

## CHAPTER SEVEN

# THE AUTONOMY OF THE POST-NATIONAL LEGAL STRUCTURE: THE AUTO-CONSTITUENT CONSTITUTION

The formation of a global society defined primarily by single sovereign states gave rise, almost of necessity, to an overarching legal structure, possessing a certain degree of autonomy in relation to national states. As national states evolved, they spontaneously displaced some of their inclusionary functions, both internal and external, into an international legal system. Indeed, states widely utilized international law to create a basic inclusionary structure for their actions, and they often relied on international norms, partly assimilated in their own constitutions, to hold this structure at a level of autonomy which had not been possible in societies with exclusively national legal systems. Only by allowing some basic functions of norm production and legitimation to migrate from national politics to global law, and especially global human rights law, have states been able, generally, to secure their own position in national society. The emergence of a global system of transnational constitutional norms, in short, is a process in which the law, quite generally, has become increasingly autonomous, and national states rely on the autonomy of transnational law to support their own autonomy, both domestically and internationally. Overall, contemporary society is marked by an increasing differentiation of the law as system, and the global legal order has now reached a high level of abstraction vis-à-vis actors and institutions in other social domains.

If international human rights norms provided a principle of autonomy for national political systems, however, the proliferation of internationally constructed human rights, often interacting with national legal norms, has instilled a more general logic of autonomy in

the legal and political system of contemporary society. To an increasing degree, global society as a whole now constructs constitutional principles to underwrite legislation in relatively spontaneous fashion, and it often sustains the inclusionary functions that were classically attached to institutionalized political systems through unfounded, internalistic processes of norm construction. In many settings, in fact, basic functions of political inclusion (that is, binding decision making, collective legislation, authoritative regulation) are not supported by obvious political mandates or demands, but derive constitutional support – simply – from the law alone, without reference to more classical sources of authority. Increasingly, the fact that society's legal structure has evolved to a high degree of autonomy means that the law *on its own* provides authority for acts of political inclusion, and the law *on its own* produces an inclusionary foundation for the political system.

On one hand, this is visible in the political system of national societies. In most national societies, law has become, to some degree, *self-originating*, and the authorization of law by classical political bodies and actors (constituent organs, legislators, executives) is no longer a precondition for law's binding force: the law on its own creates preconditions for collective political acts. On the other hand, this is manifest in the legal/political system of global society as a whole. Beyond national societies, law's authority does not necessarily rely on norms produced by sovereign actors, by actors with devolved sovereign powers, or in fact by actors positioned *outside the law* (see Urueña 2015: 133). In this domain, too, law authorizes political functions in highly internalistic fashion. Overall contemporary society is increasingly defined by the emergence of a legal system which is detached from political volition, in the classical sense of the word, and the legal system now produces normative structures to support acts of political inclusion from *within the law itself*. Most decisions with a (classically perceived) political quality are now produced, simply, by the law, and many political acts are little more than inner-legal functions. This is of course not a universal phenomenon, and in some settings classical forms of politics still persist. But the migration of political functions into legal structures, and the rise of a relatively autonomous legal system, capable spontaneously of producing decisions with political authority, is a striking feature of contemporary society.

What underpins these processes, arguably, is the fact that contemporary society has lost, or is losing, the essential distinction between the legal system and the political system, and, through its global

extension, society is in the process of abstracting a general system of inclusion, in which law and politics cannot easily be separated. Through its increasing autonomy, the legal system spontaneously creates the inclusionary structure, or the constitution, for political acts, and the number of political processes that are not pre-determined by global law diminishes rapidly. In this amalgamated legal/political system, in fact, functions of political inclusion are often assumed by the law, and the law produces its own constitution to authorize these functions. In many respects, society's legal structure has simply become its political system, and the global political system now *constitutes itself* in multiple, varied fashion, across national and international arenas, by referring to norms, which it contains within itself, as law. In general, this means that, to an increasing degree, the political system of global society produces itself, at different locations, both within and outside national societies, *ex nihilo*. The autonomy of the global legal structure means that society is able to construct features of a political system in very different domains, in highly contingent fashion: that is, it can produce and legitimate binding laws in institutionally unregulated environments, often beyond the limits of obviously authorized jurisdiction. Indeed, owing to the autonomy of the global legal structure, society is now easily able to generate spaces of regulatory order outside classical political institutions, and the law supports political-systemic formation as a relatively spontaneous process of social construction.

In this transformation of the political system, the role of internationally defined rights has assumed particular significance. Human rights in fact increasingly distil principles to support an *auto-constituent* structure of political inclusion for contemporary society: that is, human rights underpin a legal structure, both nationally and extra-nationally, in which primary laws, classically made by political actors, are formed within the legal system, and in which law making is internally authorized, without recourse to primary political acts. The inclusionary structure of the global political system, both in its national and transnational dimensions, increasingly extracts its substance from transnationally constructed rights. This structure utilizes rights, instead of sovereign acts of national constituent power, as a primary basis for the production and authorization of law. At the centre of the inclusionary structure of the politics of contemporary society, in fact, is a *final severing of legal inclusion from popular inclusion*. Through the constitutional rise of international human rights law, national political systems were partly stabilized against the peoples from whom they claimed to draw

legitimacy for legislation. Now, however, the constituent centration of the political system around a particular population has been widely supplanted by a political system which has become fully autonomous, and which produces legitimacy for law, not from inclusion of external actors, but from inner-legal auto-constructed norms, *usually condensed into basic rights*.

These tendencies towards the *autonomous constitutionalization* of legal/political structures have a range of quite distinct results. In fact, the process of *auto-constitutionalization* has led, broadly, to a deep polarization in contemporary law. On one hand, the growing autonomy of the law has in some contexts established a series of quite static self-contained legal/political regimes, in which legal/political entities and institutions are obdurately hardened against particular demands for inclusion. As a result, it is rightly argued that some auto-constituted regimes merely repress, or at least relativize, basic rights and freedoms guaranteed under more conventionally deliberated constitutional systems.<sup>1</sup> On the other hand, however, the growing autonomy of the law has also allowed society to generate a plurality of legal/political forms and multiple sources of constitutionality. In some instances, the rising autonomy of the law underpins the emergence of highly adaptive patterns of political-systemic formation, in which law can be generated in very spontaneous, contingent manner, and in which decision-making functions classically assigned to political actors are assumed by many different subjects. In some instances, in fact, the rise of transnational rights as a global inclusionary structure has produced openings for the exercise of new modes of political agency and legal subjectivity, and even new modes of constituent power. Quite generally, however, the construction of primary norms to support society's requirements for law and binding decisions now increasingly occurs as an autonomous internal function of the legal system.

## RIGHTS AND SUPRANATIONAL ORDER

There are some very concrete settings in which, in the emergence of contemporary society, rights have established an autonomous constitutional structure, in which classical political functions of inclusion, decision making and binding legislation have been internalized

<sup>1</sup> For different variants on this view see Coppel and O'Neill (1992: 245), Movsesian (1999: 779), McRae (2000: 29), Marceau (2002: 795), Schneiderman (2008), Somek (2008: 157) and Nicol (2010: Chapter 4).

within the law. To some degree, this is evident in the early expansion of the authority of the UN, in which, as discussed, judicial interpretation of human rights obligations played an important role. However, this role of rights is most evident in other legal/political entities, which have acquired legislative and jurisdictional functions of a strictly *supra-national* character, some of which have developed a consolidated legal structure not categorically distinct from that of national states.

One, albeit qualified, example of this is the WTO. On one hand, the WTO has certain constitutional features, and it draws authority from processes of legal formation which have semi-constitutional quality. For example, the WTO is based in a series of treaty norms, claiming higher-law status *vis-à-vis* national statutes, which create the premises for the supra-national authority of WTO laws (Helfer 2003: 202). Moreover, the legal form of the WTO is fleshed out through the functions of high judicial organs, notably of the Appellate Body (Cass 2001: 42–4; Trachtman 2006: 639), which has defined a distinct interpretive function for itself, and at times sustains its rulings through reference to general international law, and even to international human rights (Jackson 2000: 181). In the functional domains under its jurisdiction, the Appellate Body of the WTO reaches into national states to fortify the rights held by individual agents in their economic activities (Petersmann 1998: 31; Charnovitz 2001; Trachtman 2006: 405), some of which, such as intellectual property rights, are protected in the UDHR and the ICESCR (Petersmann 2000: 21). To this extent, the WTO forms a supra-national legal/political system whose legal structure possesses clear autonomy against national laws, and which derives constitutional power from rights. On the other hand, however, the tendencies towards constitutional formation in the WTO are not very elaborated. In essence, the WTO remains a legally self-contained international organization, focused on trade law and deriving authority from a small set of treaties. It is linked to general international law through Art 3.2 of the Dispute Settlement Understanding (see Pauwelyn 2001: 577). Yet, this does not authorize WTO panels to reach beyond underlying inter-state agreements to implement general international norms, or general human rights laws (see Marceau 2002: 789; Andersen 2015: 11).

As a result, the structure-building results of the WTO are limited. It is possible to observe a structurally enhancing role of the WTO in some societies, such as China, in which WTO directives have promoted judicial systematization (Hung 2004: 108). Moreover, the WTO

promotes normative structure building in some societies because, in dictating external conditions for trade, it curtails economic protectionism, decoupling legal institutions from embedded inner-societal interests and rent-seeking actors, and, to some degree, it is able to promote general norms against the will of national executives (Petersmann 1995: 180). More generally, however, the WTO can easily be seen as a legal system distilled from very select monetary rights, necessary for the liberalization of markets. As a result, WTO provisions manifestly contradict some entrenched rights, especially social rights and rights of labour protection, in some established national jurisdictions (Clarkson 2002: 21). However, the WTO does not of itself possess an independent inclusionary structure.

The most striking example of auto-constituent structure building by human rights jurisprudence is the European Union (hereafter, EU, initially European Economic Communities, or EEC). In many respects, the EU began life as a simple international organization (see Ipsen 1972: 201). To be sure, from the outset, the EU had some attributes that distinguished it from more typical international organizations; for example, it contained decision-making organs, especially the Commission and preceding executive bodies, that were independent of national treaties and whose acts were not directly dictated by member-state prerogatives. Yet, in its original construction, the EU did not differ generically from other international organizations. Over time, however, the EU evolved into a supra-national political system, with clear autonomy against institutions authorized by national and international law.<sup>2</sup> Over time, moreover, the EU acquired a legal order with de facto constitutional standing, able to produce and authorize laws on constitutional foundations, and its autonomy was substantiated by a series of founding legal norms (see Hartley 1986: 234). In particular, the judicial enforcement of rights acquired great significance in the construction of the EU as an autonomous legal/political entity, and rights assumed clear auto-constituent structure-building role in this context.

At its inception, the EU must have appeared a somewhat unlikely case for inclusionary structure building by rights. It has been plausibly argued that the original plans behind the founding of the EU imagined the EU as a community with a strong commitment to international

<sup>2</sup> For a very early variant on this perception, see the claim in Badura (1966: 6) that the 'law of the EEC is an autonomous legal order *sui generis*' [*eine selbständige Rechtsordnung eigener Art*]. See also Maduro (2005) and Witte (2012: 42). For reconstruction of the debate about the legal autonomy of the EU see Bogdandy (2000a: 231, 215, 223).

human rights law, and that the first projected treaty of the European Political Community was designed expressly to protect the rights of single citizens, assimilating the ECHR as its constitutional substructure (de Búrca 2011: 674, 676). As the EU took concrete shape, however, human rights norms played a more marginal role in its formation, and its legal system was scarcely defined by strict normative objectives (de Búrca 2011: 665). The original treaties of the EU, in particular the Treaty of Rome, only mentioned rights insofar as these related to equality of remuneration for economic activities, and, at its creation, the purposes of the EU were defined by a narrowly construed economic mandate (de Búrca 2011: 664).<sup>3</sup> This indifference to rights was underlined in early rulings of the European Court of Justice (ECJ); notably, in *Stork* (1959), in which the ECJ stated that its functions were not founded in rights-based concerns and international rights norms could not be invoked to support its rulings, and in *Geitling* (1960), in which it declared that vested rights were not relevant to its jurisprudence (Scheeck 2005a: 849; de Búrca 2011: 667). As discussed below, the ECJ, and the EU as a whole, later underwent a *turn to rights*, which gathered pace in the 1970s. Right up to the 1980s, however, the ECJ restricted the scope of its rights jurisprudence, refusing to assess the compatibility of the laws of member states with the ECHR in matters falling outside EU law.<sup>4</sup> Generally, the relation between the EU and international human rights law has remained ambivalent. In the ECJ, human rights are still subordinate to guarantees for economic liberties (Coppel and O'Neill 1992: 245; Somek 2008; Micklitz 2012: 245), and, in cases of conflict between fundamental rights and core economic freedoms, the ECJ has tended, notoriously, to show preference for the latter (Curzon 2011: 146; Coppola 2011: 203). Historically, fundamental rights mainly infiltrated European law in cases implying questions regarding market freedoms and free movement. Still today, although Art 6 of the Treaty on European Union (TEU) guarantees that it is bound to respect human rights, the EU has no universal human rights jurisdiction, and protection of the rights of persons affected by its acts is not uniformly strong (see Peters 2014: 435). Furthermore, the EU accession to the ECHR is not complete, and the relation between the jurisprudence of the ECJ and the ECtHR, although increasingly

<sup>3</sup> Rights have thus been seen as a 'lacuna' in the original EC Treaty (Bogdandy 2000b: 1338; Beck 2012: 184).

<sup>4</sup> *Cinéthèque SA and others v Fédération nationale des cinémas français*, Joined cases 60 and 61/84 [1985], p. 2627.

overlapping and co-operative, is not without contestation (Van den Berghe 2010: 152; de Búrca 2011: 692–3).

