion.

Colombia appears as the most extreme example of the impact of the growing differentiation of the legal system on democratic institution building. As an extreme example, however, it throws paradigmatic light on a general phenomenon. In Colombia, judicial institutions, positioned at different points in the global legal system, interacted at a high level of autonomy, to create a more robust body of constitutional norms to determine the use of public authority in national society, and even to create foundations for a national legal/political system *per se*. Of course, it would be illusory to claim that this process has created a uniform material structure in society. As explained, one of the two primary objectives of the Constitution – to create a peace settlement – was not realized (if it was realized at all) for over 25 years. In consequence, the essential institutional conditions for democratic consolidation were not immediately established.[278] During this time, however, the legal system itself acted, in some respects, as a surrogate for political democratization. Indeed, engagement of citizens with international human rights replaced, or at least rivalled, engagement with national-political institutions as the primary element of political citizenship, so that international law sometimes reached deep into the most violent and exceptionalist zones in Colombian life. This reflects the deep irony that modern Colombia is based on a constitution that emphatically subscribes to an ethic of participatory citizenship. Such emphasis, of

[277] See lengthy discussion of the state of exception in C-802/02. Here, it is striking that the Court insisted on continued enforcement of the block of constitutionality in political emergencies and it quoted extensively from the ACHR and the ICCPR.

[278] See the typology of regional de-institutionalization in Colombia in García Villegas et al. (2016: 95–100).

course, has not been without effect. In some respects, however, use of law and engagement with courts have been the most socially formative mode of citizenship practice.

4.2.5 Global Human Rights and National Democracy 5: Russia

The relative autonomy of the legal system also underlies political and constitutional developments in some societies that have not assumed a fully democratic form. In recent Russian history, for example, the consequences of inter-judicial interaction, especially between national and international bodies, are comparable with those experienced in other settings. Indeed, articulations between legal institutions in Russian society and international legal bodies have pervasively shaped the accountability principles that surround the political system. As a result, the approximation towards democratic citizenship, which exists in some parts of the Russian legal/political system, is primarily generated through inner-legal processes.

Naturally, this claim may, for a number of reasons, appear implausible. First, clearly, the quality of democracy in Russia under Vladimir Putin is widely criticized. It is easily observable that the Russian political system deviates from standard models of democracy, which have the primary feature that the exercise of governmental power depends on the protected institutionalization of opposition parties, which can compete with governing parties for occupancy of office on broadly equal terms.[279] In Russia, the institutionalization of opportunities for opposition to executive or presidential policy is not non-existent, as opposition is articulated through smaller parties in the Duma, and in regional institutions. However, structures facilitating organized opposition are relatively weak; the leading political party is in many respects an adjunct of the state, and it is improbable that it could be replaced by regular democratic rotation of governmental office (Roberts 2012: 98). As a result, the accountability of the government to political groups outside the executive apparatus (broadly defined) is reduced, the openings for the effective exercise of popular citizenship rights are curtailed, and access to the political process is controlled. Moreover, the Russian government is commonly con-

[279] See Reuter (2010: 295). See extreme critique of Putin's regime in Hassner (2008); Chandler (2014: 743); Petrone (2011: 168); Gill (2015). Amongst grounds for the classification of Putin's government as straightforwardly authoritarian can be included amendments (2004) to the Law on Political Parties (2001), making restrictive provisions for the formation of political parties. The source of legislation quoted in this chapter, unless otherwise noted, is www.pravo.ru and www.consultant.ru.

demned in international judicial fora, and acts of government are often found in breach of international human rights conventions. For example, the ECtHR has very recently found violations of the ECHR in the Russian government's policies concerning adoption of Russian children by nationals of the USA,[280] in the treatment of HIV-positive aliens[281] and in differential policies regarding male and female military personnel.[282] Further, it is often alleged, although not always in adequately corroborated fashion, that the Russian judiciary is susceptible to external political influence (see Ledeneva 2008: 330; Hendley 2009: 242).

On these counts, the Russian political system cannot easily be aligned to a simple model of democratic formation through differentiation of the legal system. In some respects, nonetheless, political realities in contemporary Russia can be placed on the same spectrum as other patterns of democratic formation through autonomous legal agency. Indeed, given the semi-authoritarian nature of the Russian polity, the legal system has distinct salience as a channel for articulating and enshrining social liberties, and it plays a primary role in upholding and expanding citizenship rights. Albeit in rather unintended manner, the legal system has evolved as an important source of counter-power within the polity as a whole, so that, to some degree, patterns of agency transmitted through the legal system countervail the authoritarian emphases of the political system. As a result, the Russian political system can be observed as possessing a *sui generis* constitutional order, on which certain processes within the legal system have left a very distinctive structural mark, and in which judicial institutions consistently shape the parameters of government. In fact, the legal system has created distinct opportunities for the exercise of citizenship practices and for collective norm production, which are less strongly established within the political branches of the state. The weak institutionalization of opposition parties is partly balanced by practices located in the legal system, and counterweights to governmental power are partly generated within the law. On these grounds, Russia can be seen as a striking example of a polity in which classical democratic citizenship practices have only obtained limited expression, but the law partly compensates for this weakness. Indeed, in certain respects, leading actors in the government

[280] *A.H. and Others* v. *Russia* (Applications No. 6033/13, 8927/13, 10549/13 et al., Judgment of 17 January 2017).

[281] *Novruk and Others* v. *Russia* (Applications No. 31039/11, 48511/11, 76810/12 et al., Judgment of 15 March 2016).

[282] *Konstantin Markin* v. *Russia* (Application No. 30078/06, Judgment of 22 March 2012).

consciously utilize the law as a medium that compensates for weaknesses of political institutionalization.

The importance of legal interactions in contemporary Russian politics is closely connected to embedded patterns of institutional formation in Russian history. In fact, the Russian political system is defined in central respects by a deep reliance on the law, and legal institutions have played a vital, albeit unusual, role in the recent development of the Russian polity. This has a long historical tradition, and, since the nineteenth century, Russian leaders have often reached for the law as a means for solving structural problems in the state.[283] The most important immediate reason for this, however, is that, in the 1990s, the Russian political system experienced a process of catastrophic institutional collapse, caused by a variety of factors. In this setting, various strategies of legal reform were promoted to overcome the crisis, so that policies for improving the rule of law acquired core significance as instruments of state construction. Indeed, judicial institutions acquired a structurally formative role within the state, and the legal system assumed an unusual constitutional position because of this.

First, the Russian state approached collapse in the 1990s because, in the wake of the reforms to the Soviet system of political economy introduced by Gorbachev, powerful economic actors stripped the government apparatus of its assets, and they transformed much of the institutional order of the old regime into private spoils.[284] Importantly, prior to Gorbachev, the political apparatus of the Soviet Union was already based in a pattern of indirect rule, in which regional party secretaries acted as dispensers of patrimonial privileges, entailing at times egregious levels of corruption and private arrogation of public goods.[285] As a consequence, government institutions were already marked by deep privatization, especially in remote territories of the Soviet Union, and articulations between citizens and the state were defined by informal interests, motivations and transactions, and they lacked uniform reserves of legitimacy. By the mid-1980s,

[283] For earlier examples see Rudden (1994: 56); Wortman (2010: 9).

[284] See discussion in Grzymala-Busse and Luong (2002: 545); Shlapentokh (1996: 394, 396); Tompson (2002); Taylor (2011: 25); Gel'man (2004: 1024); Easter (1996: 602, 606); Garcelon (2005: 221).

[285] See discussion of this system of indirect rule in Central Asia in Mirsky (1997: 3). The Brezhnev era was synonymous with local corruption and monopolization of regional government by 'complex networks of friends, clients, and relatives erected by local party bosses' (Suny 1993: 119). Importantly for the argument set out here, Brezhnev established a loosely regionalized corporatist model of government, in which great trust was placed in local elite cadres, effectively re-institutionalizing semi-autonomous ethnicities (see Shcherbak 2015: 874).

Gorbachev increasingly defined promotion of the rule of law as a priority policy objective, and he saw this as a means to reduce the reliance of government agents on corruption and local (often ethnic) power monopolies (White 1990: 37; Kahn 2002: 87): reform of the legal system, or even *legal revolution*, was perceived as a way to establish public foundations for government and to intensify state capacity (Kahn 2002: 87). Gorbachev's reforms, however, did not achieve this goal. On the contrary, they triggered intense economic crisis and institutional fragmentation, in which existing tendencies towards corruption and resource grabbing were greatly exacerbated, resulting in still more corrosive colonization and debilitation of the governmental order. In consequence of this, state control of society in the Soviet Union and then, later, in the Russian Federation was greatly undermined, and collective confidence in institutions was deeply unsettled. Importantly, social agents commonly showed reluctance to use public institutions for provision of justice, often preferring to approach private actors, including gangs and oligarchs, for redress and remedy in their grievances (Gel'man 2015: 57). Legal institutions, which were already weak in the Soviet Union, were dramatically eroded through its collapse. Putin acknowledged this very clearly when he introduced plans for judicial reform in 2001. He claimed that lack of trust in the state had led to the proliferation of 'shadow justice', which meant that citizens were inclined to seek remedies for legal problems by private means, thus diluting the power of the central government.[286] In fact, he expressly declared that a state not consistently governed by law is a *weak state* (2000), and his own policies were deeply shaped by this observation.

Second, the Russian political system approached collapse in the 1990s because of the fact that Gorbachev's reforms released a surge of separatism in the constituent Republics and in other autonomous entities of the Soviet Union, and, after 1991, in the Russian Federation. This separatism was initially greatly encouraged by Yeltsin, as Chairman of the Russian parliament. In fact, by 1990, Yeltsin strongly encouraged different territorial subjects to assume sovereign powers of government. Subsequently, as President of the Russian Federation, he continued this policy by contracting out government functions to regional subjects, often through bilateral treaties negotiated on an extraconstitutional basis (see Shlapentokh, Levita and Loiberg

[286] Annual Address of the President of the Russian Federation to the Federal Assembly, delivered on 3 April 2001. As background to Putin's policies, see the account of shadow justice in Baranov (2002). By 2012, Putin claimed that great success had been achieved in ending shadow justice. This view was expressed in Putin's speech (2012) at the VIII National Congress of Judges, 18 December 2012.

1997: 101; Kahn 2002: 168, 187; Robertson 2011: 109).[287] As a result, the Russian political system was deprived of its basic institutional capacity to legislate and uniformly to enforce law across all parts of national society, and the limited cohesion that it possessed was derived from precarious inter-elite arrangements (Kahn 2002: 234). In turn, this exacerbated the broader problem of endemic privatization in the Russian political system, as sitting elites in different regions often exploited their growing autonomy to monopolize public resources, and to distribute public goods as patrimonial commodities in order to secure their hold on political authority. In many regional units of the Russian Federation, sitting governments became effectively private, semi-sovereign dynasties, whose authority was based on strong patron–client links (Sharlet 2001: 199; Cappelli 2008: 547; Chenankova 2010: 44). From 1991 on, therefore, acute centrifugalism posed a potent threat to governmental cohesion in the Russian Federation. Many regions then further intensified their powers, often in contravention of the formal text of the Russian Constitution, through the latter part of the 1990s (Konitzer and Wergren 2006: 503). Indicatively, some regions, such as the Bashkortostan and Ingushetia Republics, even tried to introduce their own judicial systems (Pavlikov 2004: 85).

For these separate reasons, by the late 1990s, the Russian political system had in many respects forfeited its basic quality as a centre of determinately public order, and the ability of Russian society to rely on a distinctively public domain was clearly curtailed. Owing to powerful tendencies towards centrifugalism and privatism within the political system, society as a whole lacked a basic inclusive normative substructure. Like Colombia, in fact, although Russia possessed a formally democratic system in the 1990s, this formal democracy had limited bearing on society as a whole. Actors within the political system were not able to assert a monopoly of power in society's different functional domains, and many key political institutions were hollowed out thorough the influence of private actors. This period witnessed large-scale societal disengagement from the political system. Indeed, it witnessed an endemic *deconstitutionalization* of both state and society.

[287] In 1990, Yeltsin famously instructed subjects of the Republic to 'take as much sovereignty as you can swallow'. His primary motivation in so doing was to build up support amongst the regional leaders (Kahn 2000: 76–7). Later, In the Federation Treaty 1992, Yeltsin claimed authority to appoint regional governors (Moraski 2006: 15, 17). By 1994, Yeltsin began signing power-sharing treaties with subjects of the Federation, as a result of which some assumed powers close to those of nation states (Goode 2011: 8).

Against this twofold background, following his assumption of the Russian presidency in 1999–2000, Putin embarked on a comprehensive process of systemic transformation, implementing a number of far-reaching reforms. This process was oriented towards consolidation of public authority, re-centralization of government functions and restriction of regional and ethnic autonomy. These reforms had various profound implications for the Russian political system, and for the distinctive model of democracy that eventually developed. Central to this wider reform process were packages of judicial reform, which were designed to encourage citizens to address social grievances in a formalized institutional domain, and to use regular courts as means of conflict resolution. Individual elements in these reform policies were intended to increase the quality of jurisprudence in the law courts, to standardize judicial procedure and to bring normative and regional consistency to the legal order, to improve judicial training, and to tighten the articulations between different levels of the court system.[288] These policies were flanked by more specific measures to increase openness of the courts, to raise the transparency of judicial functions, and to ensure that case law and judicial decisions were available for public scrutiny.[289] Also significant in this regard were measures to diminish judicial corruption, including laws to improve salaries and working conditions for judges, creating strong disincentives for professional malfeasance among judges.[290] In each of these respects, Putin's judicial reforms were designed to enhance protection of basic rights in

[288] These general objectives were proclaimed in government target programmes on the development of the Russian judicial system. See Decrees No. 805 of 20 January 2001 'On the Federal Target Program "Development of the Russian Judicial System in 2002–2006"'; No. 583 of 21 September 2006 'On the Federal Target Program "Development of the Russian Judicial System in 2007–2012"'; No.1406 of 27 December 2012 'On the Federal Target Program "Development of the Russian Judicial System in 2013–2020"'.

[289] See Federal Law No. 8-FZ of 9 February 2009 'On Ensuring Access to Information about the Functioning of State and Municipal Authorities'; Federal Law No. 262-FZ of 22 December 2009 'On Ensuring Access to Information about Activities of Courts in the Russian Federation'; Supreme Court Plenum Ruling No. 35 of 13 December 2012 'On the Openness and Transparency of Judicial Proceedings and Access to Information on the Activities of Courts'.

[290] See, for example, Decree of the President of the Russian Federation No. 784 of 8 June 2012 'On Increasing the Salaries of Judges in the Russian Federation'. Since 1 January 2013, a new grade-based remuneration system for judges has been introduced, tying salaries to different qualification classes and ensuring upward mobility of judges through the grades. See Federal Constitutional Law of 25 December 2012 No. 5-FKZ and Federal Law No. 269-FZ of 25 December 2012.

the legal system, and to ensure that rights could be more easily activated through litigation.[291]

On one hand, Putin promoted reform of the legal system as a means to eradicate private power from political institutions, and to stabilize a domain of clearly public authority in society, not monopolized by influential private bodies and players. As mentioned, one of Putin's greatest concerns at his accession to the presidency was the prevalence of *shadow justice*, sometimes described as *legal nihilism*, in the political system. He envisaged that increased access to formal law would consolidate the legal order of government, linking people across society directly to the state. On the other hand, Putin pursued reform of the legal system as a means to consolidate a more *uniform legal space* across the different territories in the Russian federation (Sharlet 2001: 203; Kahn, Trochev and Balayan 2009: 330).[292] In this regard, Putin's policies were premised on the assumption that the increased willingness of citizens to litigate would act as a socially integrative practice. In fact, given the weakness of nationally overarching political organizations, litigation was perceived as a social activity in which citizens across the Russian Federation could engage in direct fashion with the political system, and in which nationalized patterns of legal/political behaviour and interaction could be institutionalized. Notable in this regard was the fact that Putin's early legal reforms were not restricted to civil law, and they included measures to simplify litigation against government agencies, which culminated, first, in the passing of the Civil Procedure Code of 2002.

Overall, the judicial reforms initiated by Putin were intended to remedy a number of separate, yet related weaknesses in public order, and they were designed to connect citizens across society in more immediately integrated fashion to the organs of government. The promotion of legal reform was conceived as a means to ensure that the legal system could be clearly

[291] Universal principles and norms of international law are considered an integral part of the Russian legal system, while the priority of international treaty norms over domestic legislation is guaranteed by Article 15(4) of the Russian Constitution. International human rights conventions are directly applied by Russian courts. Such application is encouraged by the Supreme Court and Russian legislation in general. See Supreme Court Plenary Rulings No. 5 of 10 October 2003 'On Application by Courts of General Jurisdiction of Universally Recognised Principles and Norms of International Law and International Treaties of the Russian Federation'; No. 23 of 19 December 2003 'On Judicial Decision'; No. 21 of 27 June 2013 'On Application by Courts of General Jurisdiction of the ECHR'.

[292] Promotion of a 'unified legal space' is one of the priorities of the legal reforms of the 2000s. One of Putin's most important early orders was Decree No. 1486 of 10 August 2000: 'On Additional Measures to Ensure the Unity of the Legal Space in the Russian Federation'.

perceived and consolidated as a relatively autonomous system of interaction in society, in which publicly authorized actors and organizations could be factually and symbolically differentiated from more private sources of interest, prerogative and authority. In fact, these policies were designed to promote a *re-constitutionalization of society*, and especially to impose a stricter constitutional diction on the lines of interaction between citizens and state. Implementation of legal reform was thus clearly observed as a vital element in a broad strategy of state building.[293]

In addition, the legal reforms promoted by Putin were designed to imprint a particular unifying pattern of citizenship in the Russian Federation. Notably, like other countries considered here, the Russian political system had not, historically, been centred around simple or unified models of national citizenship. As a result, the political system was not supported by strong structures of political obligation and legitimation, and its inclusionary force was patchy and variable. Against this background, one intended function of Putin's legal initiatives was to address enduring problems in the institutionalization of national citizenship in Russia.

The complexity of citizenship in Russia was caused, historically, by the multinational character of the Russian Empire and then of the Soviet Union. First, in the Tsarist Empire, citizenship had a variable quality, as many citizens were incorporated in the Empire by military annexation, and they acquired citizenship as collective subjects (see Hessen 1909: 203; Ponisova 2011). Moreover, the legal category of citizenship was only generalized after the reforms of 1864 and the military conscription law of 1874 (Sanborn 2003: 4).[294] The polity of the Soviet Union, then, contained many different autonomous or semi-sovereign subjects, and a very pluralistic construction of citizenship was accepted in order to hold the different subjects together. Self-evidently, the Soviet Union witnessed periods of aggressive Russification, especially in the 1930s.[295] Moreover, inhabitants of the Soviet Union were often either fully or partly excluded from the exercise of citizenship rights on ideological grounds, which sometimes coincided with ethnic categorizations. The late 1920s

[293] On the nexus between constitutional implementation and state-building in Russia see Sharlet (1999: 98).

[294] On these points see Lohr (2012: 34, 123).

[295] Initially, Lenin had opted for pragmatic recognition of separate nationalities as a means to hold the Soviet Union together (see Namaylo and Swoboda 1990: 58–9; Martin 2001: 23). Stalin supported recognition of indigenous nationalities in the 19290s, but changed policy in the 1930s (Martin 2001: 177). This culminated in violent ethnic cleansing (Martin 2001: 311; Gosewinkel 2016: 184). In 1937–8, leaders of all ethnic Republics except Azerbaijan and Georgia were purged (Smith 2013: 119).

in particular saw large-scale disfranchisement of class aliens and undesirables, including peripheral ethnic groups (Alexopoulos 2003: 25–8, 57). Nonetheless, both before and after Stalin, the Soviet government promoted affiliation to Soviet ideology, or Soviet citizenship, in a fashion that did not preclude recognition of separate national and cultural identities. On the contrary, the government usually actively encouraged national feeling and national autonomy within the constituent entities of the Soviet Union, providing incentives for indigenous elites to identify with the Communist Party, presumably to avoid the patterns of nationalist sabotage that had unstitched other European Empires (Roeder 1991: 207; Suny 1993: 102–3; Beissinger 2005: 28). As a result, the Soviet Union established an ethno-federal order, in which units within the Union were organized around ethnically homogeneous populations, and institutions of autonomous ethnic groups were highly structured and deeply legitimated (Brubaker 1996: 23; Gorenburg 2003: 77). One account even states that the Soviet Union was based in 'chronic ethnophilia' (Sleznine 1994: 415).

Consequently, in the Soviet Union, the Communist Party promoted a complex, multi-level institutionalization of citizenship. At the surface level of society, Soviet identity, linked to Communist ideology, was established as a primary, albeit rather thin, stratum of obligation, which all inhabitants of the Soviet Union were expected to recognize.[296] However, beneath this layer of obligation, it was perfectly possible for separate nationalisms to flourish, so that affiliation to the Soviet Union could coexist with subsidiary modes of national attachment (Grebenok 2011). Indeed, separate ethnic groups were organized in Republics, and their representatives were accorded priority treatment, beneath the formal affiliation to the Union, partly because this helped to strengthen loyalties to the central government (see Silver 1974: 46; Zaslavsky 1992: 98, 102; Brubaker 1994: 61).[297] In the Soviet system of ethno-federalism, above all, legal rights of citizenship were not congruently linked to nationhood. Constituent subjects of the Union possessed nationalities that did not fully overlap with citizenship: rights of citizenship, as a legal-political construct, were concentrated around the Soviet Union, whereas claims to nationality were embedded in the Republics and other autonomous entities.

[296] The idea of a 'Soviet people' was promoted in the 1960s, but with limited effect (see Raffass 2012: 66).

[297] One brilliant analysis of this process states that the Soviet government utilized the 'local indigenous population' as sources of support in the geographical expansion of the political system, so that particular ethnic groups appeared as 'valuable colonists' (Hirsch 2005: 91).

Importantly, moreover, the Soviet Union did not promote an overarching Soviet nationality as a basis for citizenship. This had particular significance for Russia itself, whose nationhood, arguably, was deprived of institutional distinction because of Russia's leading political position in the Soviet Union (Tolz 1998: 1004; Beissinger 2002: 397).[298] Of course, further, the Soviet Union also propagated, generally, a distinct pattern of social citizenship (Mann 1987: 349).

These different dimensions of citizenship became acutely problematic during the collapse of the Soviet Union. In fact, some authors suggest that the Soviet identity crisis had become, by 1980s, the Union's 'gravedigger', and one of the main triggers of its eventual implosion (Turaev 2016: 76). At this time, obviously, the idea of social citizenship, ideologically integral to the Soviet Union, was dissolved. Moreover, the trans-regionally unifying element of Soviet citizenship became extremely fragmented, and the quasi-states already created by the Soviet Union began to assume institutionalized national form.[299] In this process, inherited multi-level models of Soviet citizenship were rivalled by citizenship demands in emergent successor states, challenging the primacy of obligations towards the Soviet government, and replacing generalized patterns of Soviet citizenship with nationally and often ethnically reinforced constructions. After the formation of the Russian Federation under Yeltsin, then, models of citizenship continued to coalesce around separate nationality claims, and these demands contested the territorial boundaries of the Russian state, and the primacy of obligations towards the Russian government.[300] Through the transition from the Soviet Union to the Russian Federation, therefore, it became difficult to construct a clearly national government and a clearly

[298] One account describes Russian nationality as the 'great taboo' of the Soviet Union (Martin 2001: 39). Other authors connect this with the idea of the Soviet state as a higher value, to which the population of the Russian Republic owed particular obligation (Plotnikova 2016: 15). One interpreter explains that the Russian Republic in the Soviet Union was 'the least distinctly and cohesively constituted of all the federal units' and that little effort was made to construct a Russian ethnic consciousness separate from the Soviet Union (Roshwald 2001: 179). See also Riga (2012: 22).

[299] See the account of how the 'segment-states' created in the Soviet Union became independent after 1991 in Roeder (2007: 255).

[300] Notably, some constituent Republics of the Russian Federation tried to claim their own regional citizenship based on ethnic composition. See, for example, RCC Ruling on Admissibility No. 250-O of 6 December 2001 on regional citizenship of Bashkortostan Republic. In this ruling, the Court stated that only unified federal citizenship is possible in the territory of the Russian Federation. A similar decision was reached by the Court in its Ruling on Merits No. 2-P of 22 January 2002 in respect of the regional citizenship of Tatarstan Republic.

national foundation of citizenship to sustain the government. Indeed, the longer wake of the dissolution of the Soviet Union was marked by repeated and protracted problems in the creation and institutional consolidation of a genuinely national political system.[301] At the same time, given the multinational composition of the Soviet Empire, the actual legal parameters of Russian citizenship were difficult to define, and early citizenship laws (1991) in Russia were expansive in recognizing non-Russian citizens of the Soviet Union as citizens of Russia (Shevel 2012: 117–20). Both ideologically and systemically, in sum, the 1990s witnessed an acute fracturing of the order of balanced loyalties and dual obligations around which the Soviet Union had been built.

Putin's legal reforms formed, in part, a reaction to this condition of extreme legal and structural fragmentation. As mentioned, these reforms were designed to stimulate litigation, to generate a demand for law,[302] and to reinforce legal order across society.[303] At the same time, however, the reforms also promoted particular citizenship practices, which responded to the increasing conflicts between different models of citizenship in the Russian Federation. Most notably, the reforms implicitly fostered a concept of the citizen as litigant or a concept of *inner-legal citizenship*,[304] in which use of the law, expressed in acts of litigation, was imputed a

[301] On weak political nationalization in Russia see Golosov (2015: 401).