Partly for these reasons, however, the development of the EU demonstrates very distinctively how, in contemporary societies, human rights norms promote the autonomous abstraction of inclusionary structures, providing relatively abstract support for political functions. Moreover, it shows how classical political functions have, in part, been transferred to the legal domain. Above all, in the emergence of the EU, judicial institutions, especially the ECJ, developed a jurisprudence of rights that helped to consolidate the European legal/political system as it experienced rapid and insecurely authorized expansion, in which conventional sources of inclusionary authority could not easily be activated. Through the ECJ, in fact, human rights instilled a normative centre in the EU through which it internally and autonomously constructed a constitution to explain and sustain its political functions.

The initial position of the ECJ in the EU was rather unassuming, and it did little to foreshadow its later impact. First, under Arts 33 and 41 of *The Treaty Establishing the European Coal and Steel Community* (1951), the court was only expected to examine acts of the High Authority of the Community. It was then authorized to interpret secondary European law by Art 177 of the Treaty of Rome, and its powers in referral proceedings were discernibly widened (Basedow 2012: 67). However, it was only through a series of landmark rulings of the ECJ in the early 1960s, in particular *Van Gend en Loos* (1963) and *Costa* (1964), that it began to assume a structurally formative role in the European polity. The ECJ established in these cases that European laws should be applied directly to individual persons within member-state societies (i.e. it was not mediated through national institutions), and it could itself enforce European law as law with precedence over national statutes and national legal practices. Through the resultant presumption that European law had direct effect across all member states, the legal order of the EU was progressively consolidated as a free-standing, sui-generis legal system, whose origins, authority and enforcement were strictly separated from inter-state acts. Indeed, in *Van Gend*, the court formally declared that the Community established by the Treaty formed ‘a new legal order of international law’.<sup>5</sup> In *Costa*, the ECJ stated that Member States had voluntarily ‘limited their sovereign

<sup>5</sup> *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*. Reference for a preliminary ruling: *Tariefcommissie – Netherlands* [1963], p. 12.

rights', creating a 'body of law which binds both their nationals and themselves'.<sup>6</sup>

On this basis, in its designated areas of competence, the ECJ gradually acquired a status analogous to that of a superior national court, able to rule directly in cases regarding single persons within the member states. In fact, it established a legal system in which national courts, insofar as they heard cases relevant to European law, were transformed into subordinate actors within a supranational legal order, answerable to the ECJ in appellate proceedings. National judges were progressively required to provide remedies in accordance with European law, and, in designated spheres, they became judges of European law. This interaction between the ECJ and national judiciaries produced a decentralized institutional apparatus for the EU, in which European law acquired a distinct inclusionary consistency in relation to the law of different member states.<sup>7</sup>

The formative interaction between European legal institutions and the legal institutions of member states occurred in a number of ways. The linkage between the two tiers of the EU was initially often cemented in relatively informal, co-operative fashion, mainly through the preliminary referral of cases from national (usually lower) courts to the ECJ (see Alter 2003: 55).<sup>8</sup> The European legal system was more fully consolidated, however, as its foundations were subject to challenge by national judicial bodies, which were committed to defending the legitimational integrity of their own national legal orders. The principles set out in *Van Gend* and *Costa*, notably, engendered a sharp conflict of competence between the ECJ and some national Constitutional Courts. National courts, especially those with an ideologically immovable commitment to basic rights jurisprudence, such as the Constitutional Courts in Italy and West Germany, began directly to contest the legitimacy of European legislation and judicial rulings and to oppose the immediate incursion of EU law in national societies. This conflict of competence, tellingly, was conducted in the vocabulary of human rights, and it was through inter-judicial contests in the diction of rights that the normative system of EU law, following its first emergence, was firmly solidified.

On one hand, the Constitutional Courts of Italy and West Germany formulated their resistance to the direct effect of ECJ jurisprudence by

<sup>6</sup> *Flaminio Costa v E.N.E.L.* [1964], p. 593. <sup>7</sup> See excellent comment in Fennelly (2013: 63).

<sup>8</sup> The first preliminary referral was in 1961. The practice was slow at first but grew rapidly after 1971. See discussion in Broberg and Fenger (2010: 5, 8).

arguing that ECJ rulings showed insufficient regard for human rights norms, and they lacked legitimacy for that reason. Consequently, these courts claimed that national courts were entitled to apply domestic standards to oversee, and even overrule, ECJ judgments, and so to restrict the transfer of judicial powers to the Community (Defeis 2001: 309).<sup>9</sup> This conflict first became visible in the case law of the Italian Constitution Court in the 1960s, and then it was prominently expressed in *Frontini* (1973).<sup>10</sup> This judgment recognized the primacy of European law, but it reserved to the Italian Constitutional Court the right to review all cases in which a conflict occurred between EU law and domestic constitutional or human rights law. This rivalry between courts culminated, famously, in the first *Solange* ruling of the West German Constitution Court (1974), in which the German court claimed the right to review Community statutes *as long as* the ECJ did not fully reflect human rights thresholds derived from the ECHR.

In this context, therefore, human rights norms were asserted in the judicial politics of the EU, paradoxically, by actors seeking to harden the competence of national states and their courts, and to police the conditions under which jurisdictional sovereignty could be attributed to Community organs (Carmeli 2001: 344). In response to these attacks on its legitimacy, however, the ECJ began to emphasize human rights norms, especially the ECHR, as premises for its rulings, and it utilized human rights, by design, to justify its autonomy and authority towards national courts. This process began in the key early case of *Stauder v City of Ulm* (1969), in which the ECJ, exposed to the rising criticism of national courts, defined human rights norms as ‘general principles’ of European law (Williams 2004: 145; de Waele 2010: 3, 5), implicitly promoting an incorporation of human rights norms in the Union Treaties. Subsequently, in *Internationale Handelsgesellschaft* (1970), the ECJ declared that human rights could be generally observed as part of the constitutional traditions common to the member states, and they could be applied as common law across member states (Metropoulos 1992: 136). After these cases, the ECJ gradually came to define human rights as parts of a moral *lingua franca* for the EU, which needed to be considered in relevant judicial process. This gained momentum in *Nold* (1974), *Rutili* (1975) and *Hauer* (1979), in which the ECJ explained its

<sup>9</sup> For an account of early opposition of the Italian Constitutional Court to the supremacy of EC law, see Vauchez (2010: 19).

<sup>10</sup> For an earlier case expressing reservations about restrictions of constitutional rights under EU law, see Italian Constitutional Court 98/1965.

judgments as drawing legitimacy from international treaties to which member states had been signatories, including the ECHR.<sup>11</sup> Accordingly, this period was defined by a strategic, although only selective, alignment of the ECJ's jurisprudence to that of the ECtHR (Denys 2001: 35–6).

Through these processes, the ECJ was able to assume some functions usually allotted to Constitutional Courts, and it progressively conferred *upon itself* the power to review EU legislation for conformity with human rights norms, thus heightening its purchase within member states.<sup>12</sup> By the late 1970s, the ECJ was increasingly perceived as a European Constitutional Court (Walter 1999: 962; Höreth 2000: 11; Vesterdorf 2006: 607),<sup>13</sup> and it gradually explained its authority as derived from the protection of human rights (Tanasescu 2013: 217). In some respects, in fact, the ECJ created its own authority through a practice close to a spontaneous declaration of a block of constitutionality. This practice of the ECJ continued into the 1990s and beyond. By 1989, in *Hoechst*, the ECJ accorded particularly elevated status to the ECHR as a source of its jurisprudence. By the late 1990s, it quoted directly from the ECtHR in its rulings, and, after 1998, regular meetings and regular exchanges were held between judges on both courts (di Federico 2011: 33, 35). Although the EU remained outside the ECHR, by the 1990s, the ECJ was able to accept the principle, declared by the ECtHR itself, that the ECHR formed 'a constitutional instrument of European public order',<sup>14</sup> and it endorsed the standing of the Strasbourg court as a source of cohesive legal identity for all Europe (Douglas-Scott 2006: 662). By 2002, in *Roquette Frères*, the ECJ specifically adjusted its rulings to replicate judgments regarding human rights in the ECtHR. In *Pupino* (2005), it directly adopted the case law of the ECtHR (Morano-Foadi and Andreadakis 2011: 1073). By 2010, the ECJ operated in clear co-operation with the ECtHR (see Haratsch 2006: 944).

Over a long period of time, in sum, the ECJ exploited its conflicts with national courts in order retroactively to construct a rights-based constitution for the emergent European polity, and *internally* to

<sup>11</sup> The ECJ declared in *Nold* that 'international treaties for the protection of human rights' (thus including the European Convention) were to be taken as 'guidelines which should be followed within the framework of Community law' (Scheeck 2005a: 850).

<sup>12</sup> See classic comment in Weiler (1986: 1105).

<sup>13</sup> See the recent description of the ECJ as a 'comprehensive Constitutional Court' in Bauer (2008: 174).

<sup>14</sup> This term was used by the ECtHR in *Loizidou v Turkey* (Preliminary Objections) (1995) and in *Bosphorus* (2005).

solidify the EU as an autonomous legal/political system (see Mancini and Keeling 1994: 182). In this process, the ECJ clearly utilized individual rights to extend the reach of the supra-national legal system into spheres traditionally reserved for national bodies, and to give constitutional standing to EU laws and directives within national domains. Indeed, in general, the construction of the EU coincided with an intensification of the standing of rights, and the thickening of rights, including human rights, supported the EU as it progressively inserted its own constitution into member-state societies.

To illustrate this, as early as *Salgoil* (1968), the ECJ had stated that Articles of European law having direct effect in national societies created personal rights in favour of individuals, which national courts were required to protect, regardless of any rule existing in national law. In *Simmenthal II* (1978), it ruled that EU law renders automatically inapplicable any conflicting national law, and that each national court had a duty 'to apply Community law in its entirety and protect rights which the latter confers on individuals'.<sup>15</sup> In *Becker* (1982), the ECJ decided that obligations of Member States under European law created personal rights, which individuals could assert against their national states. In *Wachauf* (1989) and *ERT* (1991), the ECJ expanded the scope of its rights provisions, and it intensified general personal rights secured by European law to apply fundamental rights as a framework for evaluation of state action in member-state societies. In *ERT*, notably, the ECJ claimed authority to review national rules within the scope of community law for computability with the ECHR. The scope of rights in ECJ case law was widened in *Francovich* (1991), which ruled that private parties had rights of action against states under EU law. Very importantly, in *Schmidberger* (2003), the ECJ was asked to consider, on proportionality grounds, whether political rights could be allowed to restrict rights of economic freedom. Notably, in this case, the ECJ gave support to political rights over economic freedoms. In so doing, it elevated the ECHR to a clear constitutional position in the EU, and it expanded its own authority beyond areas of competence stipulated under EU Treaties, so that it could address political questions in member states. In *Küçükdeveci* (2010), the ECJ ruled that an individual could invoke rights against discrimination in litigation against another individual to block national legislation, thus creating an intense constitutional link between the ECJ and individual national citizens.

<sup>15</sup> *Simmenthal* [1978], p. 644.

By 2011, the ECJ decided, in *Ruiz Zambrano*, that ‘the genuine enjoyment’ of rights obtained by persons ‘by virtue of their status as citizens of the Union’ should be taken as a normative ideal for all legal interpretation in the EU, able to prevail over national laws.<sup>16</sup>

Overall, therefore, the intensification of rights jurisprudence in the EU was closely correlated with the formation of an integrated legal order. In establishing human rights as core principles of European law, different national and supra-national courts acted in loose consort to create a physically decentralized but formally ordered European legal system, with primacy over relevant elements of national law (Dougan 2004: 2–3). This legal system was elaborated around the principle that legal rights, and especially fundamental rights, distilled a direct link between supra-national courts and single persons in the member states of the EU, and this link provided constitutional authority for the legal system of the EU as it evolved to a high degree of autonomy against the laws of national states.

The EU was eventually consolidated as a distinct legal/political system through a process of constitutional construction which occurred at two separate, but functionally connected, levels. Latterly, this occurred through quasi-constitutional moments, in which the basic principles of EU law were declared in programmatic political charters. After the initial judicial turn to rights in the 1970s, in fact, the EU was consciously proclaimed, through a series of effectively constitutional declarations, as a legal/political system at least partly founded in human rights. Early examples of this were the 1976 *Report on the Protection of Fundamental Rights as Community Law is Created and Developed*, and the *Joint Declaration on Fundamental Rights* (1977), which accentuated the importance attached to the protection of rights in the member states (Wincott 1994: 254; Schimmelfenig 2006). By the 1990s, the Treaties of Maastricht and Amsterdam, followed later by the Treaty of Lisbon, gave express constitutional standing to human rights. The Treaty of Lisbon accorded legally binding character to the Charter of Fundamental Rights, based largely in the ECHR, after which the ECJ assumed formally expanded duties in human rights adjudication. Art 2 of the Lisbon Treaty defined the EU as a set of institutions based in general respect for human rights. Through these innovations, human rights were transformed into an express constitutional substructure for the exercise of

<sup>16</sup> *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011], p. 1252.

public authority in the EU.<sup>17</sup> However, the initial process of constitutional construction in the EU was conducted, not by politicians, but by court rulings and inter-judicial exchanges, in which the ECJ, originally acting without reference to a written constitution, gradually spelled out a grammar of fundamental rights as a normative/inclusionary fundament for the European legal/political system.<sup>18</sup> Through this process, national courts were bound to consult with the ECJ before ruling in matters of relevance to European law, and they were instructed to disapply national laws in conflict with rights defined under EU law. National courts thus deepened the societal penetration of the European legal order, and rights defined under European law, applied to individual persons by various courts, cut further and further into national states and their legal order, providing a free-standing inclusionary structure for the EU.