[302] All early judicial reform programmes were aimed at ensuring wider access to court throughout the country. See, for example, Government of the Russian Federation Decree No. 805 of 20 January 2001 'On the Federal Target Program "Development of the Russian Judicial System in 2002–2006"'; Government of the Russian Federation Decree No. 583 of 21 September 2006 'On the Federal Target Program "Development of the Russian Judicial System in 2007–2012"'; Government of the Russian Federation Decree No. 1406 of 27 December 2012 'On the Federal Target Program "Development of the Russian Judicial System in 2013–2020"'. Moreover, all new procedural codes were adopted during the early years of Putin's presidency: Civil Procedure Code No. 138-FZ of 14 November 2002; Arbitrazh Procedure Code No. 95-FZ of 24 July 2002; Code of Administrative Offenses No. 195-FZ of 30 December 2001.

[303] For example, some authors suggest that establishment of justices of the peace in all regions, including the Chechen Republic, has created more opportunities for litigation, helping to include the Republic in the unified legal space of the Russian Federation (Saydumov 2010).

[304] Litigation against actions and decisions violating human rights is a constitutional right in Russia (Articles 45–6). This right was further expanded in the Federal Law No. 4866-1 of 27 April 1993 'On Judicial Review of Actions and Decisions Violating Rights and Freedoms of Citizens'. This legislative act was actively used in litigation. Annually, approximately 300,000 claims of this type are considered by Russian courts (statistical data available from www.cdep.ru). This Federal Law was replaced in 2015 by the Administrative Litigation Code (Federal Law No. 21-FZ of 8 March 2015). The Code, in turn, contains special provisions in which judicial review is defined as a protected activity of any citizen.

quasi-constitutional force.[305] In these reforms, legal practices were expected to lock society and public institutions more closely together, and to articulate a general normative grammar to frame and to regulate exchanges between citizen and government. Central to this was the idea that heightened engagement with the law would promote patterns of affiliation that would connect citizens more directly to the national political system, so that regional identities and memberships could once again be configured within a construct of all-Russian citizenship. Indeed, it was imagined that litigation would assume a distinctive role in establishing a national normative domain, in which persons at different locations in society were to be integrated in a shared normative order, formed by acts of citizens. Of course, litigation was not the only means used to promote a nationalization of the political system. Putin's legal reforms were flanked by alternative mechanisms to offset national fragmentation. For example, the introduction of legal reforms coincided with the introduction of measures to impose controls on gubernatorial elites in the regions and Republics of the Federation (Reuter and Robertson 2012: 1027, 1031; Golosov 2015: 415; Saikkonen 2017: 58). These reforms were also flanked by the establishment of *United Russia* as a national political party. However, at a normative level, the legal reforms introduced by Putin formed an important element in a strategic process of national political system building and societal integration. Arguably, in fact, litigation was specifically promoted in Russia as an instrument of nationalization because political organizations that typically serve to heighten the national reach of the political system, such as democratically galvanized political parties, were not fully evolved. The law was thus used to obtain the systemic benefits of citizenship practices in a context in which classical expressions of political citizenship were curtailed. In each respect, litigation was actively encouraged as a technique for the re-constitutionalization of the sphere of interaction between citizens and government, and the legal element of citizenship assumed particular prominence as part of a wider process of national integration.

[305] The transformative effect of litigation is visible through important decisions of both Supreme Court and the RCC, establishing new legal practices without recourse to the traditional route of the legislative process. For example, proportionality has become 'a constitutional principle' of jurisprudence (RCC Ruling on Merits No. 2-P of 10 February 2017).

Putin's reforms to the Russian legal system meant that a very distinctive and important position was assigned, within the national legal system, to international law, including, most particularly, international human rights law. Importantly, international law had already played an important part in the early attempted consolidation of the Russian legal system before and after 1991. The impetus towards the constitutional recognition of international law was already evident in pre-transitional legal and constitutional reforms, beginning in the 1980s. For example, in 1990, the Declaration of State Sovereignty of the Russian Soviet Federative Socialist Republic (RSFSR) announced that the reformed state had a strong 'commitment to the universally recognized principles of international law'.[306] The same principle was reflected in the Declaration of Human Rights and Freedoms of the Soviet Union (1991),[307] which, as the final act of the USSR Congress of People's Deputies, proclaimed that international covenants should be used as the basis for domestic human rights. In turn, the RSFSR Declaration of the Rights of Man and Citizen made provision for the primacy of 'international law, particularly human rights norms' above RSFSR legislation.[308] Significantly, the year 1991 also saw the adoption of the *Concept of Judicial Reform*,[309] which identified international law as an important source of law in Russia, regardless of whether it had been formally incorporated in the domestic legal system. This *Concept* prescribed that the 'universally recognized principles' of international law (interpreted at that time as *jus cogens*) should have higher authority than domestic legislation.[310] Moreover, a new constitution for the Russian Federation was created in 1993, which, in Article 15(4), dictates that international law must be directly applied in court practice.[311] Even before the constitution

[306] Declaration of State Sovereignty of the Russian Soviet Federative Socialist Republic (RSFSR) of 12 June 1990.

[307] Declaration of Human Rights and Freedoms of the Union of Soviet Socialistic Republics (USSR) No. 2393-I of 5 September 1991.

[308] Declaration of the Rights of Man and Citizen of the Russian Soviet Federative Socialist Republic (RSFSR) adopted by the RSFSR Supreme Soviet's Resolution No. 1920-1 of 22 November 1991.

[309] Supreme Soviet of RSFSR Decision No. 1801-1 of 24 October 1991 'On the Concept of Judicial Reform in RSFSR'.

[310] Ibid.

[311] Supreme Court Plenary Rulings No. 5 of 10 October 2003 'On Application by Courts of General Jurisdiction of Universally Recognized Principles and Norms of International Law and International Treaties of the Russian Federation'; No. 21 of 27 June 2013 'On Application by Courts of General Jurisdiction of the Convention for Protection of Human

was enacted, Russia had obtained a Constitutional Court, one of whose responsibilities was to enforce international law in the domestic domain.[312]

Consequently, the first process of democratic formation in Russia was partly driven by an intersection between the national legal system and the international legal order. The initial results of this interaction remained limited, since, as discussed, the Russian legal/political system as a whole entered a period of intense crisis in the 1990s. After 1998, however, when Russia acceded to the ECHR, the domestic penetration of international law was intensified, and it began to impact more substantially on the domestic legal and political system. Tellingly, Putin's endeavour to establish the legal system as an autonomous, socially consolidated set of institutions was guided by the assumption that use of international law by judges would instil a corpus of free-standing principles within the law, raising the consistency of legal finding and elevating public confidence in the law.[313] In Putin's first presidency, international law was consciously assimilated in domestic law, and international norms were viewed as instruments for establishing legal uniformity across society, for consolidating the 'unity of legal space' across the Russian Federation,[314] and for constructing reliable constitutional principles to support new legislation, especially in legally unstable areas of social practice.[315] The general policies to encourage wider use of the law were thus inextricably linked to the assimilation of international law. In 2001–2, all of the major procedural codes were renewed in accordance with the new constitution, in conformity with Russia's international obligations.[316]

Of course, since the onset of Putin's reforms, the integrity of the legal system in Russia has often been questioned, and many observers, for different reasons, dispute whether the courts exercise their functions without

Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto'; No. 23 of 19 December 2003 'On Judicial Decision'.

[312] The requirement to apply international law is the same for all Russian courts, including the RCC, see Article 3 of the Federal Constitutional Law No. 1-FKZ 'On the Judicial System of the Russian Federation'.

[313] The importance of international law as a foundation for legal consistency was accentuated in Article 3 of the Federal Constitutional Law No. 1-FKZ of 31 December 1996 'On the Judicial System of the Russian Federation'.

[314] Presidential Decree No. 1486 of 10 August 2000: 'On Additional Measures to Ensure the Unity of the Legal Space in the Russian Federation'.

[315] For comment see Tiunov (2011).

[316] These Codes are: Criminal Procedure Code of the Russian Federation No. 174-FZ of 18 December 2001; Code of the Russian Federation on Administrative Offenses No. 195-FZ of 30 December 2001; Arbitration Procedure Code No. 95-FZ of 24 July 2002; Civil Procedure Code of the Russian Federation No. 138-FZ of 14 November 2002.

political or monetary influence (Thorson 2012: 152; Mazmanyan 2015: 214).[317] Some observers argue that the Russian legal system is defined by a formal dualism, in which legally ordered institutions co-exist with informal patterns of social control, so that primary modes of authority are really constructed through personal arrangements, and formal law has limited purchase in society.[318] Other observers assert that much of the legal reform in Russia is little more than shadow play, and that vital decisions of the executive and the President are removed from judicial scrutiny (Fish 2005: 45).

Clearly, such accusations cannot simply be dismissed. There is clear evidence to indicate that public-law litigation is very predominantly focused on the acts of lower-level agencies, and some elements of the political system are outside the scope of the law.[319] Moreover, judges have been subject to political pressure in some high-profile cases.[320] Most alarmingly, recent years have seen an increasing politicization of criminal law. For example, recently, charges for treason have been pressed against persons found sending text images of Russian military equipment, or making telephone contact with the Ukrainian embassy. Importantly, since the Russian–Georgian war of 2008, cases concerning terrorism, treason and espionage do not require trial by jury.[321] Furthermore, in 2012, federal treason laws were re-worded to prohibit not only publicization of state secrets, but also provision of 'any assistance to a foreign country, international organisation or a foreign organisation if their activity is aimed against Russia'.[322]

[317] This view is less strongly endorsed in research of the highest calibre (see Trochev 2008: 185).

[318] See the account of 'practices of para-constitutionalism' in Sakwa (2011: 47). Sakwa's claim, in simple terms, is that: 'Contemporary Russian politics can be characterized as a struggle between two systems: the formal constitutional order, what we call the normative state; and a second world of informal relations, factional conflict, and para-constitutional political practices, termed in this article the administrative regime' (2010: 185).

[319] Indeed, among more than a hundred cases of judicial review of presidential decrees considered by the RCC since 2000, none have resulted in declaring a decree unconstitutional, see www.ksrf.ru.

[320] For example, in July 2016, all the judges in a district court in Kazan, in the Tatarstan Republic, refused to consider criminal accusations regarding a large-scale fraud allegedly committed by a local very influential banker. The court of higher instance – Supreme Court of the Republic of Tatarstan – had to rule on changing the jurisdiction of the case to avoid possible pressure.

[321] Federal Law No. 321-FZ of 30 December 2008.

[322] Article 275 of the Criminal Code (as amended by Federal Law No. 190-FZ of 12 November 2012).

Despite these qualifications, Putin's promotion of legal and judicial consistency has substantially altered the linkage between citizen and state, and his reforms have had discernible impact on the structure of government. Indeed, these reforms have resulted in the creation of a legal/political order that is demonstrably marked, in some of its features, by a relatively high degree of judicial autonomy, and by a strong capacity of judicial bodies to produce independent norms to frame and regulate governmental power. Moreover, these reforms have generated important, relatively autonomous domains of political practice, and they have institutionalized elements of citizenship within the legal system.

These processes are visible in a variety of ways. To some degree, of course, the increased autonomy of the Russian legal system is simply the result of presidential legislation (either formally introduced or informally solicited by the President), designed to ensure openness and transparency in court proceedings, and to reduce judicial corruption.[323] Notably in this respect, policies of judicial reform have had significant impact on public perceptions of judicial functions, and public confidence in the courts, in different fields of litigation, has increased significantly.[324] At the same time, however, the growing autonomy of the legal system is reflected in certain more pervasive, less strategically ordained processes, which take place outside immediate political control. In some respects, the legal system has evolved a quite differentiated, spontaneous capacity for norm production, which impacts in rather contingent fashion on the constitutional order of government. In particular, increasing litigation caused by judicial reform now acts as an important source of constitutionally effective legal principles, analogous to the acts of citizens in more typical democratic polities. In some respects, as mentioned legal processes often play an important role in substituting the nation-building functions of full political citizenship, and they help to institutionalize patterns of national membership

[323] See above p.379.

[324] The increase of trust has been documented by academics, politicians and judges. Opinion polls also show a growing satisfaction with the work of the judiciary among those respondents who have experienced personal interactions with courts. For example, a 2008 survey by the All-Russia Centre for Public Opinion Research (WCIOM) reported that of those respondents who had themselves participated in the legal process 56 per cent were satisfied with the result and more than half positively evaluated the professionalism of judges and believed that an average person could expect a just resolution of their problems (WCIOM.ru 2008). Both the Chairman of the Constitutional Court and former president of the Higher Arbitration Court agree that growing litigation is a sign of an improving legal culture of the Russian people and of 'increasing trust, especially in the period of crises' (see Zorkin 2006, 2011; Yakovlev 2010).

in the absence of a strong solidified national party apparatus.[325] Both normatively and systemically, therefore, legal functions partly compensate for weak institutionalization of citizenship practices in the political system.

First, for example, the relative autonomy of the legal system in Russia is evident in the impact of international law on the legal and political system as a whole. As mentioned, use of international law was originally promoted during the earlier stages of the post-Soviet transition, primarily as a means for improving judicial consistency. However, at different levels of the legal/political system, international law has acquired a relatively independent authority, and it has created a foundation for distinct patterns of norm construction. International law is now widely used, both by judges and by advocates, to buttress jurisprudential argument, especially in public-law cases, and it plays a significant role in defining the obligations of public bodies. This is especially the case with citations from the ECtHR.[326] Notably, the reception of international law is typically strong in relatively minor administrative law cases, in which local or regional authorities are held to account by internationally standardized norms.[327] To this degree, Putin's strategy in assimilating international law to increase the domestic penetration of the legal system as a whole was a success, as implementation of international law clearly serves to instil relatively uniform lines of accountability into Russian society.[328] At the same time, however, courts

[325] On the weakness of political parties at a national level see Hale (2006); Moraski (2006: 25); Goode (2011: 8). Importantly, Putin has tried to use the dominant party, *United Russia*, as an instrument of political nationalization, but with only limited success (see Easter 2008: 218).

[326] By 2015, the annual number of citations of the ECHR in regional courts exceeded 8,000. In the short period between 2012 and 2015, the number of rulings of regional courts referring to the ECHR increased from 3,800 to 8,000. Source of the data: www.consultant.ru.

[327] Successful judicial review cases are seen in different areas of practice. Examples are challenges to illegal refusals to issue construction permits (Appellate Decision of Rostov Oblast court No. 33a-17585/2016 of 17 October 2016); challenges to illegal interference with the work of a lawyer in prison (Appellate Decision of Sverdlovsk Oblast Court No. 33a-17636/2016 of 12 October 2016); challenges to illegal prevention of immigration for persons with family members in Russia (Appellate decision of Moscow Oblast Court No. 33a-21367/2016 of 26 September 2016); challenges to other decisions made by immigration officers on the basis of Article 8 ECHR (Appellate Decision of Saratov Oblast Court No. 33-2071/2017 of 23 March 2017).

[328] Notably, international law is often utilized in appeal cases to overturn lower-court judgements, thus helping to instil uniformity across the whole legal system. In 40 per cent of

have shown some willingness to use international law, and especially norms based on the ECHR, to prescribe remedies against higher-level public bodies, and even to declare government acts unconstitutional.

In addressing these issues, caution is required. As mentioned, courts are not always robust in their scrutiny of executive and presidential acts. In the very recent past, moreover, the domestic effect of international law has been weakened.[329] Despite this, the Russian courts have applied international law to oppose public policy in important functional spheres, and even to suggest remedial legislation in areas in which international human rights norms have been inadequately acknowledged.[330] Indeed, use of international law against public bodies has resulted in the adoption of important pieces of legislation. At different societal levels, governmental compliance with judicial prescriptions is high, and the government has even established a monitoring system for controlling implementation of judicial recommendations for new legislation.[331] In these respects, judicial institutions, partly locked into a transnational legal system, have acquired important constitutional, even quasi-legislative, functions.

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appellate rulings of regional courts referring to ECHR, the result of the appeal was positive for the applicant.

[329] See p.232 above.

[330] For example, a 2009 ruling of the Supreme Court Plenum and a 2012 Constitutional Court Ruling both used international law to expand the scope of responsibility for agents performing public functions. In these rulings, it was insisted that private organizations with a special public status could be subject to standard norms of public liability (see item 5 of the Supreme Court of the Russian Federation Plenary Ruling No. 2 of 10 February 2009 (void since 27 September 2016 when a new Plenary Ruling No. 36 clarified the application of similar provisions of the Administrative Litigation Code); and RCC Ruling on Merits No. 19-P of 18 July 2012). In 2013, this principle was solidified in a federal law, Federal Law No. 80-FZ of 7 May 2013 'On Amendments to Article 5.59 of the Code of Administrative Offences and Articles 1 and 2 of the Federal Law "On Regulations Concerning Consideration of Russian Citizens' Petitions"'.

[331] For example, since 2009, all rulings of the RCC requiring legislative changes are communicated to the State Duma. Compliance with such rulings is monitored and reported annually. Similarly, the Supreme Court communicates most important decisions requiring legislative attention through dedicated publications and through a special representative of the Duma in the Supreme Court (see State Duma Resolution No. 1050-6 of 26 October 2012 'On the Plenipotentiary Representative of the State Duma of the Federal Assembly of the Russian Federation in the Supreme Court of the Russian Federation'). Both the RCC and the Supreme Court have the right to introduce draft legislation to the Duma (Article 103(1) of the Constitution).

Second, the relative autonomy of the legal system in Russia is visible in the fact that general use of the law across society has increased, and litigation has become an increasingly institutionalized mode of conflict resolution. This is a general development, and it is manifest in all areas of litigation. However, increasing use of courts is particularly striking in litigation involving the filing of suits against public bodies, which was notably simplified in 2002. After the beginning of Putin's reforms, administrative litigation increased substantially. By way of example, judicial review of secondary legislation rose in the period 2002–7 from 4,000 to 6,000 cases per year, with a 76 per cent success rate. Judicial review of non-normative decisions of public bodies (illegal actions and inaction) rose in the period 2006–11 from 50,000 to 150,000 cases per year, with a 63 per cent success rate. Individual claims against all organizations with a legal personality, including state bodies, rose in the period 2008–15 from 1,300,000 to 2,100,000 cases, with an average 90 per cent success rate. Significantly, the number of straightforward anti-government cases, filed by individuals against state bodies, has declined in the period 2007–16 from over 500,000 to 220,000 cases per year, with an average 85 per cent success rate. This decline may be due to measures introduced by the government to cut the workload of the courts. Importantly, the government has introduced instruments to facilitate extra-judicial dispute resolution.[332] In 2015, it introduced a requirement for professional legal representation in administrative litigation, and it simplified procedures for judicial review of small individual administrative claims and civil claims.[333] It has also implemented procedures to filter out frivolous claims,[334] to incentivize

[332] Chapter 2.1 on the Pre-Judicial and Extra-Judicial process of challenging actions and decisions of public bodies providing state or municipal services was introduced into the Federal Law No. 210-FZ of 27 July 2010 'On the Organization of Provision of Federal and Municipal Services' by the Federal Law No. 383-FZ of 3 December 2012.

[333] For administrative claims see Article 227(1)(2) of the Arbitrazh Procedure Code, as amended by Federal Law No. 86-FZ of 25 June 2012. Since 2016, small civil claims are considered in a simplified procedure. Importantly, this procedure was introduced with reference to regional international law. In particular, the explanatory note to the law refers to the Council of Europe Committee of Ministers Recommendation No. R(81)7 'On Measures Facilitating Access to Justice', and, paradoxically, the Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure. See Federal Law No. 45-FZ of 2 March 2016 and Explanatory Note to the Draft Federal Law No. 725381-6.

[334] For example, the concept of the new Unified Civil Procedure Code approved by the State Duma in December 2014 proposes the introduction of compulsory representation by a professional lawyer in all civil claims.

private arbitration, conciliation and mediation,[335] and to promote the use of specialised tribunals.[336] Importantly, the introduction of compulsory pre-judicial conflict resolution for some categories of cases has been a priority state policy since 2006.[337] Overall, however, recent years have seen growing willingness amongst citizens of the Russian Federation to seek redress through the courts against public agencies. This is especially notable because increases in judicial caseload are substantial in potentially sensitive areas of the law, such as immigration and housing.[338] This increase in administrative litigation has been strongly encouraged by the government, and recent acts of legislation, in particular the Administrative Litigation Code of 2015, have facilitated administrative litigation.

Significant in this regard is the fact that increasing litigation in Russia is partly linked to the incorporation of international law, and especially human rights law, in Russian domestic law. In fact, generally, international law has been used to provide the underlying normative framework, in which measures to facilitate litigation have been introduced. Importantly, new procedural codes introduced by Putin instruct the courts to resolve disputes by referring to international treaties, alongside relevant domestic legislation.[339] Moreover, both the regular courts and the Supreme Court systematically take into account relevant practice of the ECtHR, including judgements concerning access to courts.[340] The Supreme Court also regularly refers to the ECHR in order to establish normative uniformity in Russian courts.[341] Pilot judgements of the ECtHR concerning access to courts are

[335] Federal Law No. 193-FZ of 27 July 2010 'On Alternative Dispute Resolution Procedure Involving a Mediator (Mediation Procedure)'.

[336] An example is the Intellectual Property Court, established as an independent type of arbitrazh court in 2011. See Federal Law No. 4-FKZ of 6 December 2011.

[337] See Federal Law No. 137-FZ of 27 July 2006 amending the Tax Code to include compulsory pre-judiciary administrative consideration of disputes related to tax offenses.

[338] For example, administrative cases regarding provision of free housing, housing benefits, and conditions of social housing increased from 2,558 in 2012 to 6,877 in 2015. Administrative deportation cases increased in the same period from 30,767 to 97,691.

[339] Article 11(1) of the Civil Procedure Code; Article 13(1) of the Arbitrazh Procedure Code; Article 15(1) of the Administrative Litigation Code.

[340] In 2007, the Supreme Court applied Article 6 ECHR to overturn decisions of lower courts as violating the principle of legal certainty in matters of substantive law. See Supreme Court Ruling No. 6-V07-28 of 2 November 2007. See for more detail on application of Article 6 (Burkov 2010).

[341] See Supreme Court Plenary Rulings No. 8 of 29 May 2014 'On the Practice of Application by Courts of Legislation on Military Duty and Military Service and the Status of Servicemen'; No. 41 of 19 December 2013 'On the Practice of Application by Courts of Legislation on Preventive Measures in the Form of Detention, House Arrest and Bail'.

implemented on a national scale.[342] Further, international obligations concerning access to courts have led to important procedural developments in the Russian judicial system. For example, legislation regarding the transparency of judicial proceedings has resulted from Russian cooperation with the Council of Europe.[343] Indicatively, the explanatory note accompanying the draft for the 2015 Administrative Litigation Code expressly mentioned that the Code was intended to establish principles of administrative judicial process reflecting the UDHR, the ICCPR and the ECHR, taking into account best practices of administrative proceedings in other countries.[344] Adoption of the Code was encouraged by the UN Special Rapporteur on the Independence of Judges following her visit to Russia in 2013, and she eventually described the Code 'as one of the means of strengthening mechanisms to effectively fight corruption and ensuring liability of state officials' (Special Rapporteur on the Independence of Judges and Lawyers 2014: 14).

In parallel to this increase in the use of law, recent years have seen a widening of options for litigation in Russian society. Since 2001, litigation with a public interest dimension has become more widespread.[345] Moreover, laws on standing before court have been relaxed, and procedures for representing general social interests have diversified. In Russia, rules concerning public interest litigation are generally restrictive, and they still reflect

[342] For example, following the pilot judgement *Burdov* v. *Russia* (No. 2) of 15 January 2009, new federal legislation was adopted to provide compensation for lengthy trials. The same guarantee was reproduced in the Administrative Litigation Code. See Federal Law No. 68-FZ of 30 April 2010 'On Compensation for Violation of the Right to Justice in Reasonable Time or the Right to Execution of the Judgment in Reasonable Time'.

[343] See Federal Law No. 262-FZ of 22 December 2009 'On Ensuring Access to Information about Activities of Courts in the Russian Federation'.

[344] Draft Administrative Litigation Code and Related Federal Laws are Submitted to the State Duma, 27 March 2013.

[345] The previously strict rules of standing for public interest cases are being relaxed, and new proxies have been designated that can bring cases to court that reflect a public interest. Such proxies include federal and regional ombudspersons, the state agency for protection of personal data, the federal bar association, associations of citizen's oversight, and even certain state corporations and foundations. See, respectively, Article 40(1) of the Administrative Litigation Code and the Federal Constitutional Law No. 1-FKZ of 26 February 1997 'On Ombudsman of the Russian Federation' as amended by the Federal Constitutional Law No. 1-FKZ of 8 March 2015; Article 23(1) of the Federal Law No. 152-FZ of 27 July 2006 'On Personal Data' as amended by the Federal Law No. 261-FZ of 25 July 2011; Article 35(2) of the Federal Law No. 63-FZ of 31 May 2002 'On Advocacy and the Legal Profession in the Russian Federation', as amended by the Federal Law No. 160-FZ of 2 February 2016; Federal Law No. 212-FZ of 21 July 2014 'On the Basics of Citizens' Control'; Article 8(6) of the Federal Law No. 473 of 29 December 2014 'On Territories of Advanced Socio-Economic Development' as amended by the Federal Law No. 213-FZ of 13 July 2015.

traces of Soviet-era political paternalism. Recent legislation, however, has widened legal opportunities for public interest litigation, and it allows a number of proxies to file suit. In 2014, most importantly, a new Federal Law 'On Citizens' Oversight' was adopted, which authorizes different associations, including NGOs, 'to submit claims to court in the interests of an unidentifiable number of persons against public bodies'.[346]

In these different respects, Putin's reforms to the judicial system have triggered an intensified use of law, or even, to some extent, a broad process of selective legal mobilization. The increased use of law in Russia has a rather distinctive significance, as it is primarily stimulated by systemic actors, and it is facilitated through strategic reform processes. The use of law to express spontaneous challenges to public institutions is less common, although not unknown.[347] However, increased use of the law in Russia has the outcome, as in other national settings, that it promotes collective engagement with the legal system, it solidifies and expands existing rights, and it hardens legal obligations placed on public bodies. As in other settings, moreover, litigation forms an important sluice through which international law enters the national legal system, creating more robust constitutional rights through this process.[348] In each respect, engagement with the legal system through litigation practices forms a functional equivalent to more classical citizenship practices.