In these respects, the ECJ forms a classic example of an institution (a court) holding *constituted powers* that acted, in essence, as a *self-authorized constituent power*, writing a constitution, far beyond the terms of the original treaties of the EU, to fit its own objectives. Through a long process of self-authorized interpretive practice, the ECJ created a higher-law framework and an underlying inclusionary structure for the EU as a whole (Weiler 1986: 1115; Micklitz 2012: 392). The key to this was that the ECJ was able to borrow from international law, and especially from the ECHR, a series of norms possessing sufficiently high normative status to generate legitimacy for single acts of legislation, to placate national institutions and to establish the authority of EU law in national courts. Naturally, this did not put an end to all resistance by national courts. Famously, the German Constitutional Court continued, intermittently, to oppose the ECJ, most strikingly in the *Maastricht Judgment* (1993), in which it argued that, as the EU lacked democratic legitimacy, its laws could not claim primacy over national laws. Nonetheless, the first *Solange* ruling of the German Constitutional Court provided, indirectly, a vital source of validity for the EU, as it impelled the ECJ to expand its commitment to rights norms and to delineate spheres of discretion in which national courts and the ECJ were able to co-operate in applying European law, fused together

<sup>17</sup> See comment in Bogdandy, Kottmann, Antpöhler, Dickshen, Hentrel and Smrkolj (2012: 508).

<sup>18</sup> See classical observations on this general process in Stein (1981), Weiler (1991: 2419, 2430) and Stone Sweet (2004). On the specific role of rights in the formation of European public law, see Stone Sweet and Brunell (1998: 77) and Rosenfeld (2006: 620).

by a joint promotion of human rights.<sup>19</sup> Of course, it barely requires emphasis that the EU and the ECtHR were originally entirely separate jurisdictions; as discussed, in its early rulings the ECJ denied relevance of the ECHR for the EU. Through the incremental assimilation of ECHR norms in the 1970s, however, the ECJ cemented a triadic link between itself, the ECtHR and national courts. This linkage between the courts created, at one level, a unified framework for enforcement of legislation in Europe, and it bound together and integrated, however flexibly, different legislative institutions in the European legal/political order (Scheeck 2005b: 3–4). More fundamentally, however, the fact that courts were linked together in a shared structure of rights meant that EU law was able to isolate individual persons from their national jurisdictions, and it could extract from individual legal subjects the constitutional authority to legislate for all persons, in all member-state societies (see De Búrca 1993: 306; Craig 2012: 285). Rights, in other words, were utilized as two-level sources of structure building, integrating both national legislators and singular persons into the cohesive supra-national constitution of the European political system.

From the original formation of the EEC to the present, the lack of an original *pouvoir constituant* to give authority to the EU as political entity has troubled theorists of European public order.<sup>20</sup> For this

<sup>19</sup> This was formalized most clearly in the *Solange II* ruling of the West German Constitutional Court in 1986, in which European law was allowed to take precedence over German national law as long as it was consonant with the basic human-rights norms enshrined in the West German constitution. Through this ruling, rights became a medium which made it possible for a national state to transfer 'sovereign powers' to inter-state institutions, and they acted generally to distribute concurrent judicial and legislative powers across the EU polity as a whole (Hofmann 1993: 46). The 1986 *Solange* ruling may have been shaped by the preference of the West German judiciary for a solid national legal order, as opposed to one defined by the ECJ (Davies 2012: 136). Yet, this ruling established a system of inter-judicial comity, in which different courts used rights to mark out boundaries of competence, deference and mutual recognition. Through this, rights formed a language of constitutional or in fact *constituent* dialogue between different tiers of a supranational political system. On the *Solange* rulings as a basis for comity, see Lavranos (2008: 312), de Búrca (2010: 43) and Isiksel (2010: 562).

<sup>20</sup> This debate has involved a number of prominent participants, and it can only be sketched here, doubtless in a fashion that omits important interventions. Anxiety about weak constituent power shaped earliest debates about the constitution of the (then) EEC (see Kaiser 1960). This later became central to sceptical reflection on the EU. In the mid-1990s, for example, Schilling (1996: 394) denied that the EU could claim to derive authority from constituent power, and he used this claim to undermine the legitimacy of EU institutions, notably the ECJ. This critique also appeared in the works of Haltern (2005: 302). See comments in Kumm (2005: 275). In parallel, however, alternative accounts were proposed that endeavoured to construct the EU as legitimated by post-traditional expressions of constituent power. For example, Pernice (2000: 11; 2006: 18) attributed a collective constituent power to the EU, based in the devolved

reason, the EU is widely seen as a legal/political system whose constitution has an obviously *sui generis* character. From a sociological standpoint, however, the legal order of the EU can be examined not as a categorically distinctive phenomenon but as a prominent example of a wider process of inclusionary structure building, which reflects tendencies that are increasingly common in most societies. Seen sociologically, the EU appears as a legal/political system, which was able to dispense with the classical (external) source of legitimacy (national constituent power) and instead to utilize a recursive (internal) source of legitimacy (rights) as the basis for its inclusionary structure. The sociological foundation for this process is that the EU evolved as a legal/political system which, during its construction, was forced to perform complex transnational inclusionary functions, and which could not construct its inclusionary foundations around an existing people. It was obliged, therefore, to devise a constitutional basis for its functions on abstracted, contingent grounds. The absorption of international human rights standards assumed great importance in this process, as it allowed the legal/political system of the EU to compensate for its lack of focus on an objectively given sovereign people, and to produce principles of inclusion *ex nihilo*, at a high level of inner, auto-constituent abstraction. While other polities constructed legitimacy by applying rights to integrate a particular national people, the EU evolved as a polity that drew legitimacy from rights *instead of* a national people: rights stood in for constituent power. Far from forming a categorically distinct legal order, however, the logic of internal rights-based self-constitutionalization in the EU illuminates general legal-sociological patterns in modern society. It is now quite widely the case that the legal system assumes constitutive political functions, and inclusionary structures to support collectively binding laws are increasingly produced in highly autonomous, self-authorized legal acts.

powers of all citizens of the member states, resulting in the formation of a European Constitution as an 'association of constitutions'. Walker (2007: 259; 2009: 172) argued that in the EU there is 'no scope for creation *ex nihilo* of a distinctive constituent power', but he accounted for the EU nonetheless as a pluralistically authorized legal system. Peters (2001: 410) echoed this approach, claiming that, in the EU, constituent power and constituted power cannot be fully separated, and the ECJ assumes the role of 'permanent *pouvoir constituant*'. More recently, Fossum and Menéndez (2011: 53) have developed a theory that observes the constituent power of the EU as residing in the synthesis of constitutional arrangements in the member states. Habermas (2012: 22–3) has added to these debates by examining the constituent power of the EU as a 'pouvoir constituant mixte', exercised by European citizens concurrently, both as national citizens and as citizens of the EU.

## RIGHTS AND GLOBAL LEGAL STRUCTURE

The auto-constituent formation of inclusionary structures has, naturally, become most evident in consolidated, supra-national legal orders. However, the increasingly contingent self-production of inclusionary structures to sustain political functions is now inherent in the legal fabric of global society as a whole. This occurs in both dimensions of the global political system, both nationally and beyond national limits. At the centre of the constitutional law of global society, on one hand, is an *eradication of constituent power*. The constitutional law of contemporary society is increasingly formed within the inner corpus of the law, and, at different locations in global society, law is able to generate strong foundations for political inclusion without recourse to any primary or external constituent act. In some cases, for example the WTO (largely) or the EU (to some degree), this self-constitution of the law might be seen simply to impose a legal order across society, which is relatively closed to particular demands for inclusion. In some respects, however, the self-constitution of the law involves an opening of the law, and it permits contemporary society to establish a system of legal/political inclusion in improbable, spontaneous fashion, in ways that were not conceivable in classically centred societies. Also at the centre of the constitutional law of global society, in fact, is a *splitting, or a multiplication, of constituent power*, which, in some circumstances, can have acutely liberating implications for persons at different locations across global society. Whereas national states created a foundation for their inclusionary functions by claiming to integrate a national population and by devising a multi-layered system of rights to accomplish this, contemporary society increasingly attaches its legitimational support to a relatively free-standing set of rights, which are not tied to the inclusion of any given people, and which can sustain legislation on highly contingent, pluralistic, inner-legal premises. In this process, rights produce different structures in different parts of society. In national societies, this loss of emphasis on national sovereignty can mean that national constitutional laws are simply produced through inter-judicial exchanges, similar to legal formation in supra-national entities, so that classical procedures for authorizing public law become more marginal. However, this loss of emphasis on national sovereignty also means, both within and beyond national societies, that constitutional law can now be produced at many social locations. In some contexts, both national and transnational, it allows new agents to enter the political

system, even permitting new subjects to assume essentially constituent roles in the creation of primary norms for society, or for parts of society.

To this degree, the inclusionary structure of global society is now increasingly built, in part, through a *fifth tier of rights*. Global society increasingly relies on a contingent stratum of *transnational rights*, which allow it to produce and circulate law spontaneously and acentrically, as pressures for legal inclusion become more decentred and globally diffuse.<sup>21</sup> Pressures for legal inclusion in contemporary society are no longer solely communicated by single populations towards single national states. Instead, these pressures originate in constantly emerging and shifting global domains, and they are not directed towards simply aggregated political institutions: often global society is required to produce and support legislation without possessing clearly mandated institutions to do this. Transnational rights allow society to absorb or to *insulate itself against* the highly acentric demands for legislation which it creates, and they establish an inclusionary structure in which society can preserve the elemental form of a political system and create clearly legitimated laws, even in face of highly unpredictable legislative pressures. In both the national and the transnational dimensions of global society, therefore, political-systemic formation (that is, the preservation of a structure for authorizing collectively binding laws) increasingly occurs on the basis of transnational rights. Transnational rights form a fluid substructure for the political exchanges of society, and, both in its national and in its transnational locations, the global political system spontaneously *constitutes itself* by internalizing such rights as sources of constituent power.

Examples of this spontaneously structure-building role of rights can be seen in the following processes:

### **i Rights, litigation and inner-legal constitution making**

The shift to an *auto-constituent* inclusionary structure in the political system is reflected in some of the quite simple processes of constitutionalization outlined in [Chapter 2](#) – namely in the fact that, after 1945, interactions between courts began to assume constitution-making force. After this time, the rising interlocution between courts meant that, by the 1950s, courts had begun, tentatively, to construct a

<sup>21</sup> On ‘meta-rules’ in global law despite extreme legal fragmentation, see the outstanding analysis in Renner (2011: 220).

separate judicial community, gradually linking judicial bodies located at different junctures in the global political system. As a result, eventually, courts were able to produce authority for legislation on inner-systemic normative grounds without reference to external acts or agreements. The fact that, increasingly, all courts slowly acknowledged an international diction of human rights meant that judicial norms rulings could easily be passed across jurisdictional borders, and norms established by courts often became binding on other courts or on legislatures, beyond national boundaries. Of course, the interaction between national and international courts has not always been without friction, and there are innumerable cases of deep conflict between national and extra-national courts.<sup>22</sup> Nonetheless, in principle, the overlapping of international and national jurisdictions has meant that many basic laws are produced not by political actors or decisions but by inner-judicial communications, and courts now articulate constitutional norms for other actors at a high degree of inner autonomy. At different levels of global society, therefore, courts have been able to extract from human rights a self-authorizing constitution for themselves, and for other bodies. Although formally repositories of constituted power, courts now routinely produce constitutional norms, within which, with other institutions, they exercise legislative authority. Courts thus often act as constituent and constituted power at the same time.

Such inner-legal construction of constitutional law is visible in many spheres of inter-judicial interaction. Most obviously, international courts often produce norms with *national* impact, and international courts have repeatedly established rulings to produce, or at least deeply to influence, national constitutional laws.<sup>23</sup> Cases of this kind are most prominent in states operating within clearly *supra-national* jurisdictions, such as in the states party to the ECHR or the ACHR, where supranational rulings have at times triggered immediate processes of constitutional revision. An obvious example of this is *Dudgeon v UK* (1981), brought before the ECtHR. Following this case, which challenged laws prohibiting homosexual acts in Northern Ireland, the constitutional position of Northern Ireland in the British constitution was revised. A further case is *Smith and Grady v UK* (1999), brought

<sup>22</sup> *Solange I* was discussed above. The *Maastricht* ruling of the German Constitutional Court in 1993 is a further example. Note also the *refoulement* case in the Supreme Court of the USA in the 1990s, *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993) as an extreme example of opposition by national courts to international norms.

<sup>23</sup> See above pp. 93–100.

before the ECtHR. In this case, discrimination against homosexuals in the British military was declared a violation of Art 8 ECHR, and the remedies available for such violations in the UK were deemed to contravene Art 13 ECHR. This led to a revision of the core principles of judicial review in the UK, and it significantly altered the constitutional standing and competences of the judicial branch. Many examples of constitutional reform caused by international court rulings are found in Latin America. One key instance occurred following the 2001 case in the IACtHR, *La última tentación de Cristo v Chile*, in which the Chilean government changed the national constitution in response to an IACtHR ruling on censorship laws. More broadly, in 2011, the Mexican government introduced a raft of constitutional amendments, giving greater protection to human rights, as a result of judicial recommendations for constitutional revision in cases brought against Mexico in the IACtHR.<sup>24</sup>

At a national level, however, the constituent role of courts is often observed in less immediate fashion, as national courts apply general international principles to reconstruct the basic laws of their polities. As discussed, the Colombian constitution has assumed its distinctive characteristics through the evolution of the doctrine of the block of constitutionality, through which judges and advocates, clearly acting as a secondary constituent power, have used international law and the case law of the IACtHR to elevate core norms in the constitution. In some cases in Colombia, judges have even defined international soft law as part of the constitutional block.<sup>25</sup> Less formalized cases of such processes are found in Chile, into whose domestic legal order the *Pinochet* cases in London triggered a deep influx of international norms. In *Urrutia Villa v Ruiz Bunger* (2009), symbolically, the Chilean Supreme Court declared that there could be no statute of limitations for domestic contraventions of international *jus cogens*. In *Vergara Toledo v Ambler Hinojosa* (2010), as mentioned, the Supreme Court overruled the principle of *res judicata* for some cases heard during Pinochet's dictatorship. Although the Chilean courts generally recognize international treaties as having rank below domestic constitutional law, moreover, the Constitutional Court has ruled that international norms pertain to

<sup>24</sup> The cases giving rise to these changes are *Radilla-Pacheco v. Mexico* (2009) and *Rosendo Cantú et al. v. Mexico* (2011).