The constitutional outcomes of litigation in Russia are visible in two separate dimensions.

In one dimension, the constitutional impact of litigation is evident in Russia in the fact that Russian courts have issued rulings that tighten the constraints on government bodies, intensifying the regulatory order in which such bodies function. This occurs, significantly, in controversial areas of government activity. For example, courts have taken action to challenge federal immigration policy, especially concerning deportation of aliens. In particular, the courts have done this by insisting that immigration policies must show regard for the family ties, the health condition and the risks to the life of persons subject to deportation by public officials.[349]

[346] Articles 10(1)(7), Federal Law No. 212-FZ of 21 July 2014 'On the Basics of Citizens' Control'.

[347] See below pp. 476–8.

[348] After introduction of the new Administrative Litigation Code in 2015, the percentage of rulings referring to the ECHR increased to just under 10 per cent. After adoption of the Administrative Litigation Code in 2015, an average of 8 per cent of cases challenging the legality of public decisions referred to the ECHR (with a 63 per cent success rate).

[349] See for example Supreme Court Decision No. 18-AD14-58 of 7 November 2014; Abinskiy District Court of Krasnodarsky Krai Decision No. 5-116/14 of 11 April 2014.

The Supreme Court summarized judicial practice in this regard in its 2013 guidelines, advising lower courts to take Article 8 ECHR into consideration in all cases concerning administrative deportation of foreign citizens.[350] Furthermore, the willingness of courts to expand constitutional law is exemplified by cases in which the RCC has intervened in questions regarding taxation policy, a domain traditionally reserved exclusively for governmental decision-makers. In the period 2007–14, the Court invalidated several provisions of the federal Tax Code,[351] which meant that important aspects of taxation policy were amended. In cases of legal uncertainty, moreover, courts have applied international law, even in cases where it places additional restrictions on public agencies. For example, in February 2017 a regional court in Voronezh applied the constitution and international law to declare legal a protest against the war in Syria and against lack of direct elections in the appointment of the city's mayor. In this case, the Court referred to Article 11 ECHR and the ECtHR jurisprudence.[352] Alongside this, cases of strategic litigation have also generated constitutionally significant outcomes. In one such case, the Court invalidated a norm of the Russian Prison Code prohibiting long visits by relatives of some detainees, and it made reference to Article 8 ECHR in so doing.[353] Following this ruling, the Ministry of Justice prepared a draft federal law to address the suspended norm (Kulikov 2016). Strategic litigation thus also shapes sensitive areas of public policy, and its outcomes are partly determined by international law. In such respects, strategic litigation in Russia is close to the model of contentious norm formation documented in other polities (Burkov 2010: 172–222).

In a different dimension, widening legal engagement appears to diminish extreme variations between regional and all-Russian citizenship, and it transplants nationally consolidated norms across all society. Notably, increasing litigation constructs integrative patterns of citizenship by virtue

On deportation of HIV-infected migrants see RCC Ruling on Merits No. 4-P of 12 March 2015; RCC Ruling on Admissibility No. 155-O of 12 May 2006.

350 Supreme Court Plenum Ruling No. 5 of 24 March 2005 'On Some Issues Arising from Application of the Code on Administrative Offenses by Courts'. (amended on 19 December 2013): Para. 23.1.

351 Tax Code of the Russian Federation: Part One, No. 146-FZ of 31 July 1998; Part Two, No. 117-FZ of 5 August 2000.

352 Tsentralny District Court of Voronezh City, Decision on Administrative Misconduct No.5. Judgement 8 February 2017.

353 RCC Ruling on Merits No. 24-P of 15 November 2016. The ruling invalidated Articles 125 and 127 of the Penitentiary Code of the Russian Federation No. 1-FZ of 8 January 1997.

of the fact that it helps to draw together all members of Russian society in the same system of norm construction, establishing the legal dimension of citizenship as a nationally encompassing form. At one level, the simple fact that Russian citizens are increasingly willing to use the law implies that the formal legal order has pierced deeply into society, inserting itself both into lateral relations between private citizens and into vertical relations between citizens and government. Still more importantly, however, willingness to litigate is becoming widespread across all parts of the Russian Federation, even in regions where use of formal legal instruments is not strongly institutionalized. Even in regions with strong traditions of informal legal culture and equally strong anti-Russian traditions, the use of formal legal methods of dispute resolution is spreading. For example, in the Chechen Republic unofficial petitions to the president of the Republic still remain the primary mode of dispute resolution. However, reportedly, the number of Chechen residents using the federal judicial system in the Republic has increased,[354] and other means of informal dispute resolution are losing importance. This trend has become particularly pronounced since 2003, when full-time judicial bodies were formed in the Republic (Bogomolov 2003).

In both these respects, litigation now assumes some functions usually attached to more classical expressions of citizenship. It acquires a key role in societal norm production, in the enforcement and expansion of constitutional laws, and in the normative nationalization of political system. As a result, some core aspects of political citizenship practice appear to have been transferred to litigation procedures, such that, increasingly, litigation can be seen as a functional equivalent to political citizenship.

Third, the growing autonomy of the Russian legal system is manifest in the fact that, from 2000 onward, the judiciary became a more evidently self-regulating entity. Initially, as mentioned, the growth of judicial autonomy was a primary focus of government policy, and it reflected Putin's measures to reduce judicial colonization by private actors. In parallel to this, however, the autonomy of the judiciary has been strengthened through internal policies, and senior figures in the judiciary have regularly introduced measures to heighten consistency and uniformity in judicial procedure. The use of international law to support judicial rulings, initially linked to government policy, is now strongly promoted by judges themselves, and

[354] The number of administrative cases considered by courts of the Chechen Republic has increased from 107 in 2012 to 201 in the first half of 2017.

application of international law is widely supported through authoritative case law and plenary rulings of the superior courts.[355] Moreover, the courts have begun, without legislative instruction, to adopt new modes of judicial argumentation, such as precedential reasoning and proportionality reasoning, which augment the autonomous authority of the judiciary, and allow the courts to impose intensified constraints on the actions of public bodies. The use of proportionality in particular reflects a deep interaction between domestic law and international law, and the growing importance of proportionality means that norms to regulate acts of government are extracted from an implied set of transnational norms.[356]

In consequence, the form of the political system in contemporary Russia is very closely linked to the growing autonomy of the judiciary, which is itself connected to the deepening engagement between national and international legal norms. Of course, the commitment of the Russian presidential executive to judicial autonomy is not unrestricted. As mentioned, there are high-profile instances, and even acts of legislation, in which the government has tried to weaken the line of obligation between domestic courts and supranational courts.[357] Generally, however, the Russian legal system is defined by a surprising homology between national and international legal structures, and by an unusually deep commitment to the assimilation of international law by national courts. As a result, actions within the legal system constitute a primary source of norms to check

[355] For example, the Supreme Court in Plenum Ruling No. 21 of 27 June 2013 'On Application by Courts of General Jurisdiction of the ECHR' reiterated the binding nature of ECtHR judgements against Russia. Most importantly, the Supreme Court ordered the lower courts to use the principle of proportionality in cases of marked by conflicting human rights. The Supreme Court stated that in such cases the factual circumstances of the case should always be taken into account in order to counter a more traditional strictly positivist approach.

[356] In a recent case, the RCC referred to proportionality as a constitutional principle, although there is no mention of it in the text of the Russian Constitution. The RCC used the classical proportionality argument in a case on criminal liability for multiple violations of the rules of public assembly (See note 305 above). The court has also ordered the Duma to take necessary legislative measures to address this problem.

[357] As discussed above, the RCC Ruling on Merits No. 21-P of 14 July 2015 proclaimed 'the supremacy of the Constitution' over conflicting rulings of international court and tribunals. Subsequently, Federal Constitutional Law No. 7-FKZ of 14 December 2015 was adopted, which solidified the right of the RCC to rule on the constitutionality of a Strasbourg judgement. Later, this law was used to check the constitutionality of two ECtHR judgements, *Anchugov and Gladkov* v. *Russia* (Applications nos. 11157/04 and 15162/05, Judgment of 4 July 2013) in RCC Ruling on Merits No. 12-P of 19 April 2016 and OAO *Neftyanaya Kompaniya Yukos* v. *Russia* (Application no. 14902/04, Judgment of 15 December 2014) in RCC Ruling on Merits No. 1-P of 19 January 2017.

government acts, and legal engagement is an important surrogate form of citizenship practice, in a societal setting in which the scope for the traditional exercise of citizenship is diminished.

In light of this background, it is possible to conjecture, on one hand, that leading actors in the Russian state have promoted legal/judicial autonomy for obvious systemic benefits. It appears that the President and actors in the governmental executive have endeavoured to utilize judicial reform in order to obtain international recognition and credibility, showing partial compliance with international human rights norms. Moreover, it appears that judicial reform has been used to ensure the enhanced societal penetration of government functions, especially in the context of a political system marked historically by intolerably high levels of state privatization. As discussed, Putin and his allies in the courts have repeatedly declared a mission to combat *legal nihilism*, and to raise confidence in the law in order to intensify connections between the political system and society more widely. Owing to the historically debilitating privatism of the political system, persons positioned in the high executive extract distinctive systemic advantages from the rising autonomy of the legal system, linked to increasing use of international law. Notably, both the President and the government are increasingly able to presuppose normative uniformity across society, to diminish private authority and local corruption, to bind society more closely to central institutions, and generally to establish central institutions as reliable centres of societal control.

In addition to this, however, the growing autonomy of the judicial system is not simply steered by imperatives of leading actors in the political system. On the contrary, the growing autonomy of the legal system has been driven by a set of processes that are relatively free of political control, and the judiciary is able independently to generate norms that are not merely dictated by actors in the political branch of government. In fact, the promotion of judicial autonomy in Russia means that legal practices, especially acts of litigation, have assumed clear quasi-constitutional functions, and, quite independently, they even construct a distinctive pattern of constitutional democracy. At one level, the Russian courts have elaborated a legal framework for the exercise of public power which extends original guarantees and securities contained in the formal text of the 1993 Constitution. In some instances, moreover, the courts have solidified constitutional obligations in a fashion not foreseen by the constitutional text, and they have created stricter and expanded normative duties for public

bodies.[358] In addition, the day-to-day mobilization of citizens through increasing litigation acts as a source of norm production, which in some respects counterbalances the reduced degree of governmental accountability in the political domain. The growth of legal mobilization is evident both in regular administrative litigation, but also in the emergence of public interest litigation. In each respect, the legal system forms a channel of norm-constitutive engagement in settings in which other lines of democratic responsibility are not fully evolved.

As in other cases, Russia has evolved a system of democracy, or at least a system of qualified, managed democracy, in which the evolution of a relatively differentiated legal system has assumed an important, norm-constitutive role. As in other cases, the legal system distils a model of citizenship, which spills over into the political arena, creating a normative order that frames for the exercise of political power and intensifies the general penetration of the political system. This model of citizenship is not fully reproduced in the Russian context, as democracy is weakly institutionalized at the national political level. Nonetheless, legal engagement creates practices of citizenship which, to some degree, compensates for the weaknesses of formally institutionalized democratic organs, partly replacing classical democratic processes in generating norms of public accountability. Moreover, legal engagement has central importance in facilitating the social extension of the polity. As in other cases, this partial democratic model has been propelled by the fact that the national legal system and the international legal system have become structurally interwoven through reference to international human rights law. The legal system as a whole, fusing aspects of domestic and international law, has acquired a certain degree of constitutional autonomy because of this, and it independently produces core elements of the normative order in which government is positioned. Indeed, the legal system itself has projected the most sustained image of a citizen to support the political order and its integrational functions, and it has created openings for the exercise of democratic citizenship, which are relatively uniform across different parts of the Russian Federation. As in Colombia and the USA, in fact, legal developments in Russia reflect a process in which the rising autonomy of the global legal system has acted to secure not only certain elements of democracy, but, in some aspects, the basic national substructure of the governmental system itself. Even in a state with clear tendencies towards classical political authoritarianism, the reliance on global law as a source of citizenship functions remains strong.

[358] See p. 396 above.

4.2.6 Global Human Rights and National Democracy 6: Kenya

Analogies to the cases discussed above can be found in the recent process of democratic formation in Kenya. In the Kenyan setting, the historical evolution of democracy had been afflicted by problems not dissimilar to those observed in some of the societies discussed above. In this context, the global differentiation of the legal system again assumed distinctive importance, and interaction between national institutions and global norms played a central role in constructing national citizenship, and in forming basic premises for national democracy.

Most notably, first, the establishment of democratic institutions in Kenya was obstructed, historically, by the fact that the central organs of state possessed weak foundations, so that these institutions struggled to exercise generalized power across society. This problem itself was caused by the pluralistic form of Kenyan society, which obstructed the articulation of unified patterns of citizenship to sustain and legitimate governmental functions.