<sup>25</sup> One example is the Pinheiro principles, the UN principles for treatment of displaced persons, which is widely cited as part of the block of constitutionality. See for one example Colombian Constitutional Court C-280/13.

the highest laws of state and can be used to judge the constitutionality of domestic norms.<sup>26</sup> In one case, despite the notional primacy of the national legislature, the Constitutional Court assumed the power to adapt the content of legislation, as it accused the parliament of taking too long to align domestic laws to international treaties.<sup>27</sup> In these cases, the Chilean higher courts invoked international norms to re-define, in clearly fundamental ways, the normative order of society as a whole. Arguably, in fact, the courts re-defined the constituent power, and they began to interpret a constitution based, not in the will factually constituted in the late 1970s, but in the construction of current Chilean society evidenced through subsequent regime changes and elections, and interpreted by judges themselves.

Equally far-reaching examples are found in New Zealand, a polity notionally committed to Westminster-style parliamentarism.<sup>28</sup> In New Zealand, it was ruled in *Tavita v Minister of Immigration* (1993) that international human rights treaties should be considered by administrative officials, regardless of the standing of these treaties in domestic law (see Waters 2007a: 471, 478). In *Hemmes v Young* (2004), later, the Court of Appeal used human rights treaties as a basis for the constructive reinterpretation and updating of existing, seemingly antiquated, statutes, so that international law became a source of constituent norms in domestic society (Waters 2007b: 663). Even societies that are relatively closed to international human rights law, such as the USA, have seen comparable cases. In *Lawrence et al v Texas* (2003), the Supreme Court determined, partly through reference to the case law of the ECtHR, that state-level prohibition of consensual homosexual acts in private spaces was not constitutional, thus defining new constitutional principles regarding both rights of sexual freedom and the limits of federalism. In this case, the Supreme Court used reference to principles in the ECHR to overturn a previous judgment, *Bowers v Hardwick* (1986), so negating *stare decisis* and effectively declaring primary law.

Similarly, in the UK, legal cases concerning questions of human rights law have provoked deep changes in constitutional principle, and they have contributed, constitutively, to the rise of a distinct

<sup>26</sup> Chilean Constitutional Court, Rol 2493/2014.

<sup>27</sup> Chilean Constitutional Court, Rol 2492/2014.

<sup>28</sup> See the classical account of the parliamentary sovereignty in New Zealand, expressed in *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323: 'Parliament is supreme and the function of the courts is to interpret the law as laid down by Parliament'.

body of constitutional rights. Ultimately, of course, a set of appealable, semi-constitutional rights was formalized by parliament in the Human Rights Act (HRA) in 1998. Before this, however, legal cases with implications for human rights had already assumed clear constitution-making significance. In the 1970s, senior judges began to show responsiveness to the diction of formal rights, and, through the 1980s, and then more fully by the 1990s, judges consciously established human rights as elevated constitutional norms in UK public law. They did this, first, by asserting principles of common law as de facto fundamental rights, imposing normative constraints on governmental power.<sup>29</sup> At the same time, however, in the 1970s and 1980s judges ascribed heightened importance to ECHR norms.<sup>30</sup> Ultimately, in the years prior to 1998, the courts began to assimilate international human rights norms in domestic law, and to flesh out an autonomous body of human rights law, combining rights-based common law and rights derived from the ECHR. Initially, human rights were mainly cemented in the sphere of administrative litigation, notably in cases concerning use of discretionary powers, and the doctrine was developed that administrative acts affecting fundamental rights must be subject to more exacting standards of judicial control (see Hunt 1997: 220, 290, 292).<sup>31</sup> By 1995, in fact, the courts had assimilated ECHR principles to dictate general norms for the use of public authority, and they had established the principle that all public bodies were subject to particularly strict constitutional constraints where fundamental rights were implicated.<sup>32</sup>

In these acts, though, the courts in the UK, as in other common-law jurisdictions, shaped a system of public law which, although it was underpinned neither by a formal constitution nor by a formal catalogue of rights, acknowledged the existence of *constitutional rights*, which the legislature had only limited, exceptional, authority to overrule.<sup>33</sup> It became common ground in English law that, whatever their

<sup>29</sup> *Morris v. Beardmore* [1980] 2 All ER 753 *R v. Secretary of State for Home Department ex p Mohammed Fayed* [1997] 1 All ER 228.

<sup>30</sup> See *R v. Secretary of State for the Home Department, ex parte Phansopkar*; *R v. Secretary of State for the Home Department, ex parte Begum* [1975] 3 All ER 497. But see also the debates in *R v Chief Immigration Officer, Heathrow Airport, ex p Salamat Bibi* [1976] 3 All ER 843, [1976] 1 WLR 979. Here it was made clear that the ECHR was not part of UK law but ought still to be taken into consideration.

<sup>31</sup> *Bugdaycay v. Secretary of State for the Home Department and related appeals* [1987] 1 All ER 940.

<sup>32</sup> *R v. Secretary of State for the Home Department, ex p McQuillan*, Queen's Bench Division [1995] 4 All ER 400.

<sup>33</sup> *R v. Lord Chancellor ex p Witham* [1997] EWHC Admin 237 (7th March, 1997) (Laws J).

constitutional position, legislators were only permitted to act in breach of human rights norms in cases of very pressing need, and only in express terms: the will of parliament was increasingly seen as a will intrinsically proportioned to rights.<sup>34</sup> This then opened the ground for the courts to declare that the UK polity contains an implicit hierarchy of statutes, in which some laws have constitutional standing and are relatively entrenched against repeal, and even to restrict time-honoured assumptions regarding the sovereignty of parliament.<sup>35</sup> Indeed, in *Simms* (1999), one judge went as far as to suggest that the UK courts had acquired powers to assess the constitutionality of statutes not far removed from those exercised in polities with a codified constitution.<sup>36</sup> After the introduction of the HRA, this transformative logic was reinforced, and human rights cases provided further occasions for judges to solidify the normative order of the state. By this stage, judges were able to assert that the public-legal order of UK was located at an ‘intermediate stage between parliamentary supremacy and constitutional supremacy’, thus imputing some degree of spontaneous constituent authority to human rights norms.<sup>37</sup> Moreover, the force of human rights was applied not only to check new legislation for conformity with rights but to read new meanings into older legislation, and to align older laws to standards derived from rights.<sup>38</sup> This reflected the deep constitutional principle that all laws endorsed by the elected legislature should, under normal circumstances, be compatible with international human rights law. In each case, acts of judicial interpretation clearly moved close to acts of constituent power.

Inner-legal construction of constitutional law is also visible in the fact that national courts are now able to direct the constitutional law of other national polities, and the cross-national migration of judicial principles has expansive impact on public law in different societies.<sup>39</sup> Furthermore, in some, albeit infrequent, cases, national courts have been able to pass rulings that create, or at the very least reinforce, international law, such that national courts become formative of norms with constitutional force at an international level, binding on many states.

<sup>34</sup> *Pierson v. Secretary of State for the Home Dept* [1998] 2 LRC 98 (Browne-Wilkinson LJ).

<sup>35</sup> *Thoburn v. Sunderland City Council* [2002] EWHC 195 (Admin) (18 February 2002).

<sup>36</sup> *R v Secretary of State for the Home Department, ex parte Simms and another* – [1999] 3 All ER 400 (Hoffmann LJ).

<sup>37</sup> *International Transport Roth GmbH & Ors v Secretary of State For the Home Department* [2002] EWCA Civ 158 (22nd February, 2002) 71 (Laws LJ).

<sup>38</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30 (21 June 2004) 24.

<sup>39</sup> For a classical study of this, see Jackson (2010).

This can occur in a number of different ways. Sometimes, this simply occurs as national courts clarify interpretation of international norms for other national courts (see Nollkaemper 2012: 10). However, this also occurs in extra-territorial proceedings, in which national courts establish principles of liability, within their own societies, for state institutions, persons and corporations under international law. The ruling of the US circuit court in *Filártiga v. Peña-Irala* (1980) is one classical example of this. In this case, international human rights law was used to promote, as part of American law, a system for facilitating the indictment of individual persons, and then other organizations, for human rights violations committed outside the USA.<sup>40</sup> To some degree, the ability of courts to make international law is also evident in decisions, such as *Kadi* (2008) in the ECJ,<sup>41</sup> and related decisions in national courts,<sup>42</sup> which have ruled that acts and decisions in the international domain can be subject to national constitutional jurisdiction. Very notable in this regard is the judgment of the UK Supreme Court in *Ahmed and others v HM Treasury* (2010). In this case, the court overruled, as *ultra vires*, domestic measures to enforce UN anti-terrorism directives, on the grounds that they were applied without authority under a parent statute and without allowing proper access to courts for affected parties, as stipulated by the ECHR. In this decision, the Supreme Court balanced rival international norms, and it used its own powers to reverse the usual and accepted hierarchy in the relation between the UN and the ECHR, effectively defining international constitutional law.<sup>43</sup>

The most striking examples of national courts creating international law, however, appear in cases regarding immunity of states and immunity of heads of state. This can be seen in some of the rulings handed down by the UK House of Lords (1998–99) regarding Pinochet's claim to immunity as a former head of state. In these cases, the UN Torture Convention, which, unusually, confers jurisdiction on domestic courts, was interpreted as an instrument to limit the immunity of former heads of state for breaches of international law defined as

<sup>40</sup> For further discussion see below pp. 390–3.

<sup>41</sup> The full title of the case is *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2008].

<sup>42</sup> See the Canadian Supreme Court case *Canada (Justice) v. Khadr*, [2008] 2 S.C.R. 125, 2008 SCC 28.

<sup>43</sup> Conventionally both the UK courts and the ECtHR had accepted Art 103 of the UN Charter as binding and had placed the ECHR below, or at least separately from, UN conventions. See in particular the ECtHR case, *Behrami v France and Saramati v France, Germany and Norway* (2007).

*jus cogens*.<sup>44</sup> In *Ferrini v Germany* (2004), rather differently, the Italian Court of Cassation applied Arts 10 and 24 of the Italian Constitution, providing for domestic protection of human rights, to hold that Germany could not claim sovereign immunity for damages relating to crimes perpetrated during World War II.<sup>45</sup> Eventually, in 2012, these rulings of the Italian court were overturned by the ICJ, which claimed that Germany was immune from civil jurisdiction in Italy. However, in 2014, the Italian Constitutional Court struck down legislation in Italy to give effect to the ICJ's rulings on state immunity, seeking to nullify the ICJ judgments as unconstitutional in Italian law and effectively claiming higher authority to define *jus cogens*.<sup>46</sup>

In these examples, it is observable that legal norms claiming higher-order standing are now often generated inner- or inter-judicially: *within the law*. In particular, cases relating to human rights law increasingly touch on intersections between national law and international law, and courts hearing these cases can easily produce rulings that initiate changes in the structure of constitutional law, both nationally and transnationally, and that re-define basic principles of government. Notable in such cases, above all, is the fact that the powers traditionally allotted to constituent actors can now be assumed, in certain circumstances, by new constituent subjects. In this respect, courts routinely move close to the exercise of constituent power. However, subjects acting as *litigants* also assume a similar position. Indeed, it is an increasingly prominent phenomenon that *single litigants* raise legal claims in a form that circumvents conventional legislative and constitution-making procedures, and rights defined under international law can be activated, through litigation, as a source of de facto constituent power, able, in different settings, to create laws of near-constitutional rank (Ochoa 2007: 181).

This is not an entirely new legal development. Throughout the history of national constitutional law, there are a number of cases in which purely domestic rights-related litigation has created new laws, often with partly constitutional standing, and litigation over rights has even been able to establish new, de facto constitutional rights. As a classical example of this, in the USA, rights regarding free exercise of sexual preference were originally formalized as extensions to the right of

<sup>44</sup> See especially *R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening)* (No 3) – [1999] 2 All ER 97.

<sup>45</sup> My attention was directed to this case by analysis in Roberts (2011).

<sup>46</sup> Italian Constitutional Court 238/14.

privacy, which itself lacked strict constitutional foundation and was first articulated through judicial expansion of other rights.<sup>47</sup> The right to privacy was first identified as a constitutional right by the Supreme Court in *Griswold v Connecticut* in 1965, where it was constructed as implicit in, or rather as a precondition for, rights grouped under the First Amendment. The right to privacy then became the basis, in *Roe v Wade*, for rights regarding reproductive choices (Mann 1992: 87, 89). Ultimately, this right was extended in the District Court case, *Ben-Shalom v Secretary of the Army* (1980), to consolidate employment rights for homosexuals. As an alternative example, the evolution of the right of personality (*Persönlichkeitsrecht*) in the post-1949 FRG has had similar results. Through this concept, the courts of the FRG interpreted existing rights in the *Grundgesetz* to create a sequence of new rights, concerning the inviolability of the individual private sphere. This concept was established in a ruling of the highest civil court in 1954.<sup>48</sup> But it was eventually elaborated by the Constitutional Court to prescribe rights of privacy against media intrusion,<sup>49</sup> and ultimately to determine rights concerning access to private information, including information held in electronic media.<sup>50</sup> The theory of personality rights has been extended still further in some Latin American countries, where it produced rights of identity, rights of access to genetic data<sup>51</sup> and even rights to enjoyment of soft narcotics.<sup>52</sup> Rights-related litigation, therefore, has a long-standing tradition of creating new rights, at a high degree of inner-legal autonomy. Despite such precedents, however, the transnational interlocking of judicial norms means that litigation is now a primary source of constitutional norms, and litigation often contains elements of constituent power.

At one level, the constituent power of litigation is visible in *national* societies. To some degree, in fact, all acts of litigation which link domestic law to international law have a constituent element, and litigants in such cases commonly act as constituent subjects in this role. In some cases, however, the constituent force of litigation is especially pronounced. For example, the exercise of national constituent power through litigation is striking in collective rights-based legal mobilization, in which international human rights norms are asserted within

<sup>47</sup> See the early analysis of this in Warren and Brandeis (1890: 214).

<sup>48</sup> West German Bundesgerichtshof, BGH 25.05.1954 – I ZR 211/53.

<sup>49</sup> West German Constitutional Court, BVerfG 35, 202 – Lebach (1973).

<sup>50</sup> West German Constitutional Court, 1 BvR 370/07 and 1 BvR 595/07.

<sup>51</sup> Chilean Constitutional Court, Rol 834/2008.

<sup>52</sup> Argentine Supreme Court, *Arriola, Sebastián y otros s/ causa* Nr 9080 (25.8.2009).

domestic jurisdictions. In such cases, international human rights norms, themselves weakly enforced, are often given emphasis in national constitutional law by political organizations, which are able to articulate their domestic prerogatives around pre-established principles of international human rights law (Simmons 2009: 199). Examples of this during the longer political transformations in Latin America, Eastern Europe and North Africa have been discussed above.<sup>53</sup> In such instances, collective associations, for example advocacy networks or social movements, have often been able to use national courts to galvanize specific interests around rights claims, and so to construct publicly effective, even constitutional, norms by attaching ground-level claims to internationally recognized principles.<sup>54</sup> In some cases, in fact, courts and advocacy networks have worked together to revise existing legal structures.<sup>55</sup> As discussed, moreover, in some transitional societies, especially those with fragile state institutions, litigation is specifically encouraged as a semi-constituent practice, which binds different parts of society into a direct constitutionally formative relation to the political system.<sup>56</sup> The recent rise of public-interest litigation in many societies is especially exemplary of this. In many societies, sitting governments consciously simplify and facilitate public interest litigation. As discussed, this is partly due to the fact that such litigation eliminates local counterweights to the central government, and it adds uniformity to the law's reach across society. At the same time, however, public interest litigation enables multiple subjects to participate in shaping primary laws, and, in many cases of public interest litigation, international law is commonly asserted as a means to expand the public-law obligations of national states.<sup>57</sup>

<sup>53</sup> For extensive analysis, see Sikkink (2011: 88), arguing that human rights prosecutions directly helped to 'build the rule of law' (155).

<sup>54</sup> See suits in *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), cert. denied, 532 U.S. 941 (2001). See broad discussion in Merry (2005).

<sup>55</sup> The example of pre-2011 Egypt is striking in this regard; see Bernard-Maugiron (2008: 269).

<sup>56</sup> See pp. 226, 352 above.

<sup>57</sup> Particularly important examples, strongly influenced by Indian precedents, are found in Kenya. As discussed in Arts 22(2) and 258(2), the 2010 Constitution of Kenya already endorsed substantially liberalized rules on standing for persons initiating court proceedings. Subsequently, Kenya has seen important public interest cases, at times creating new domestic social rights. See most notably the *Satrose Ayuma* case. In this case, the High Court ruled that it had a duty to develop domestic law, using international law as a guide, to secure new rights for collective litigants (a group threatened with eviction). Also very important are examples of public interest litigation in Colombia, which are constitutionally authorized under Art 88 of the 1991 Constitution, and in which new rights, including rights to health, rights to a healthy environment and even rights to public space, have been strongly consolidated. See discussion of this

However, the constituent role of litigation is most visible not in national states but at the level of *transnational norm construction*. Rights-oriented litigation assumes a particularly intense constituent force for exchanges extending beyond clearly delineated national jurisdictions. In these settings, litigation has begun to produce a defining constitutional grammar for society, and the regulatory structure of global society in its extra-national dimensions is increasingly formed by subjects acting as litigants.

Important examples of this are found in cases of extra-territorial litigation, relating to international tort cases. In the USA, for instance, recent decades have seen a number of cases brought under the Alien Tort Statute, in which individual litigants have sought remedies under tort law for violations of human rights law committed outside the USA, and federal courts have adapted international law to furnish rights for private litigants. Early cases heard under the Alien Tort Statute were filed against individuals acting for governments; state action or closeness to government authority was originally a precondition for liability in such claims.<sup>58</sup> However, liability under the Alien Tort Statute was also imputed to individuals in cases, such as *Kadic v Karadzic* (1995), concerning acts of political figures not necessarily acting under colour of law. Increasingly, in fact, it was recognized that the Alien Tort Statute created a legal framework in which extra-territorial liability could also be imputed to private bodies, and it was used for proceedings against a range of organizations, including multi-national corporations. To be sure, the Alien Tort Statute is not the strongest foundation for constituting the obligations of transnational economic actors. Notably, most early cases brought against larger organizations, especially corporations, were settled or dismissed on preliminary motions. In *Sosa v Alvarez-Machain* (2004), an important basis for subsequent litigation, the Supreme Court stated that the bar to private extra-territorial litigation was to be set high. Moreover, in *Kiobel v Royal Dutch Petroleum* (2013), the Supreme Court decided that the Alien Tort Statute did not contain a presumption of extra-territoriality, thus overruling lower-court precedents, in which the statute had been used to exercise extra-territorial jurisdiction. Nonetheless, by 2012, about sixty cases against corporate defendants had been brought under the Alien Tort Statute (Stephens 2014: 1518). Examples of such cases are cases brought against

in Colombian Constitutional Court, T-1527/00. In fact, in much of Latin American, public interest litigation now acts as an important source of constitutional law.

<sup>58</sup> See most importantly *Filártiga v. Peña-Irala* 630 F.2d 876 (2d Cir. 1980).

Texaco for acts in Ecuador, against Coca-Cola for acts in Colombia, against Unocal for acts – including complicity in promoting use of forced labour – in Burma, and against ExxonMobil for acts in Indonesia. In some of these cases, corporations complicit in governmental violations of international law have been designated as de facto public bodies, or as public bodies *by proximity*, and corporations have been assigned liability for breaches of international human rights law on that basis. In some cases, notably *Unocal* (2002), this has meant that corporations operating under governments guilty of gross violations of international law have been subject to proceedings where it could be shown that they had knowledge of these violations or in some way derived benefit from them.<sup>59</sup>

Overall, the Alien Tort Statute acquired a complex constituent role in constitutional structure building. On one hand, it was utilized, without very obvious constitutional mandate, to harden constitutional rights within the domestic politics of American society, where it provided an important opening for the introduction of international human rights law into American jurisprudence. Following a series of Alien Tort cases, notably, 1992 saw the passing of the Torture Victim Protection Act, designed to grant individual US citizens and non-nationals the right to sue an individual for torture committed outside the USA, thus establishing a cause of action for extreme human rights violations in cases in which the Alien Tort Statute could not be used (Stephens 2014: 1488–9). On the other hand, the Alien Tort Statute transposed human rights norms from American society, where their authority was limited, into extra-territorial settings, where they were flagrantly denied. Applied to corporations, most notably, this statute subjected private bodies to international law, and it conferred a distinct legal personality, with attendant duties, on economic organizations. Single acts of litigation thus acquired a double constituent standing, and they imposed de facto constitutional norms on a range of different societies, and on a range of different actors, without clear extra-legal mandate. Extra-territorial litigation has also assumed semi-constituent authority in UK courts, notably in *Lubbe v Cape* (2000). In these cases, litigation has quite broadly assumed powerful transnational constituent force.

As a result of such cases, litigation over human rights is now emerging as the premise for a multi-dimensional transnational normative

<sup>59</sup> *Doe v Unocal*, 395 F3d 932 (9th Cir. 2002).

structure, which reaches into spheres of social interaction previously outside the domain of national constitutional law. At the centre of this is an expansion of legal personality, through which many actors in different locations are bound by laws with higher normative force. In the growth of transnational litigation, notably, legal personality has been increasingly constructed through reference to human rights, and relevance for human rights norms is established as a principle for attributing legal personality to a given organization. In particular, this indicates that firms and corporate bodies are constitutionally bound not to violate the rights of singular actors, especially outside their home jurisdiction, and they can be subject to international or extra-territorial proceedings in cases of such violation. To be sure, this is a highly disputed field, and it is widely and justifiably argued that originally private subjects, such as corporations, whose activities impact extensively on large populations in multiple settings, are still very weakly accountable under law (Stephens 2002: 48; Kanalan 2015: 214–15). Nonetheless, in different ways, the centring of global order around singular rights has – however tentatively – begun to produce a normative diction, which brings even non-classical subjects under the sway of transnational constitutional obligations. In this respect, rights-based litigation has clearly acquired a constituent role, and rights expressed through litigation project high-ranking norms, able to traverse previously separate jurisdictions. In particular, such litigation has constructed a normative order which, however tentatively, applies like obligations to public bodies (states and agencies) and to private bodies (corporations).

Rights-based litigation has also begun to perform a constituent role in the regulation of modes of social exchange that are intrinsically and irreducibly transnational, which cannot be subject to public-legal order in any one national society. As, diversely, Moritz Renner (2011: 171), Lars Viellechner (2013: 263) and Ibrahim Kanalan (2015: 277) have explained, one example of this is internet regulation, in which informal codes, applied by dispute settlement bodies, are utilized as the basis for regulating conflicts over internet space. In some examples, international administrative panels have deployed international human rights law to construct law for the internet, thus consolidating basic human rights as transnational norms between private parties.<sup>60</sup> In other examples, litigants have brought cases to national courts regarding

<sup>60</sup> See WIPO Arbitration and Mediation Center, *Fundación Calvin Ayre v. Erik Deutsch*, Case D2007–1947.

interests affected by actions in the internet, perpetrated by actors situated extra-territorially, and national courts have referred to international rights treaties to authorize jurisdiction and judgment. This is exemplified by the Australian High Court ruling in *Dow Jones & Co v Gutnick* (2002), in which human rights agreements were considered as instruments for providing a common standard for transnational disputes regarding the potentially defamatory content of internet sites. Self-evidently, this is still a tentatively emergent area of legal practice. However, in such examples, private litigation seems likely to generate a normative order for extra-national interactions, which have to date been weakly regulated by particular states. The possibility that single acts of litigation will produce constitutional norms for the internet is high, and, in such spheres, litigation often stands in for more classical patterns of constituent agency as a source of binding norm formation.

Across a range of settings, therefore, litigation is increasingly a potential source of constitutional formation, and even a source of constituent power, providing a basic legal structure for society as a whole. The activation of constituent power through litigation mainly occurs through the transplantation of international norms into domestic settings. But it also occurs through the constructive transformation of international norms to regulate transnational phenomena. In each respect, global society increasingly authorizes legislation on autonomous inclusionary foundations, and it gives validity to legal acts, reaching improbably across functions and territories, on highly constructed, inner-legal foundations. In each respect, laws concerning emergent phenomena are primarily distilled from provisions regarding human rights, and the inclusionary structure to support such laws is spontaneously produced within a stratum of transnational rights. In such cases, human rights make it possible for a society to produce political authority for decisions as it is confronted with new, precarious objects for regulation, where reliance on classical sources of public-legal validity is improbable. Transnational rights thus assume a key constitutional role as sources of inclusionary structure for society's political functions.

## ii Proportionality

The emergence of an *auto-constituent* inclusionary structure in contemporary society can also be identified in the recent global rise of *proportionality* as a basis for legal ruling, norm setting and public supervision. Evidently, proportionality is a principle of jurisprudence which judges use to resolve legal disputes in which there occurs a conflict between

two rights claims or two rival interests, and especially in which there occurs a conflict between the rights claim of a single person and a state act or state interest (Harbo 2010: 158). In such cases, proportionality is used to adjudicate whether an individual state action that encroaches on legally protected rights is substantially justified by some proportionately valuable benefit that arises from this action, and, as they use this standard, it allows courts constitutionally to measure and determine the legitimacy of public acts, typically in the executive branch. As a result, proportionality alters the classical separation of powers in favour of courts, and it permits courts substantively to evaluate the content of laws and administrative decisions, and effectively to project constitutional objectives for other departments of government. In applying proportionality, courts flexibly apply rights as shadow legislators, using rights-based criteria to measure the adequacy of single government acts to their particular purpose, and conferring legitimacy on these acts as they take effect, and as their implications become clear, through society as a whole.

Moreover, proportionality is closely linked to the rise of international human rights law, and to the broadening penetration of international norms more generally. In most cases, proportionality became widespread in domestic law as national states were integrated in a supranational legal order, and it has commonly been used to assess acts of national institutions in relation to international instruments. Accordingly, most major international human rights instruments contain provisions, or at least make allowance, for use of proportionality in application of international norms, and they permit national institutions to limit, or even derogate from, supranational norms where a proportionately valuable benefit is obtained. This is exemplified, in particular, by Arts 8–11 ECHR. In applying proportionality, therefore, national courts usually engage in dialogue, either implicit or express, with other courts, both national and supranational, and they produce norms, partly with legislative or even constitutional effect, as part of a transnational conversation about the interpretation and enforcement of transnational rights obligations (Cohen-Eliya and Porat 2013: 135). In this respect, proportionality promotes a constant alignment of national jurisprudence to transnational judicial norms, and it adjusts the acts of national political bodies to norms underlying the global legal system in its entirety. The use of proportionality means that internationally declared rights are consolidated as constantly co-implied elements of the transnational legislative landscape, and all public acts, at all

societal levels, are placed, by courts, in a constitutive relation to transnational rights. This originally became prominent in national societies, whose openness to international law was a point of symbolic legitimational commitment, such as post-1949 West Germany. This became most emphatic in the Canadian case, *Slaight communications incv. Davidson* (1989), where the Supreme Court implied that use of proportionality should be used to harden the standing of international human rights law in domestic law. However, proportionality also brought an influx of international norms in jurisdictions, such as the UK,<sup>61</sup> that were historically closed to international law and hostile to proportionality. This is also the case in societies, such as Russia, in which judicial independence from executive institutions was historically curtailed.<sup>62</sup>

The auto-constituent force of proportionality is most clearly visible within the political systems of national societies. Where a national state absorbs proportionality as a principle for ruling on the legality of public acts, the political system is subject to particularly intense constitutional organization. Where proportionality is applied, each act of government is constitutionally controlled by transnational norms, and judicial actors actively constitute domestic law as part of a transnational constitution. Insofar as they assess the proportionality of laws and administrative acts, moreover, judges acquire a vital *sociological* function as agents that observe and normatively assess the impact of public acts through society, and they assess the constitutional acceptability of laws, not only as they are passed but as they penetrate different spheres of social life. Leading figures in the judicial system thus impose a deep constitutional grammar on the national political system, and they ensure that transnational norms (human rights) reach deep into national society, shaping legislation at all stages of its societal application. In this respect, judges, interpreting transnational rights norms, form a mobile constituent power in the state, projecting inner-legal norms to cover, recursively, all political functions, at all societal levels.