Problems of democratic formation in Kenya were linked, originally, to the fact that state institutions were partly rooted in the institutions created by British colonial authorities, who imposed a centralized coercive order on society, with little broad-based support. Importantly, under colonial rule, the universal rule of law was not established, and parallel legal systems were used for different sectors of the population and different categories of case (Ghai and McAuslan 1970: 130). Moreover, British rulers deliberately encouraged tribalism and chieftaincy, as they relied on chiefs and local notables to uphold the system of indirect rule, based on the devolution of administrative powers from centrally imposed colonial institutions to local and tribal governmental bodies, which they imposed on Kenyan society (Throup 1988: 144, 238; Bates 1989: 47–8; Joireman 2011: 36). The system of indirect rule meant, clearly, that governmental authorities did not possess immediate obligations towards actors in society, and that the direct relation between government and citizen required for national democracy could not be established. In this respect, colonial society closely mirrored pre-modern political structures in Europe, in which governmental force was mediated through local potentates.[359]

[359] See for analysis Tilly (2004: 165). Imperial spokespersons saw indirect rule, widely adopted in the later stages of European Imperialism in Africa, as a benign governance system, in which 'the tutelary power' granted statutory powers to local organizations, facilitating self-administration by 'a chief in council' or 'a council of elders' and offering recognition for customary law (Perham 1934: 690–1). As in pre-modern Europe, however, this system

The system of indirect rule also meant that the legal-political order could not be extended into a nationalized form, and that the legal structure of society remained parcellated and deeply pluralistic (see Kamoche 1981: 199). As a result, indirect rule instilled a factionalized, intensely divisive political system into the heart of Kenyan society.

More immediately, second, problems of democratic construction in Kenya were caused by the fragmented ethnic composition of Kenyan society, itself an outcome of colonial rule. Notably, the process of decolonization in Kenya in the 1950s and 1960s was not driven by a single national people, seeking to replace the British colonial administration with a simple nation of citizens. Under British rule, pervasive societal nationalization had traditionally been obstructed, and colonial authorities had originally opposed the formation of national political organizations able to integrate different social groups (Kamoche 1981: 233; Maxon 2011b: 30).[360] By the 1950s, the British colonists looked more sympathetically at moderate, orderly nationalist movements, which were perceived as providing a potentially useful basis for post-colonial reorganization and social management.[361] But the political mechanisms for nation construction were not elaborate. To be sure, Kenyan society had become partly nationalized in the Mau Mau uprising of the 1950s, during which colonial rule was severely unsettled (see Gordon 1986: 113–14).[362] In fact, the Mau Mau revolt spelled the beginning of the end of British occupation in Kenya. However, the Mau Mau revolt did not easily fit the simple nationalist template – it was largely driven by conflicts over land, resulting from a history of racist land administration, reflected in colonial expropriation and reallocation.[363] As well as expressing hostility towards the British

created a dualistic legal system, marked by variable obligations and patterns of affiliation. It prevented the rise of unified constructions of society and promoted the entrenchment of highly particularized ethnicities (see Mamdani 1999: 868). On the inevitable localization of society under indirect rule see Berman and Lonsdale (1992: 277).

[360] Such organizations were legalized in 1959 (see Bates 1989: 52).

[361] Sir Andrew Cohen, Governor of Uganda, argued that 'successful working with nationalists is the smoothest way of helping a country to self-government' (1959: 61).

[362] Debate persists as to whether Mau Mau was a nationalist movement, an anti-colonial uprising, or, in part, a civil war between factions of the Kikuyu. For the former view see Berman (1991: 200). For the latter view see Throup (1985: 426); Branch (2007: 300). For a mixed account see Gordon (1986: 114). One author claims that Mau Mau was a 'complex symbiotic interaction of Kenyan nationalism, Kikuyu cultural mobilization and internal strife within the Kikuyu community' (Young 1976: 128).

[363] For discussion of the importance of contest over land in the period of the Mau Mau uprising, see Sorensen (1967: 80); Leo (1984: 44); Bates (1987: 20); Kanogo (1987: 136); Berman and Lonsdale (1992: 245).

administration, Mau Mau created inter- and inner-group conflicts, and it left a long legacy of division between different ethnic population groups and between different factions in the same tribal communities.[364] The rise of political consciousness in the 1950s, therefore, was not necessarily identical with the rise of a national consciousness. Overall, a clearly national foundation to support government was not established in Kenya before independence.

This lack of national cohesion was reflected in the writing of the Kenyan Independence Constitution (1963). In this process, different ethnic groups promoted sharply divergent models of political organization for the new post-colonial state.[365] In particular, constitutional designs during the period of decolonization were split between distinct conceptions of citizenship and statehood, reflecting deep-rooted conflicts between groups committed to building a centralized unitary state and groups defending local interests and tribal affiliations. In this setting, non-dominant tribal groups tended to advocate a quasi-federal polity, in which separate ethnic interests would be protected at a local level.[366] This was reflected in the fact that some groups promoted the creation of a *majimbo* constitution, emphasizing the importance of tribal identities, and seeking to protect tribal autonomy through strong provincial governments (see Maxon 2011b: 18, 77, 105). In addition, of course, many European members of Kenyan society were deeply sceptical about Kenyan nationhood altogether, and they were reluctant to accept Kenyan citizenship (Rothchild 1973: 316, 371). In fact, up to 1960, the British administration had favoured a policy of *multiracialism* for the emergent Kenyan polity, in which different ethnic groups would share power. It was only as the constitution took shape that it became clear that it would be a fully Kenyan constitution (Maxon 2011a: 180, 255). Generally, the first constitution of Kenya evolved in unpropitious circumstances. It was not driven by any uniform construction of the polity. It was shaped by a background in which colonial forces had launched a violent crackdown on Kenyan nationalism, so that the first steps towards the construction of the post-colonial polity occurred in a state of emergency.

[364] For analysis of this, see Oucho (2002: 114). Bates also argues that the Mau Mau uprising was a broad conflict over land tenure, and not primarily a conflict between white and black people (1987: 26). On the importance of conflicts over land in this period see also Rosberg and Nottingham (1966: 136–7);

[365] One observer states that by 1962 the 'nationalist struggle was characterized by ethnic parochialism', in which each group sought to avoid Kikuyu dominance (Kanogo 1987: 173).

[366] During the 1960s, the Kikuyu were the dominant ethnic group, and Kenyatta was supported by Kikuyu elites and he actively promoted Kikuyu dominance.

It was also accompanied by controversy over policies addressing the ultra-sensitive and highly divisive issue of land apportionment.

Initially, the Kenyan constitution established a semi-federal political order, reflecting some *majimbo* ideas, in which minority ethnic constituencies preserved some autonomy, and favourable conditions were established for minority groups (Ndegwa 1997: 605; Maxon 2011b: 265). In this respect, the Constitution was conceived as a technical instrument for the peaceful transfer of governmental functions, providing sufficient benefits for each societal groups to avert intense inter-ethnic conflict.[367] Immediately after independence, however, the Kenyatta government abandoned the *majimbo* components of the constitution, and imposed a unitary state on society, in stark opposition to the model of decentralized government that had been endorsed by other stakeholders in the decolonization process (Gertzel 1970: 28; Rothchild 1973: 140; Lynch 2011: 66–8).[368]

In this shift towards political centralism, Kenyatta was guided by nationalist prerogatives. At one level, he promoted a number of strategic nation-building initiatives, with both political and economic emphases, oriented towards comprehensive Africanization of government, citizenship and economic resources.[369] Despite this, however, Kenyatta's governmental regime was a unitary state in name alone; it did not possess full integrational force amongst different social groups, and it did not effectively overarch or integrate different ethnicities. Politically, in fact, Kenyatta's policies directly obstructed the rise of national political citizenship, as, in the late 1960s, the democratic constitution was replaced and Kenya became a de facto one-party state. Moreover, his economic policies failed to impose a uniform political order across the ethnic fissures in society.[370] Beneath the facade of national unity, the state that emerged in Kenya in the 1960s was dominated by small, ethnically privileged elites.

[367] This claim is made in Munene (2002: 140). Notably, the writing of the constitution coincided with policies for the consolidation of land tenure, and it was followed by policies for reallocation of land. It was framed by great uncertainty over land tenure (Sorrensen 1967: 118).

[368] One account claims that the 'dismantling of regionalism', partly caused by inter-ethnic clashes, was the main policy concern in the immediate aftermath of independence (Okoth-Ogendo 1972: 18).

[369] On the promotion of African citizenship after independence, on terms initially designed to include non-African minorities, see Rothchild (1968: 421, 428).

[370] Notably, a uniform model of political affiliation was proclaimed through the policy of promoting African socialism, which, beginning in the mid-1960s, declared a self-sufficient, responsible semi-socialist economy as a framework for galvanizing national citizenship (Harbeson 1973: 172–6).

Successive governments sustained their hold on political authority not by appealing to persons in society as national citizens, but by building up coteries of support amongst distinct ethnic contingents, or by designing alliances between different population groups (see Withroup 1987: 48, 67; Ajulu 2002: 263; Murunga and Nasong'o 2006: 10). In this respect, Kenyan politicians simply established a model of government, based on privatistic social alliances and unrepresentative executive power, that partly replicated patterns of British domination under the colonial order.

Owing to the growing linkage between government and ethnicity in Kenya, successive governments from the 1960s onwards justified their hold on the instruments of political authority by claiming that the holding of democratic national elections would trigger uncontrollable ethnic rivalry and intensified conflict over land (see Ndegwa 1997: 610). Anxiety about the politicization of ethnic fissures in society was intermittently intense, and it prevented the promotion of national citizenship practices. As a result, social integration took place primarily through selective material allocation and distribution of offices as privileges, but these were not tied to the uniform distribution of rights or to unifying experiences of citizenship.[371] A core feature of post-colonial Kenyan government, in fact, was that patrimonial distribution of goods, often linked to particular ethnic privileges, formed a primary pillar of state authority. This also meant that national political institutionalization, entailing the expression of national patterns of will formation and the national exercise of sovereignty, was strategically impeded.

A further cause of problems of democratic formation in Kenya, third, was that different organs of state were not securely institutionalized, and the extent to which political organs could impose and legitimate control on actors in the executive was limited. Due to the prevalence of patrimonialism, different organs of the polity were not easily separated from sitting executives. In particular, judicial institutions had an ingrained tradition of patrimonialism, corruption and deference, and the reluctance of judges to hold government bodies to account was widely acknowledged (Ojwang and Otieno-Odek 1988: 45, 49; Nowrojee 2014: 37–9). By the late 1980s, judges had devised a number of innovative excuses for not applying the precise normative provisions of the constitution to restrict government

[371] Indicatively, Kenyatta's support was based on distribution of patronage to the Kikuyu. Later, President Moi 'dismantled Kikuyu privilege and replaced it with a Kalenjin cohort' (Ndegwa 1998a: 360; Lynch 2011: 108, 133).

actions, so that the constitution had clearly been relegated to dead-letter status.[372]

Overall, in post-independence Kenya, the legal and political conditions for the expression of national democratic citizenship and the recognition of laws as products of a national will were weakly consolidated. A clear and abiding legacy of colonial rule was that institutions were precariously structured, and their ability to claim representative attachment to national citizens and national society was limited, as offices of state were often perceived as the property of one ethnic group. Dual institutionalization of legal and political obligations, divided between nation and ethnicity, remained a primary hallmark of Kenyan society.[373] An enduring outcome of this was that members of Kenyan society conceived their position as citizens in parallel categories – in 'dual and competing citizenships' – in which local ethnic loyalties often prevailed, and loyalties towards national institutions were purchased by material patronage (Ndegwa 1997: 613).

Eventually, Kenya began a gradual passage to democracy and a gradual renewal of constitutionalism in the 1990s and the early 2000s. A first transition to multi-party democratic elections occurred, formally, in 1992, but, in the first instance, inter-ethnic bargaining meant that elections held at this time were not fully competitive. In fact, these elections were followed by a period of authoritarian repression, in which basic political liberties were again curtailed (Ndegwa 1998b: 188). After 2000, then, the momentum towards more effective institutional reorientation increased; in 2004, a new draft democratic constitution was written; in 2005, a constitutional referendum was held, in which a revised constitution was rejected; in 2010, a new constitution was finally approved by referendum. Notable in the background to this process was the fact that the public economy in Kenya had been deflated as a result of structural adjustment policies implemented by the International Monetary Fund, which meant that the resources of patronage at the disposal of the government were diminished (Berman 2010: 19; Mati 2013: 247). The traditional pattern of social integration through selective allocation of material entitlements was thus replaced, in part, by an attempt to promote integration through the distribution of broadened political rights and the solidification of constitutional

[372] In 1989, in *Maina Mbacha and 2 Others* v. *The Attorney General,* the High Court ruled 'inoperative' Section 84 of the Constitution, which provided for the judicial protection of fundamental rights (see discussion in Kuria and Vazquez 1991: 142; Ross 1992: 424). In fact, in the late 1960s the Court had ruled that the constitution should be interpreted in the same way as any regular statute. See *Republic* v. *El Mann* (1969) E.A 357.