<sup>61</sup> See as leading case *R v Secretary of State for the Home Department, Ex p Daly*, [2001] UKHL 26 (23 May 2001). See also the claim in *Huang v Secretary of State for the Home Department; Kashmiri v Secretary of State for the Home Department* – [2007] 4 All ER 15 that classical British public law had failed to provide ‘adequate protection of convention rights’ (Bingham LJ). In *Wilson v First County Trust* 4 All ER 97 (Rodger LJ), it was stated that international human rights (the ECHR), mediated through HRA (1998), had unique position in UK law, acting as a ‘catalyst across the board’ for all acts of legislation, and so allowing courts to assume unprecedented authority in shaping legislative acts.

<sup>62</sup> Proportionality was used in Russia from the mid-1990s onwards.

The constitutional role of proportionality is usually evident in the fact that it elevates the position of *already constituted* rights in the political system. For instance, in the path-breaking Canadian case, *R v Oakes* (1982), the Supreme Court placed a strict three-step proportionality test on legislative interference with personal rights, ultimately finding Canadian narcotics legislation unconstitutional on proportionality grounds.<sup>63</sup> The court interpreted the commitment to a free and democratic society in the *Charter of Rights and Freedoms* in the *Constitution Act* (1982) as a basic norm for checking public regulation and for restricting legislative power. In this case, the Canadian judiciary was able to apply proportionality to define foundational norms for the entire polity, tying the legitimacy of law to a simple rights-based test, to which all public acts could be subject.

In parallel to such cases, however, proportionality at times assumes quite genuine *constituent* force, creating entirely new rights for a particular polity, and it establishes a fundamentally new structure for the political system. In the UK, for example, the increasing use of proportionality, intensifying classical patterns of judicial review, has been instrumental in re-defining the historically accepted system of political constitutionalism. Until the 1990s, it was openly (although not unanimously) declared that proportionality was likely to upset the classical relation among parliament, executive and judiciary in the UK, and it could have no place in English law.<sup>64</sup> Since then, however, proportionality has been integral to the gradual formation of a constitution in the UK, in which certain primary laws (rights) are hardened against the will of parliamentary majorities, and human rights are defined as binding norms to accompany all public acts, from the high executive down to local planning bodies.<sup>65</sup> In the UK, most notably, proportionality became a strong normative foundation for the courts' powers of judicial review, which had traditionally been exercised, to a large extent, as simple common-law powers. Significant impetus for the recognition of proportionality was provided by the ECtHR, in *Smith and Grady v UK* (1999), stating that the accepted criterion of reasonableness used for review of public acts in the UK was not an effective remedy under

<sup>63</sup> *R v Oakes* [1986] 1 S.C.R. 103.

<sup>64</sup> *Brind and others v Secretary of State for the Home Department* – [1991] 1 All ER 720. In this case, it was stated that there was 'at present no basis upon which the proportionality doctrine applied by the European Court can be followed by the courts of this country' (Ackner LJ).

<sup>65</sup> See, for example, *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

Art 13 ECHR, as it did not allow judges to raise substantial questions about public administration. The ECtHR thus came close to prescribing proportionality as a necessary constitutional norm for the UK.<sup>66</sup> In consequence, in *Alconbury* (2001), it was argued in the House of Lords that access to review on grounds of proportionality was a distinctive precondition for the legitimacy of public functions.<sup>67</sup> Ultimately, although the authority of proportionality reasoning remained contested, the presumption grew in UK public law that judges had a duty to apply proportionality to public acts with implications for human rights. This meant, in effect, that judges were bound by a ‘requirement of proportionality’ in cases in which important rights were affected.<sup>68</sup> Proportionality thus assumed clearly constituent force within the political system, and it moved the entire political system towards a judicial-constitutional model, in which the right to rights-based judicial control of public acts became a primary pillar of law’s authority (see Cane 2011: 99). Indeed, UK judges openly ascribed to themselves the duty to make a ‘sociological assessment’ of the impact of administrative acts and to ensure accordance of such acts with higher rights norms.<sup>69</sup>

This auto-constituent force of proportionality is visible, second, in national societies more widely. In many respects, proportionality imposes a deep, self-constituent order on society as a whole. Where a legal system is centred on proportionality principles, society as a whole becomes subject to human rights adjudication, and rights provide a pervasive normative diction in which social phenomena are legally constructed and regulated. One reason for this is simply that private acts are subject to deeper constitutional control, and their impact is more fully evaluated, often against standards of public interest.<sup>70</sup> Most importantly, however, where proportionality becomes a powerful legal principle, the volume of interactions in society subject to constitutional law expands, and, often, interactions across all society, including those between private parties and private organizations, are subject to a constitutional grammar. As a result, the regulatory power of the political

<sup>66</sup> Subsequently it was accepted ‘that the court’s approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting’: *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* – [2006] UKHL 15 (Bingham LJ).

<sup>67</sup> *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions and other cases* – [2001] All ER (D) 116 (May).

<sup>68</sup> *Pham v Secretary of State for the Home Department* [2015] UKSC 19 (Reed).

<sup>69</sup> *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40 142 (Hobhouse LJ).

<sup>70</sup> See use of public interest criteria in proportionality reasoning in *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22 (Hoffmann LJ).

system reaches more deeply into society, and rights provide a constitutional structure in which phenomena in many parts of society are subject to direct political inclusion.

Famous examples of this are the landmark rulings regarding the third-party effect of human rights in the West German Constitutional Court, in which spheres of exchange classically pertaining to private law were subject to constitutional norms.<sup>71</sup> The growth of proportionality was reflected, among other cases, in the public-law case, the *Apotheken-Urteil* (1958), which dictated that restrictions of professional freedom were bound by principles of proportionality.<sup>72</sup> In the same year, however, the court decided in *Lüth* that all cases with implications for basic rights were subject to constitutional jurisprudence, and the court could apply proportionality to such cases. In the FRG, ultimately, proportionality was widely extended to cover interactions located formally in the sphere of private law, and it established the norm that all legally regulated relations were defined by an obligation to recognize higher-order basic rights. Proportionality thus imprinted a deeply pervasive constitutional grammar on society as a whole.

Similar, de facto constituent applications of proportionality are evident in other states. One striking example is Chile, where judges have used proportionality, quite creatively, to impose higher norms across all parts of society. In *Contra Corbalán Castilla y otros* (2013), the Supreme Court ruled that all persons exercising public functions are bound by international human rights treaties, and, for proportionality reasons, civil law is also subject to international law wherever it raises questions with human rights implications.<sup>73</sup> In 2010, the Constitutional Court ruled that in some matters with implications for public welfare, notably health-care provision, private contracts have a public-legal status, and they are regulated by principles of constitutional law.<sup>74</sup> Accordingly, alterations to contracts between notionally private parties in such areas are subject to principles of proportionality. In essence, arguably, such cases mean that proportionality considerations have been used to transform cases heard under civil law into cases with constitutional dimensions, and proportionality extracts some social exchanges from private law and places them in the domain of public law. Indeed, in Chile,

<sup>71</sup> See comment in Kumm (2006: 346).

<sup>72</sup> West German Constitutional Court, BVerfGE 7, 377 – *Apotheken-Urteil* 442.

<sup>73</sup> My thanks are due to Rodrigo Cespedes for discussion of this point. This interpretation is rather controversial. Usual caveats apply.

<sup>74</sup> Chilean Constitutional Court, Rol 1710/2010.

where many service providers were privatized under Pinochet's dictatorship, proportionality has clearly been applied to regulate private bodies, to offset the general primacy of private law and to impose a rights-based constitution on exchanges removed from state control through privatization. Similar cases have become evident in Russia, notably in reference to insurance companies; this also promotes the judicial re-constitutionalization of a recently privatized society.<sup>75</sup> In each example, proportionality spontaneously imposes a deep constitutional structure on society, and it draws society more consistently into a national system of constitutional inclusion, ordered under principles of public law.

As an extension of this, in many cases, proportionality has also gained importance in relation to emergent regulatory fields, and it often projects an inclusionary structure in which legal phenomena can be regulated, which are not easily controlled through existing patterns of public law. Historically, legal systems began to utilize proportionality as a measure of validity for public acts under circumstances in which public authority was undergoing rapid expansion, where government was required to penetrate more intensely and diffusely into a given society and where the inclusionary burdens directed towards administrative agencies increased accordingly. Typically, this occurred where new regulatory functions were accorded to the political system, and where the political system was forced to encounter single social agents in an increasingly broad range of social settings.<sup>76</sup> In such cases, the principle of proportionality enabled the political system to promote simple, flexible criteria to check and control its functions. This meant that, even where it penetrated new societal terrains, the political system could project a normative code to explain and control its societal interactions and to adapt to new demands for regulation (see Sullivan and Frase 2008: 3).

In contemporary society, this original function of proportionality is often reproduced, as proportionality is now commonly applied in settings where the political system is expected to generate legislation for complex, contingent phenomena, typically those with a transnational

<sup>75</sup> Russian Supreme Court, No. 32-KG14–17 (2015).

<sup>76</sup> The concept of proportionality was first developed, tentatively, in the first Prussian Civil Code (*Allgemeines Landrecht*, 1794), whose enactment was intended to regulate the growing range of functions performed by the Prussian state. This concept then gained wider purchase through the growth of the Prussian administrative state in the later nineteenth century, notably in judgments of the Prussian administrative court (1880 and 1882) regarding limits of police action. In the UK, the first (albeit very basic) test of proportionality – the *Wednesbury* reasonableness test – coincided with the expansion of welfare regulation after 1945.

dimension. In such contexts, proportionality constructs authority for legal acts in uncertain regulatory domains, where there is a lack of systemic experience and authority in law making. One obvious example of this is contemporary employment law. In this field, proportionality provides a normative framework in which new social phenomena, such as the use of the internet at work and resultant questions of privacy and intrusion, can be reliably regulated (see Oliver 2002: 351). Similar examples are observable in disputes regarding intellectual property. In both national and supranational courts, proportionality is applied to regulate disputes over the blocking of internet sites by connectivity providers, which violates copyright and intellectual property laws. In such cases, verdicts have been reached through balancing of considerations regarding freedom of information and concerns regarding protection of intellectual property (see Savola 2014: 128).<sup>77</sup> Similar cases are also found in disputes regarding data protection. In such cases, rights of privacy and rights of freedom of information have been balanced through proportionality to define a basic constitutional grammar for internet regulation.<sup>78</sup> Indeed, in such examples, proportionality has meant that private internet regulators (access providers) are subject to constitutional norms, and it performs constitutional functions for the internet qua transnational function system. Generally, therefore, proportionality translates new social phenomena into an authoritative constitutional coding. It allows the political system (both national and global) to expand its reach into society, often in normatively insecure transnational domains, without reliance on express political decisions. In each respect, proportionality spontaneously creates an underlying structure for the political system, and it greatly simplifies otherwise precarious acts of legal inclusion.

In these different ways, proportionality can be seen as a mode of norm production, in which human rights serve, at a high level of inner-legal abstraction, to construct an inner-legal inclusionary structure for the political exchanges of society. At first glance, of course, the spread of proportionality might appear to restrict the decision-making autonomy of the political system. Indeed, proportionality is often seen as reinforcing general defensive rights against political encroachment (Rivers

<sup>77</sup> See, for example, the ECJ ruling in *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* [2014]. Reference for a preliminary ruling: Oberster Gerichtshof – Austria. See also the UK High Court ruling in *EMI Records Ltd & Ors v. British Sky Broadcasting Ltd & Ors* [2013] EWHC 379 (Ch).

<sup>78</sup> See recent ECJ cases: Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* (9 November 2010).

2006: 176; Kumm 2006: 349). To an increasing degree, however, proportionality expands the basic authority and penetration of the political system through society, both nationally and globally. Indeed, proportionality imprints a deep structure of political inclusion on all society. Through proportionality, overall, society's political system obtains an internal perspective through which it can observe itself and construct an internal standard to calibrate its reactions to new regulatory demands, thus projecting an inner form to orient its actions and authorize extensions of its inclusionary functions. In addition, the rise of proportionality imposes a constitutional order on phenomena at different locations across society, both public and private, and the fact that these phenomena are perceived in terms of their *intrinsic relevance for rights* means that they can be rapidly subject to authoritative regulation. Both in public and in private law, proportionality acts as a medium for society's internal constitutional formation, and it allows society as a whole to presuppose an internal formal rationality, through which it can support complex acts of regulation and legislation, even where the political system is exposed to very unpredictable exchanges. Through proportionality, in effect, principles of public law are imprinted on all social phenomena, and all social phenomena, constructed as having relevance for rights, can be subject to easily extensible legal regulation, on authoritative foundations. As in other cases, this allows the political system (both nationally and globally) recursively to *constitutionalize itself*, as its reach into society is extended, and it plays a core role in thickening an inclusionary structure for the hyper-complex political reality of contemporary society. The fact that proportionality allows all social objects to be observed as *relevant for rights* effectively means that society can easily generate and internally project new inclusionary structures for even the most diverse and unpredictable social phenomena.

### iii Rights and new legislative actors

The rise of an *auto-constituent* inclusionary structure is also evident in the fact, as mentioned above, that in contemporary society many agents and organizations are able to assume some degree of legal personality, and certain rights and obligations, under international law. One account of the transformation of legal personality in fact enumerates, alongside states and individuals, inter-governmental organizations, insurgent groups, corporations, and even businesses as potential subjects of transnational constitutional law, bearing both

legal rights and resultant legal obligations (Clapham 2006: 30, 270). Either formally or de facto, in consequence, many agents are in a position to influence, or even to participate in, transnational law making, and many different actors exercise powers with constitutional implications, both nationally and internationally.

This phenomenon is most manifest in the increasing presumption that the individual person is a subject of international law. As discussed earlier, in most post-1945 societies individual persons have been able to obtain some recourse, however partial and limited, to international judicial fora. With some reasonable hope of remedy, single persons are normally able to appeal political acts of their own states, or private acts of other citizens, on established grounds of international law. More importantly, the domestic judiciaries of national states are responsible for applying rights-based international norms in national courts, and they often enforce singular human rights norms, against executives, to protect individual claimants. On this basis, the singular person, constructed in generic form as a rights holder, has evolved as an effective source of primary norms. The claims of individual applicants and litigants, whether brought to national or to international courts, are able to produce laws which run against the original intentions of national state organs, to subject these organs to constitutional constraint, and, in some cases, to create primary norms for all members of a national society (see Peters 2014: 479).

A similar phenomenon is observable in the case of organizations, especially those that cross the regional boundaries between state jurisdictions, and which operate at uncertain points between the public and the private domain. This applies most obviously to NGOs. NGOs now widely act as important norm providers, at least in matters related to their designated sphere of concern. Although lacking any obvious political mandate, NGOs, normally campaigning on human-rights grounds, widely act as legislative or even constituent actors in given policy areas, and they articulate norms with far-reaching effect for public and private bodies within and across the geographical divisions between national polities.

The emergence of NGOs as bodies with legislative, or even quasi-constituent, force became visible first, after 1945, in the international domain. At this time, NGOs acquired important functions in inter-governmental organizations, especially in the UN General Assembly, in regional human rights bodies and in international courts,

most of which were porous to NGO activities.<sup>79</sup> For example, some post-1945 human rights treaties authorized non-state organizations, to petition international courts, and some accorded them a direct role in international norm setting. Notably, Art 71 of the UN Charter first gave recognition to the role of NGOs, and it assigned to them consultative functions with respect to the Economic and Social Council. A Committee on Non-Governmental Organizations was founded as a standing committee of ECOSOC in 1946, and its terms of reference were formally set out in ECOSOC Resolution 288B(X) (1950). In 1968, ECOSOC Resolution 1296 strengthened the consultative functions of some NGOs in the UN. By 1970, ECOSOC Resolution 1503 was adopted, which authorized the Human Rights Commission of the UN to take complaints from non-governmental sources (Tardu 1980: 568; Rodley 2012: 322). This was more fully formalized in the ECOSOC Statute of 1996 on 'Arrangements for Consultation with Non-Governmental Organisations'.<sup>80</sup> In the Declaration on Human Rights Defenders (1999), the UN then made more comprehensive provisions regarding the role of NGOs in international human rights protection. In Europe, Art 25 ECHR restrictively allowed NGOs to submit applications to the European Commission of Human Rights. Later, revised Art 34 ECHR also ascribed standing and personality to NGOs close to that of entities with primary personalities under international law (states). Moreover, from the outset, NGOs obtained high standing in the Council of Europe, and they played an important role in drafting legal instruments (see Wassenberg 2013). Similarly, under Art 44 of the ACHR, NGOs were entitled to lodge petitions with the Inter-American Commission. Art 45 of ACHPR allows NGOs to file human rights complaints (Hobe 1999: 164; Charnovitz 2006: 353). In addition, in some regional systems, involvement of NGOs in international law-making procedures has been intensified through the practice of allowing NGOs to act as friends-to-the-court. By the 1980s, the ECtHR formally allowed NGOs to submit amicus curiae briefs. The ICJ remains closed to NGO involvement, but it has allowed amicus curiae briefs of NGOs to be made public during trial proceedings (Charnovitz 2006: 353). Extensive amicus curiae practice exists before IACtHR, which can receive amicus curiae briefs submitted *proprio motu* (Shelton

<sup>79</sup> For accounts in agreement see Gunning (1991: 230), Gaer (1995: 402), Koh (1999: 1412), Boyle and Chinkin (2007: 77) and Shany (2009: 79). For details, see Spiro (1995: 48; 2000: 572).

<sup>80</sup> [http://www.un.org/esa/coordination/ngo/Resolution\\_1996\\_31/Part.1.htm](http://www.un.org/esa/coordination/ngo/Resolution_1996_31/Part.1.htm).

2004: 638). The provision of *amicus curiae* briefs is a particularly generalized judicial or even quasi-legislative function of NGOs, and it allows NGOs to sidestep restrictions on the categories of legal person acting as party to cases (Wellens 2002: 112; Shelton 2004: 612).

The standing of NGOs under international law is, of course, contested (see Martens 2003: 19, 23). In some delineated spheres, however, NGOs have attained a position which in some respects mirrors that of primary international organizations and even states, and they routinely participate in a range of legislative acts.<sup>81</sup> NGOs widely provide information for and shape the decisions of UN bodies and other international organizations (Gaer 1995: 402; Spiro 1995: 46), and they impact decisively on law making, both in the form of domestic law and in the form of multi-national treaties (Stephan 2011: 1575). Above all, this position of NGOs is determined by human rights: the fact that many NGOs explain their functions as related to rights has provided the foundation for their integration in the broader political system of global society, and they have been able to use rights as a vocabulary to explain, authorize and even constitutionalize their functions within this system.

Vitaly, first, the fact that NGOs often concentrate their functions around human rights questions means that they can be constructed as having legal personality, and they can interact formally with courts situated at different levels in global society – i.e. with national and international courts. This rights-based accountability of NGOs means that they can assume a fluidly integrated, yet legally ordered position in law-making procedures at different junctures in the global political system (Benvenisti and Downs 2009: 69; Scott and Sturm 2006: 576). Moreover, second, the fact that they refer to rights means that they can translate the questions which they address into a constitutional vocabulary, which can be presented to and acquire legislative force through international organizations. This can occur as NGOs supply information to international institutions. However, it can also occur through the activities of NGOs in grass-roots mobilization against public bodies in different states, especially in oppressive regimes, in which domestic organizations interlock with international groups to create (at least) hard normative pressures on government organs (see Sikkink 1993: 423–5). In such cases, NGOs extract from human rights

<sup>81</sup> See the outstanding analysis in Hobe (1999: 162, 171). See also Charnovitz (1997: 270) and Nowrot (1999: 631).

law the authority to set normative standards, which, under some circumstances, can assume near-obligatory status for public actors, both nationally and internationally.<sup>82</sup> In this respect, human rights underpin a process in which NGOs, originally private associations, are literally *transformed* into publicly constituted and even effectively constituent actors. In fact, in some national societies, NGOs are often able to obtain a distinctively public structure-building role. In some contexts, NGOs have been invited to participate directly in constitution-making processes, and they have subsequently exerted powerful influence in constitutional practice.<sup>83</sup> In other contexts, especially where formal governance is weak, NGOs act as bodies able to provide legislative and regulatory functions where governments, for whatever reason, are not structurally equipped to do so. The fact that NGOs assume accountability for human rights protection means that they can easily assume quasi-public functions of governance and legislation, and they legitimize such functions inwardly, in national societies, and outwardly, towards international actors.<sup>84</sup>

The constituent power of NGOs is clearly visible in their ability to promote norms for national states and public authorities in national states. However, this power is especially pronounced in the interactions between NGOs and other actors, such as transnational corporations, whose authority is not easily regulated by national states, and not easily captured under formal international instruments (Joseph 2004: 6). In such interactions, NGOs are able to construct a regulatory order in domains that are beyond the reach of most official norm providers, and they distil constitutional norms for the transnational dimensions of society. For examples, NGOs have played a prominent role in the monitoring of powerful transnational private actors, especially large-scale international firms, and for imposing legal, rights-based constraints on such bodies across national boundaries (Ratner 2001: 533). This has been partly accomplished by the use of pressure tactics – for example, through public shaming. But it has also been partly effected through extra-territorial litigation against companies with transnational operations.<sup>85</sup> An illuminating example is *Khulumani*

<sup>82</sup> For details see Spiro (1995: 48; 2000: 572). On this general point, see Gunning (1991: 230).

<sup>83</sup> In Bolivia, NGOs were involved in the process that created the 2009 Constitution. In Colombia, NGOs shaped the judicial elaboration of a block of constitutionality.

<sup>84</sup> Note in this light the claim that: 'Most NGOs probably exist to influence, to set direction for, or to maintain functions of governance or to operate where government authority does not' (Gordenker and Weiss 1995: 546).

<sup>85</sup> See above p. 392.

v. *Barclay National Bank Ltd* (decided 2007), in which a South African NGO (albeit ultimately without success) sued transnational corporations under the Alien Tort Statute before a Circuit Court in New York for complicity in human rights abuses under the apartheid regime. A still more illuminating example is the case brought before the African Commission, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria* (2001), in which two NGOs successfully filed suit against the Nigerian Government and Shell Corporation.

Alongside NGOs, in fact, similar patterns of auto-constituent legal agency are now commonly assumed by other associational groups. For example, it is widely observed that advocacy networks have particular success in producing solid norms, both for public actors and for private bodies, located both in the national and in the transnational arena.<sup>86</sup> Social movements can also claim a position with a certain analogy to that of a constituent power in the transnational arena, and they widely use international human rights norms to articulate legally formative influence around single national issues.<sup>87</sup> To some degree, moreover, corporations and private companies themselves can assume the role of transnational constituent subjects. Corporations with cross-national functions clearly possess a distinct, albeit sui-generis international legal personality. In some cases, manifestly, corporations have material resources substantially exceeding those of many states. As a result, they are capable, and widely guilty, of violating the primary laws of the societies in which they operate, and even of suspending national laws or enforcing external legal norms, especially regarding trade regulation, in the national societies in which their activities are conducted. Moreover, as formally non-public bodies, corporations can easily evade criminal liability, and they are often beneficiaries of governmental acquiescence in malfeasance, especially in national societies with high levels of public corruption or external dependency.<sup>88</sup> In many cases, therefore, transnational corporations act in negation of international and constitutional law. At the same time, however, corporations are capable, potentially, of solidifying a normative structure to regulate their operations, and they are able to promote potent norms to control

<sup>86</sup> See pp. 352, 390, 392 above.

<sup>87</sup> See the unusual account of this in Bailey and Mattei (2013).

<sup>88</sup> See the cases of extreme violation alleged in the US Supreme Court in *Kiobel* (2013), in which Royal Dutch Shell, it was suggested, aided and abetted the Nigerian military in the 1990s. For comment see Joseph (2004: 2, 18).

the actions both of their own representatives and of other actors within and across the boundaries between national societies – at least in designated functional spheres. There is of course no formal or constitutional system of self-regulation for corporations. UN bodies first began to promote binding standards for transnational corporations in the 1970s, and a UN sub-commission promulgated draft norms in 2003.<sup>89</sup> These norms were not accepted by the UN Human Rights Commission and a softer set of framework principles was later approved in 2011.<sup>90</sup> However, multinational corporations have shown some signs of willingness to signal compliance with, and even to consolidate, international legal standards (see Nowrot 2006: 500, 596). This is perhaps mainly attributable to the fact that such normative compliance brings symbolic capital to the corporations in question. In some cases, however, corporations have agreed regulatory frameworks to shape the decisions of large-scale economic organizations, and even to impose normative pressure on national public actors, including states. One example of this is the decision of the Norwegian Government Pension Fund and Danske Bank, the biggest Danish Bank, which decided in January 2014 to divest from Israeli banks for their involvement in building activities in illegal Israeli settlements.<sup>91</sup> This can be seen as an act of corporate constitutional foundation, reaching well beyond the corporate sphere, placing potential constraints both on state agencies and other corporations.

In each of these dimensions, contemporary society is evolving a political system marked by intensified multi-centricity, in which many actors perform functions of legislation and inclusion, and which, in its different dimensions, is capable of constructing norms and promoting regulatory actions in highly contingent fashion. At the same time, however, the political system of contemporary society is able to resist conclusive fragmentation in its acts of normative inclusion, and it is able to rely on symbolically extracted human rights norms to organize, and preserve

<sup>89</sup> See Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12 (2003). See also Ruggie (2007: 820).

<sup>90</sup> See Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (2011): [www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf](http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf)

<sup>91</sup> The Norwegian decision was made pursuant to a recommendation of the Council on Ethics to the Norwegian Ministry of Finance, 1 November 2013, which analyzed Article 49 of the Fourth Geneva Convention and referred to findings of the ICJ in the Wall Opinion, the UN Security Council and the ICRC, see [www.regjeringen.no/pages/1930865/Africa\\_Israel\\_nov\\_2013.pdf](http://www.regjeringen.no/pages/1930865/Africa_Israel_nov_2013.pdf). A Dutch Pension Firm, PGGM, had divested for similar reasons, in so doing also referring to the ICJ Wall Opinion. I am grateful to Jean d'Aspremont for this information.

uniformity within, its legislative functions. Transnational human rights form a basic inclusionary structure for the political system of contemporary society, especially in those dimensions focused on transnational phenomena. This structure enables many actors to create primary legal norms, and it ensures that authoritative acts of legislation can be established in highly variable, spontaneous fashion. Yet, the fact that this structure is based in generally identifiable rights also means that acts of normative inclusion retain some consistency, and legal norms can be reproduced, with some predictability, across very different settings. Rights, thus, underpin modern law making as an increasingly hyper-contingent auto-constituent process, and they project a basic constitution from within which society can flexibly meet its increasingly decentred demands for legislation.