[373] On this phenomenon in general see Mamdani (1996: 22, 26, 113, 189).

rule (see Ndegwa 1998a: 364; Onalo 2004: 193). The constitution approved in 2010 was designed both to establish democracy and to transform the foundation of the state from patrimonialism to citizenship.

During the long democratic transition in Kenya, the different draft constitutions, as well as the final ratified constitution of 2010, all placed great emphasis on the importance of mass-political engagement in the consolidation of democracy. All promoted a strongly participatory, transformative concept of the democratic citizen, designed to galvanize and express the will of the nation. This was expressed most especially in Articles 174(c) of the final version of the 2010 Constitution, which stressed the importance of local participation. However, this principle runs like a thread through the whole constitution. Clearly, this participatory impulse in Kenyan constitution writing was intended, for symbolic reasons, to create a constitution that was decisively separated from colonial influence. The constitution of 1963 had been written under the eyes of British officials, and it did not result from the decisive acts of the Kenyan population. Moreover, this aspect of the 2010 Constitution was intended to increase the sense of public identity with the state, encouraging citizens to step outside traditional, post-colonial perceptions of the state as an alien body, and to engage directly and formatively with the domain of public authority. Further, in its participatory dimensions, the Kenyan 2010 Constitution was designed to articulate the political system with actors at different points in society, to weaken the historical influence of sub-national groups in the political system, and to underpin the formation of a political system not immediately susceptible to colonization by one particular ethnic population group and its elite representatives. This clearly reflected a very pressing exigence, as the longer constitution-making process was punctuated by ethnic violence, stimulated by contests over different draft constitutions, and by attempts of different groups to monopolize the content of the constitution.[374] In each respect, the constitution was an endeavour to solidify a national population of citizens, and the emphasis that it placed on active participation was designed to incorporate different social groups into the state in a form, that of the national citizen, that was decisively detached from their personal or ethnic affiliation.

At the same time, all the draft constitutions written during the transitional interim in Kenya contained clauses that were intended to intensify the authority of the legal system, and all attempted to separate the legal

[374] See discussion in Bannon (2007: 1854); Berman, Cottrell and Ghai (2009: 495–6); Kramon and Posner (2011: 97).

system from private control. In each instance, the promotion of a political system based on even national citizenship was inextricably linked to the promotion of a differentiated, relatively autonomous legal order. Indeed, the legal system was accorded great importance in establishing national patterns of citizenship, and the legal system had particular responsibility for institutionalizing direct lines of articulation between citizen and state. This was ultimately reflected in the judicial provisions in the 2010 Constitution; the constitution established the right to institute proceedings in cases where a human right had been violated (Article 22(1)), it created a separate procedure for human rights appeals (Article 23(1)) and it encouraged public interest litigation (Article 22(2)(c)). In each respect, the constitution encouraged citizens to engage directly with the legal system, and to utilize the law as a medium of social agency. Moreover, the implementation of the constitution was flanked by subsidiary policies to safeguard judicial autonomy – notably, by frameworks for improving judicial quality, for elevating levels of judicial education and for reducing judicial corruption.[375]

The transition to democracy in Kenya remained affected by traditional factors that had impeded democratic formation. Notably, in the years after 2010, ethnic monopoly of office-holding remained rife, patrimonialism and related corruption remained embedded, and official disregard for constitutional norms remained a recurrent, although not invariable, phenomenon. Most importantly, the formal political organs of the Kenyan state have not been fully detached from ethnic factionalism, and in popular elections, which still risk generating inter-population violence, voting attachments are very strongly determined by group affiliation. This can be seen in the conduct of the 2017 elections, in which ethnic violence was commonplace, and sub-national affiliation was a strong determinant in voting practices. The extent to which the Constitution has created a nation of political citizens, therefore, is a matter of dispute. As discussed above, moreover, the relation between courts and executive since 2010 has often assumed an attritional and personalized character, marked by intermittent political pressure on legal appointments. This culminated, of course, in the initial decision of the Supreme Court in 2017 that the national election results were invalid, and that new elections had to be held.[376]

[375] Central to this was the implementation of the Judiciary Transformation Framework, initiated in 2012.

[376] *Raila Amolo Odinga & another* v. *Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR.

In the Kenyan setting, however, the formation of national citizenship, to the extent that it exists, has proved strikingly dependent on the societal penetration of global norms. Indeed, legal institutions have assumed particular importance because of their ability to project generalized patterns of integration, and to outline modes of political obligation that are not linked to ethnicity and particular membership. The legal system, articulated to the global normative order, forms a vital store of democratic norm formation and a vital focus of national inclusion.

To illustrate this, for instance, Willy Mutunga, appointed Chief Justice in 2011, assumed an important role in placing the judiciary at the centre of the reformed Republic in Kenya. In particular, he attempted to consolidate the Supreme Court as a fully national court, in which judges acted to protect the sovereignty of the people from regional or organic fragmentation, and to use judicial powers as a core element in the broader construction of a national popular will. To this end, he endeavoured to establish a categorically national body of constitutional jurisprudence, separate from English common law, through which he sought to project a robust construction of integrative national values. In an important opinion, Mutunga explained the practical realities of democratic self-rule in Kenya, asserting that courts are bound in 'indestructible fidelity to the value and principle of public participation'. To this degree, he viewed the courts as core organs of national citizenship, creating a medium for the direct expression of the popular will, separate from ethnic particularities. However, he also accorded to the courts a distinctive constructive role in this process, claiming that the courts needed to bring together a range of 'rich ingredients', including judicial analysis of scholarly works and use of 'comparative jurisprudence from other jurisdictions',[377] to stabilize democratic participation and collective/popular self-expression. In particular, he argued that a constructive judicial approach was required 'to deconstruct and demystify the participation of the people', translating the ideal of popular sovereignty into an implementable value.[378] Implicitly, this approach presupposed that popular participation had to be moderated through judicially constructed principles, and judicial institutions had a strong responsibility for ensuring that the popular will was expressed as a general set of national norms, distinct from the interests of large influential ethnic groups.

Significant in the process of constitutional redirection in Kenya was a debate about the role and authority of international law in the new Kenyan

[377] In the Matter of the National Land Commission [2015] eKLR at para 355.
[378] In the Matter of the National Land Commission [2015] eKLR at para 321.

democracy. Indicatively, leading judges in pre-transitional Kenya had interpreted the role of international law in strict conformity with common-law dualist principles, and it had been declared in leading cases that international conventions and instruments could not impact directly on domestic rulings (see Okuta 2009: 1068; Wabwile 2013: 171).[379] As mentioned, further, by the late 1980s, judges had abdicated responsibility for enforcing the basic rights provisions inscribed within domestic law. During the constitutional transition, however, the push for increased judicial autonomy was shaped, not coincidentally, by the increasing, albeit initially tentative, openness of the legal system to international norms. During the transition, a number of important rulings gave cautious protection to internationally defined rights within the national legal order,[380] and citation of principles derived from international law became part of the broad constitution-making situation. This was strongly reinforced in the 2010 Constitution, which acknowledged international norms as important sources of domestic law (Articles 2(5), 21(4)). After 2010, much debate ensued in Kenya about the relative standing of international law in the domestic legal system, and different rulings pulled in different directions in this regard.[381] In general, however, senior figures in the judiciary became increasingly resolute in arguing that the Kenyan legal system needed to be construed in monist categories, and that international law should be used as an immediate source of authority for legal rulings (Mutunga 2015b: 8).

Against this background, Kenya forms the most vivid example of society in which the national substructure of democracy has been strategically created on global legal premises. In Kenya, international law was used to abstract and construct a counter-factual idea of the national citizen, in a form indifferent to inner-societal attachments, and external legal sources were specifically configured to impose a system of uniform legal/political inclusion on society. The nation-building role of international law in Kenya then became visible in a number of different processes.

At a purely normative level, Kenyan judges have used international law in order to separate a legal form for the national citizen from traditional ethnic monopolies, and to generate equal rights and equally binding legal protection for all sub-communities within national society. In this respect, recent rulings in cases concerning the most contested and divisive issues

[379] The classic case is *Okunda* v. *Republic* [1970] EA 453.

[380] See for example In Re the Estate of Andrew Manunzya Musyoka (2005), eKLR. For discussion see Kabau and Ambani (2013: 40); Oduor (2014: 98).

[381] See for a summary Kabau and Ambani (2013).

have often contained extensive reference to international law, to underline the objective authority of the decision. For example, the courts have used international law to give recognition for rights of minority populations.[382] In establishing such rights, importantly, the courts have often simply expanded other rights, for example the right to water, the right to housing, or the broader right to a dignified life, in order to protect minority and marginalized population groups, using international law to define such rights.[383] In such processes, collective actors defined by ethnic affiliation have been able to pursue legal inclusion through reference to norms of citizenship based on international principles. As a result, courts have been able to guarantee access to national goods for ethnically constructed communities without premising such recognition on legal acknowledgement of group affiliation as a source of rights. In this way, ethnic groups have been able to acquire and exercise group rights in categories not linked expressly to ethnicity, and unlikely to induce destabilizing political conflict. Inclusive patterns of national citizenship have thus, to some degree, been constructed because international law is able to express a generalized abstract concept of the citizen, which can be articulated to establish multiple rights and obligations above the fissures in national society, without reference to historical realities and divisions. The fact that citizenship can be centred around a global model facilitates the construction of the basic form of national citizenship, and it makes it possible to overcome the classical division between national and ethnic citizenship, simplifying the factual inclusion of particular social groups within a single and socially overarching normative order.

At a more structural level, judicial actors in Kenya have insisted on the importance of international law because of its importance in the campaign against judicial corruption and ethnic monopoly of judicial functions, reflecting a concern that renewed judicial office trading would derail the process of democratic consolidation (see Mutunga 2015a). In this respect, judges have attempted to link Kenyan case law to international standards in order to ensure that case rulings are visibly underwritten by normative principles that are relatively immune to personal manipulation or ethnic bias. Use of international law is promoted as a policy to

[382] See extensive use of international covenants to recognize political rights of the Il Chamus people in *Lemeiguran and Others* v. *Attorney-General and Others* (2006) AHRLR 281 (KeHC 2006).

[383] See important use of international human rights law and other international instruments in protecting indigenous land rights in *Charles Lekuyen Nabori & 9 others* v. *Attorney General & 3 others* [2007] eKLR; *Joseph Letuya & 21 others* v. *Attorney General & 5 others* [2014] eKLR.

uphold the basic differentiation and the general autonomy of the legal system within Kenyan society, and to preserve clearly national principles to sustain legal authority. Indeed, although high levels of judicial corruption persisted in Kenya after 2010, international law has provided a solid basis for litigation against government bodies, and rulings in contentious political cases have been supported by reference to international norms.[384]

In Kenya, however, perhaps the most important impact of the internalization of international norms became visible in the fact that, following the implementation of the constitution, the volume of litigation increased significantly, including a steady rise in the filing of constitutional petitions.[385] Moreover, in this period, patterns of litigation underwent marked diversification. In recent years, actors from different social and regional positions in society have used the courts as instruments both for general conflict resolution and for proceedings against the government. Importantly, this has been reflected in the growing use of courts by socially disadvantaged groups; the post-transitional period has seen a wave of public-interest litigation over social-economic rights, often referring to international or comparative law.[386] Through this process, the courts have opened up new opportunities for mobilization and political subjectivization, again using international norms to imprint unified models of citizenship on society. At the same time, this internalization of international norms has been reflected in the use of the law as a medium for presenting claims by different ethnic population groups. Notable in post-2010 Kenyan legal history, in fact, is the growing tendency for members of minority populations to utilize the law, and for such groups to reach into the domain of international law to assert legal claims within national society. This should not be seen as a linear or incremental process. The Kenyan government has not shown itself consistently sympathetic to such claims, and it has been subject to international sanction for failure to recognize indigenous rights.[387]

[384] See *Mitu-Bell Welfare Society* v. *Attorney General & 2 others* [2013] eKLR.

[385] The number of constitutional petitions increased from 341 in 2011 to nearly 600 in 2012 (Mukaindo 2013).

[386] See relaxation of standing in *Priscilla Nyokabi Kanyua* v. *Attorney General & another* [2010] eKLR. This ruling used Indian case law.

[387] See the case against Kenya before the African Commission, *276/03 Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya*. See the resultant case heard by the African Court on Human and Peoples Rights, *African Commission on Human and Peoples' Rights* v. *Republic of Kenya*, Application 006/2012, Judgment of 26 May 2017.

Nonetheless, strategic litigation for minority groups has become partly institutionalized, both in law and in practice.[388]

In different respects, in consequence, the Kenyan constitution has created a legal/political order in which new patterns of inclusion, mobilization, participation and citizenship have been generated. As mentioned, this is a precarious condition; the web of national citizenship shaped by the constitution is very fragile, and it remains uncertain whether the legal construction of citizenship will cut deep enough into society to sustain a full democracy. However, the interpenetration of domestic law and international law is a core aspect of Kenyan democracy, and it creates an overarching focus for democratic integration which is unmistakeably separate from legally parcellated or traditionally dominant ethnic groups. In some instances, paradoxically, the fact that the state is founded on a unified construct of the citizen, established under global norms, means that members of the people can factually present themselves in pluralistic modes of citizenship to the legal/political system. In particular, the use of human rights derived from international law in domestic law means that recognition can be given for particular group claims in relatively abstract principles and in relatively neutralized procedural fashion, such that recognition of ethnic particularity does not necessitate a politicization of ethnic interests around the political system. The pluralistic form of society, thus, can be represented by democratic means specifically because the essential rights and principles of citizenship originate outside national society. For these reasons, further, the rights-based abstraction of the national legal system has begun to form an important parallel system of democratic agency and will formation, sitting alongside more classical political institutions and forms of interest representation. Indeed, the capacity of the legal system to reflect global models of citizenship remains a key counter-weight to the particularistic tendencies that affect the composition of the political branches.

4.3 Human Rights and the Transformation of Politics

In most settings, the general spread of national democracy has been driven by a process in which the legal system and legal constructions of political agency have assumed a position of relative autonomy in national societies. In this process, judicial bodies have acquired relatively independent capacities for producing law, for establishing constraints on the power of governments, and for underpinning complex, multi-focal forms of

[388] See further discussion below at p. 412.

democratic agency, citizenship and inclusion. Generally, national political systems became democratic, or at least acquired some democratic features, through their integration in a global system of norms, leading to the partially virtual inner-legal construction of citizenship. Moreover, political systems usually remain democratic to the extent that they preserve their basic contiguity with a global normative system. At the core of modern democracy is the fact that patterns of citizenship are created above the factual interactions in society, and political institutions refer for their legitimacy to norms that are not really embedded in society. The legitimational detachment of the political system from material agents in society is the most typical precondition for national citizenship and national democracy.

A number of political theorists have argued that democratic citizenship presupposes national identity, and that the practices of citizenship risk being devalued if located outside national contexts and national processes of legislation.[389] In reality, however, few national societies generated secure concepts of citizenship. In virtually all societies, national political institutions ensured that the rights of citizenship could not be equally claimed by all social groups. National legislatures almost invariably failed to create national citizenship. In fact, legislatures failed to create national citizenship for a range of different reasons – sometimes, because they entrenched class dominance; sometimes because they solidified ethnic hegemony; sometimes because they were enmeshed in private conventions in society; sometimes simply because they were unable to form normative articulations with all social groups. It was only as the central content of citizenship was designed within a global normative order that the exclusionary pathologies of citizenship became less pronounced.[390] Quite generally, the national citizen had to be incorporated in national legislation from an external, international source.

A number of sociologists have noted how the deepening interpenetration between national legal structures and global law, including globally defined human rights, has contributed to a solidification of democracy

[389] Some argue that citizenship is essentially linked to national territories or at least to distinct cultural identities (Walzer 1994; Canovan 1996: 44; Sandel 1996: 343–5; Miller 2000; Schuck 2000: 225). Others argue that democratic citizenship is already in principle, or at least in part, decoupled from national territory (see Soysal 1994: 165; Jacobson 1996: 106; Delanty 2000: 136; Sassen 2002b: 5; Höffe 2004: 171; Colliot-Thélène 2010b: 178). For critical reflections on the bounded construction of the citizen, see Benhabib (2000: 24); Stokes (2004: 128); Linklater (2007: 16); Isin (2012: 5).

[390] From a different angle, see the account of the correlation between the global diffusion of certain basic rights, the rising robustness of state institutions and the nationalization of citizenship practices in Meyer et al. (1977: 251).

and democratic citizenship in national societies.[391] Moreover, a number of sociologists have argued that the extension of inclusive rights to traditionally excluded social groups has resulted from the emergence of a 'world model' of political citizenship.[392] The analysis set out above affirms these insights. However, the analysis offered here also extends such hypotheses, claiming that national citizenship itself was only rarely fully consolidated before global norms began to define the grammar of national political inclusion. Indeed, such claims are widened here to incorporate the secondary claim that democratic citizenship has almost invariably depended on the formation of a world model of citizenship, constructed through the dense articulation between national and global legal domains. Even the basic formation of a generalized national political community, supposedly the constitutive political core of citizenship, has only been possible through the penetration of international law into domestic legal practices. Most societies did not succeed in establishing a distinctive political domain, separated from dominant private bonds in national society, without international normative support.

These processes possess particular significance for the sociology of law. In recent decades, the process of integration through the law, and through rights contained in the law, which classical sociologists located at the heart of modern democracies has, at least partially, become reality. Indeed, integration through the functions of a differentiated legal system became a core founding dimension of modern democratic systems. But this only occurred in societies as they were lifted above their national form, and the integrational functions of law were not realized on national foundations. Classical sociologists looked in vain for a higher set of norms, within national societies, to support law's functions. They also looked in vain for rational processes of will formation to support the law. Law's integrational force only became real as international human rights supplanted national systems of rights as the foundations of social integration, and as these rights were separated from national populations.[393] Only as international

[391] For such analysis see Boli, Ramirez and Meyer (1987: 167); Meyer, Ramirez and Soysal (1992); Meyer et al. (1997: 157–9); Ramirez, Soysal and Shanahan (1997).

[392] See for one use of this concept Ramirez, Soysal and Shanahan (1997: 743).

[393] It is extraordinary that the leading sociologists writing after 1945 who examined processes of legal integration in modern democratic society omitted to observe the importance of international law. For example, Parsons (1965), Luhmann (1965) and Habermas (1990 [1962]) all identified the construction of constitutional rights as vital for democratic inclusion, and all were working in nations whose formation as democracies was inseparable from the pervasive force of international law. Yet, none of them noticed this proces – or at least, in the case of Habermas, not until much later.

rights penetrated into patterns of interaction in national society did rights act as a means of comprehensive integration, able to mediate the intergroup conflicts which had historically impeded the realization of democratic citizenship.

In key respects, across different lines of democratic polity building, national democracies have been formed through complex patterns of *interlegality*. This term is usually reserved to describe volitional or activist processes of legal mobilization (Sousa Santos 2002: 437, 2006: 70; Sierra 2005: 310). However, this term also captures the essential foundation of modern democracy, as democracy widely evolves not through the strict exercise of political agency, but through overlapping trajectories in which legal institutions, at different global positions, construct overarching norms, which are then assimilated and configured in socio-political practice. This normally occurs because the national legal system uses global norms to separate citizenship practices from factual modes of agency and affiliation, and, on this basis, it creates general premises for inner-societal interaction between citizens themselves and between citizens and the political system. This assumes different form in different societies. But, typically, democracy has only taken shape as the construction of citizenship has been displaced from the national political system into the global legal system. As a result, the ongoing globalization of democracy over recent decades is inseparable from a process in which the primary norms of society, and the primary procedures of citizenship, are constructed not by political actions, but by actions and interactions performed *within the law*. The globalization of democracy is thus part of a wider process – namely, the globalization of the legal system. *The globalization of democracy is one consequence of a broader globalization of the legal system, in which the legal system has attained a high level of differentiation and influence in relation towards other systems through reference to human rights law.* Democracy was classically understood as a pattern of national political self-legislation, and it is not easy conceptually to separate democracy from national polities. As mentioned, there is much controversy about transnational citizenship, and the question is often posed whether the substance of citizenship can extend beyond national boundaries. However, democracy only became a globally widespread factual reality through a process that profoundly contradicted the traditional conception of democracy. The national citizen only evolved on a transnational basis, and democracy depended on constructions of political obligation, binding on both citizens and institutions, that were secured outside national societies, and outside the realities of national social structure. The deep democratic nexus between citizen and state,

which necessarily underpins political democracy, had to be interposed between state and citizen in a form extracted from the global domain. As discussed, interactions in the global legal system formed surrogates for more classical citizenship practices, and the basic inclusionary implications of citizenship could only be realized through the translation of citizenship into global functional equivalents. In the cases examined, the transposition of democratic norms into functional equivalents articulated the process in which the original norms of democracy approached reality.

Through these processes, both nationally and globally, the differentiation of the legal system has created a reality in which much that was once political is now simply law. The growing autonomy of the global legal system effectively means that, at different societal levels, the legal system has acquired primacy over the political system. At a global level, it is difficult to identify any phenomena close to an overarching political system; global political functions are more typically performed by judicial bodies. At a national level, similarly, political institutions are deeply reliant on, and enmeshed within, legal institutions. Overall, the globalization of democracy has occurred as part of a process in which society as a whole has been stripped of its distinctive political subjectivity, or its political subjectivity has been translated into functional equivalents. The idea that the institutional form of democratic society can be defined by categorically political decisions, reflecting political agency separate from the law, has disappeared. The politics of modern society as a whole is underpinned by an increasingly asymmetrical relation between politics and law, as result of which, at different points in society, law integrates the functions of politics: law, not politics, makes the law, and law institutionalizes the modes of social inclusion in which law is made.

In some respects, the depletion of politics has acted as the constitutive precondition for the emergence of democracy as a global political-institutional form. As mentioned above, the classical idea of democracy hinged on two conjoined principles: the principle of full legal inclusion (in a system of rights) and the principle of national political participation, attached to citizenship.[394] Classically, the first principle was seen as contingent on the second principle. However, these two principles proved internally conflictual, and democracies legitimated by participation failed to establish full legal inclusion. In fact, democracies legitimated by mass participation remained structurally exclusionary, and they failed to establish a pattern of citizenship able to penetrate deep into society. Democracy

[394] See pp. 37–8 above.

was only realized as legal inclusion replaced participatory politics as the mainstay of democracy. For this reason, the essential normative subject of democracy – the political citizen – needs to be abandoned, or at least re-imagined in a system of equivalence. As discussed, the fact that the differentiation of the global legal order has implanted an autonomous legal structure in national societies, even generating the basic subjective forms of citizenship practice, is often a primary reason why democracy is able to take hold. Often, paradoxically, the political desubjectivization of society through the global differentiation of the legal system forms the main ground for the generalization of democracy. Through the global differentiation of the legal system, the law began to absorb within itself both principles of democracy – integration and participation – and it was only as a result of law's double democratic function, promoting rights-based inclusion and participation as inner-legal functions, that democracy could be broadly institutionalized. Democracy began to evolve as a global political form as it was separated from the *demos*. Indeed, democracy was only stabilized as the citizen, as a participatory source of norms, was transformed into an inner-legal figure. If democracy is founded on both the legal integration and the political participation of citizens, it depended historically both on the construction of external normative premises for integration and on the assimilation of many participatory practices within the law. Through this process, in effect, the law internalized the source of its own integrational authority, providing integrational functions to underpin democracy by translating the citizen into functional equivalents. This paradox formed the core of modern democracy.

In the 1920s, Carl Schmitt argued that legislatures could not create democracies. More specifically, he argued that legislatures were in thrall to particular interests in society, and they could not generate broad or group-transcendent foundations to bring legitimacy to legislation (1923: 19–20). As a remedy for this, he advocated that legislatures should, in some circumstances, be suspended in favour of plebiscitary patterns of acclamation, distilling the national will into single homogenous decisions, enacted directly by national executives (1927: 38).

On one count, Schmitt was right. Legislatures did not create democracy. Indeed, across a range of societal environments, it is visible that national political systems, notionally centred on legislatures, prevented the final realization of democracy. Accounts of democracy that prioritize the role of legislatures usually present highly idealized, counter-factual pictures of legislative bodies (Waldron 2006: 1361). In most cases, models of democracy focused on national legislatures obstructed the comprehensive

inclusion of society and they failed to generate overarching and fully inclusive constructions of citizenship. In the examples examined above, we can see that legislatures failed in these respects for many different reasons.

On one count, however, Schmitt was clearly wrong – in fact, he was wrong in rather spectacular fashion. Eventually, democracy did not evolve in a form that relied on any regress to a pure national will. To be sure, Schmitt would not have accepted the ultimate prevalent form of democracy as true democracy. However, the form finally taken by democracy depended on the fact that the will of the people, which was supposed to be channelled through the acts of legislatures, was separated, by global law, from the factual will of the people, and stabilized through inner-legal exchanges, in a global system of functional equivalence. Only through this process was it possible to separate law's source from dominant groups in national societies, and only through this process was a variable form created within which, however imperfectly, all persons in society could assume a position in a national system of inclusion. International law provided a construction of the citizen that avoided both the excessive particularism and the excessive homogeneity that characterizes democratic polities centred on legislatures.[395] The precondition for this shift was that the form of the citizen was extracted from outside national society, and detached from the factual reality of the national citizen.

Of course, this does not mean that legislatures play no role in contemporary democracy. However, the global legal system instils the form of the citizen in society, and it pre-structures the legislative functions of democracy. In fact, democracies increasingly rely on two lines of legal/political communication, one representative, and one judicial, both of which play a role in actively articulating the state and society. In most instances, as discussed, it is the legal/judicial line of communication, partly elevated above the interests of factual citizens, that plays the deepest, most constituent role in shaping the form of democracy.

[395] See above pp. 287–92, 324–5, 403–6.