#### **iv Rights, private parties and the multiplication of constituent power**

The increasing standing of the single person as the normative focus of international law has meant that persons are perceived as holders of strict rights not only in relation to their national states but also with regard to one another. As a result, national states have assumed obligations regarding protection of rights, not only in relations between public authorities and single persons, but in horizontal interactions between persons in society. In numerous cases, international courts have expressed the principle that national states have responsibility to ensure that the rights of persons subject to their jurisdiction do not experience violation of inner-legal by other persons, thus implying that states have a *positive duty* to ensure that all persons are secure in their rights, and that states are bound to recognize and preserve interpersonal, horizontal rights.<sup>92</sup> In this respect, too, the organization of law around rights has changed the constitutional structure of society, and it has established quite new sources of constituent power.

Important early examples of this can be found in rulings of the ECtHR. The ECHR was not first intended to apply directly to private interactions between persons. However, the Strasbourg court gradually developed a body of opinion to the effect that contracting states had clear positive obligations in the private domain. This principle was applied in *Airey v Ireland* (1979) to determine that states are accountable for private violations of rights, and for ensuring that rights between

<sup>92</sup> For analysis of these points, see Reinisch (2005: 79).

private parties are adequately protected. In *Marckx v Belgium* (1979), the ECtHR ruled that the responsibilities of states for protecting private life implied positive obligations: i.e. to legislate in order to protect rights in the private sphere (Cherednychenko (2006: 197–8). In *X and Y v the Netherlands* (1985), the ECtHR again ruled that states have a reasonable obligation to adopt ‘measures designed to secure respect for private life even in the sphere of relations of individuals between themselves’.<sup>93</sup> In this case, the ECtHR held that the Netherlands had failed to respect the private life of a mentally handicapped teenager who had been forced to have sexual intercourse with the son-in-law of the governor of the home in which she was a resident. Non-observance by a state of its duty to protect lateral rights of citizens was again taken to imply that the state had failed in its responsibility in *Costello-Roberts v UK* (1993) (Fredman 2008: 59). Analogous tendencies also appear in rulings given by the Human Rights Committee of the UN. In *Delgado Páez v Colombia* (1990), the Committee found Colombia in violation of the right to personal security (guaranteed in Art 9 ICCPR) because the respondent had not adequately protected the applicant against assault. One of the most notable cases in this category is *Velásquez Rodríguez* (1988), a case treating forced disappearances of political regime opponents in Honduras, which entailed the first exercise of contentious jurisdiction by the IACtHR. As well as emphatically extending the scope of individual rights against the state, the verdict in this case declared that state liability for breaches of human rights could be found for omission on the part of states to guarantee rights of individuals and for failure to take necessary steps, including ensuring appropriate domestic remedies, to reinstate persons in their rights.<sup>94</sup> The implications of this case had an abiding impact on the actions of the IACtHR. By 2006, in *Damião Ximenes Lopes*, the IACtHR, in its first ruling against Brazil, held that a state is in breach of convention rights if it does not provide adequate protection for persons suffering ill treatment, in private institutions, because of mental-health problems. Subsequently, the court monitored compliance with its rulings by seeking to extract data regarding standards of training for mental health professionals.

In these cases, the construction of individual rights as sources of legal authority has clearly positioned states within a vertical *external* constitution, so that they are obligated to international norms both in their

<sup>93</sup> ECtHR, *X and Y -v.- The Netherlands* [1985] 7.

<sup>94</sup> IACtHR, *Velásquez Rodríguez v. Honduras* (1988).

actions and in their omissions. Yet, this construction has also established an *internal* normative grammar, gaining effect inside national societies, which has extended constitutional law, both in origin and in application, into the private domain. As a result, the sphere of private exchange, traditionally defined by horizontal legal relations, is increasingly seen as having constitutional relevance, as giving rise to public-legal causes, and as acting as a source of new constitutional norms. In many societies, in fact, where their acts touch on human rights, private bodies are translated into repositories of publicly constituted authority, and relations between private agents become parts of society's constitutional order. In essence, where courts treat violations of human rights norms, courts themselves, acting as public bodies, have an obligation to apply constitutional norms to the subjects before them, and, in consequence, courts increasingly draw these interactions, and implicated bodies, into the constitutional domain. Through the implementation of human rights, therefore, courts have redrawn the boundaries between public and private activities, and they now construct a thickened constitutional structure for society, able to incorporate, and dictate higher-order legislation for, exchanges in all spheres of society.

Some of the most striking national cases of this auto-constituent extension of public power through human rights have occurred in the UK. The constituent role of human rights in the private domain has had particular importance in the UK both because of the UK's historical resistance to international human rights norms, and because the British courts had traditionally rejected clear distinctions between private law and public law.<sup>95</sup> The rising importance of rights as determinants of public law has fashioned new conceptions of public law and established distinctive principles for ascribing public-legal responsibility. In particular, however, the constituent role of rights has assumed significance in the UK because, in classical British public law, courts could only supervise public bodies on *ultra-vires* grounds, which meant that only institutions founded in statutory powers could be subject to judicial review: the construction of a body as public depended on its exercise of a power originally granted by parliament. The opening of the UK's legal order to formal human rights law, however, meant that courts were prepared to see traditionally private acts as impinging on rights protected under public law. In some cases, this led to a broadening of the grounds of judicial review, and it meant that a growing range of bodies, not only those

<sup>95</sup> See *Davy v Spelthorne Borough Council* [1984] AC 262, [1983] 3 All ER 278 (Wilberforce LJ).

exercising authority strictly conferred by parliament, were defined as public and were subject to constitutional constraint by courts.

The role of rights in reformulating the limits of UK constitutional law had already begun before the ECHR became domestically applicable (2000). As early as the mid-1980s, the definition of public-law authorities had widened, and some private agencies, at least insofar as they formed part of a broad governmental framework, were deemed amenable to judicial review, effectively as hybrid private/public bodies (Cane 2011: 16; 103).<sup>96</sup> The presumption was articulated at this time that public powers could be defined as such by virtue of their functions, and that any body or any organ could be subject to judicial review, and so classified as public, if it performed functions with a partially public dimension.<sup>97</sup> This extension of the concept of public authority was furthered through the reception of EU law, which, reflecting the emanation of the state of doctrine applied by the ECJ, created the presumption that rights could be claimed against any person or any organization acting as a provider of public services or discharging obligations of a public nature.<sup>98</sup> Ultimately, under the HRA, the range of actors in the UK that were imputed a public quality increased significantly, and the (never categorically pronounced) distinction between public and private bodies was reconfigured. In some cases, notably, acts with a traditionally private character, such as the termination of tenancies, were deemed to possess a public character insofar as they impacted on formal rights of affected parties.<sup>99</sup> In other cases, courts, under obligation to enact the ECHR, were prepared to observe unusual subjects, for example newspapers, as agencies subject to obligations under human rights law, performing functions with some public qualities and infringing rights which required protection under public law.<sup>100</sup> As a result of this, the concept of 'public' authority – as a category of legal imputation – was modified and extended.<sup>101</sup> In many respects, courts became primary arbiters in this question, and the construction of a body as distinctively *public*

<sup>96</sup> Important precursors of this can be found in Indian law. See especially *Shetty v. The International Airport Authority of India & Ors.*, [1979] 1 S.C.R. 1042.

<sup>97</sup> *R v Panel on Take-overs and Mergers, ex parte Datafin plc and another (Norton Opax plc and another intervening)* – [1987] 1 All ER 564.

<sup>98</sup> See consideration of this doctrine in *National Union of Teachers and others v Governing Body of St Mary's Church of England (Aided) Junior School and others* [1997] IRLR 242 CA.

<sup>99</sup> *R (Weaver) v London & Quadrant Housing Trust* [2009] EWCA Civ 587.

<sup>100</sup> *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22 (Hale LJ).

<sup>101</sup> *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another* – [2001] 3 All ER 393. Note though that this was overturned on appeal.

fell to courts: courts decided which private functions could be transformed into functions with constitutional significance, bound by rights-based constitutional norms (see Bamforth 1999: 160).<sup>102</sup> Overall, the volume of social exchanges subject to binding constitutional inclusion was greatly expanded, and human rights dictated increasingly consistent structures of public law to regulate different social spheres.

Other polities, however, are witnessing a far more fundamental transformation of the public/private distinction through the constitutionalization of the private sphere, dictated by human rights law. Particularly notable recent cases of this can be seen in Chile. Perhaps most importantly, since 2005, Chilean courts have adopted the unusual practice of applying international rights norms to cases falling under private law or tort; through this practice, cases with implications for basic rights have been subject directly to constitutional law, and proportionality has often been used to constitutionalize private relations.<sup>103</sup> In Russia, the Constitutional Court has used international human rights law to extend the range of actors subject to laws of public accountability, declaring that all legal persons, including private organizations, can be imputed public functions insofar as their actions have implications for the rights of parties affected by them.<sup>104</sup> In Colombia, courts have also extended the realm of public law deep into the realm of private law, and the generally decisive role of courts in national state building has been mirrored in constitutional rights guaranteed in the private sphere.<sup>105</sup> In Kenya, courts have reacted to public-interest cases by expanding concepts of public accountability: that is, by widening constructions of state authority,<sup>106</sup> and even, where indigenous rights are concerned, by introducing private claims such as claims over land rights into the category of public law.<sup>107</sup> In Bolivia, indigenous communities have been broadly constructed as constitutional subjects, bound to recognize principles of international law, because of their

<sup>102</sup> In *R (Weaver) v London & Quadrant Housing Trust* (2009), the court proposed a concept of 'hybrid authority' to capture functions, not of a classical public-law character, that are bound by human rights norms. On other occasions, the courts were less flexible in applying public-law remedies to contractual acts. See *YL v Birmingham City Council & Ors* [2007] UKHL 27 (20 June 2007).

<sup>103</sup> See rulings in *Laurie Sáez v San José School* (Appeal Court of Temuco, Rol nr 59/2011) and *González Norambuena v Arellano Stark* (Supreme Court Rol nr 4.723-07, 2008). See comment in Cespedes (2013).

<sup>104</sup> Russian Constitutional Court Decision on merits (*Postanovlenie*) No. 19-P of 18 July 2012.

<sup>105</sup> Colombian Constitutional Court, T-167/15.

<sup>106</sup> See, for example, the *Satrose Ayuma* case discussed above at p. 344.

<sup>107</sup> See *Ledidi Ole Tauta & Others v Attorney General & 2 others* [2015] eKLR.

capacity to dispense justice affecting human rights.<sup>108</sup> In each of these cases, internationally defined rights have greatly intensified the societal reach of national political systems. Mediated through national courts, human rights have, in many polities, constituted a deep structure of public law across all society, and the quantity of actors assuming strict accountability under public law has greatly increased.

In these different examples, a general tendency in the constitutional impact of transnational rights norms is becoming visible. To an increasing degree, the domestic absorption of international human rights law means that the public or constitutional quality of political power is defined, not through any specific inner feature or source of authority, but by the contagious effect of transnational rights. To this degree, the political order of contemporary society is internally constituted by rights, dictated and transmitted by courts, and more and more acts in society are bound by constitutional law produced in this way. Both nationally and outside nation states, society's political system is increasingly defined, or even constituted, as *that mass of exchanges in society which have relevance for rights*. As a result, transnational human rights law imposes a deepening inclusionary structure on society, through which many categorically diverse actors operate, and are held to account, as bodies exercising public, constitutionally defined authority for society as a whole, and the actions and decisions of an increasing quantity of subjects in society are determined and authorized by a strict inclusionary order (rights). This results in a contingent, deeply internalistic auto-constitutionalization of society, through which society's structure of public inclusion is extended to regulate an increasing number of social interactions, across its increasingly hybrid interfaces, beyond classical categories of private and public law. Through the fusion of national law and international human rights law, human rights acquire the power to roll out a system of public law into new spheres of society, whether national or international, and they extend the inclusionary reach of public law, horizontally, from within *the law itself*.<sup>109</sup> All society thus becomes subject to a process of self-constitutionalization. On one hand, this process limits the power of subjects bound by public law, and it

<sup>108</sup> See Bolivian Constitutional Court 0152/2015-S2.

<sup>109</sup> Note the distinction between this view of transnational constitutional law and the account proposed by Gunther Teubner. One of Teubner's claims (2012: 48) is that transnational constitutional law originates, not only from public law, but also from private law. While not disputing the fact that private law can now create constitutional norms, my claim is that we can currently observe a constant extension of the domain of public law, and that an ever-increasing quantity of social exchanges is translated into the grammar of constitutional law.

imposes a strict order of human rights obligations on a growing number of actors. On the other hand, this process dramatically increases society's capacity for producing and authorizing law. It constructs a political order which can produce authoritative law for new phenomena at a high degree, simultaneously, of spontaneity and inner consistency.

## CONCLUSION

Contemporary society is increasingly defined by the fact that its political system, both nationally and transnationally, constitutes itself directly through human rights, which are identified with single persons in society. This reflects a deep convergence between the legal system and the political system of contemporary society. This process of self-constitution can be observed in both dimensions of the global legal/political system, in its national and its extra-national locations. Human rights now form a general transnational inclusionary structure in society, and they are articulated, in many practices and by many actors, as principles to give contingent authority to legislation, and pre-emptively to incorporate new phenomena in the system of legal/political inclusion. Rights instil a deep auto-constituent logic in society and its political system(s), and to an increasing degree, most social exchanges generate a constitutional order for their regulation from within themselves, insofar as they refer to rights norms. As discussed in earlier chapters, the inclusionary structure of the modern political system was built through the inclusion of the people through different strata of rights, so that the people became present in the political system and its legislative acts through the inclusionary medium of rights – first, through private and monetary or economic rights; second, through political rights; third, through socio-material rights. These tiers of rights were ultimately stabilized under a fourth stratum of international human rights. Increasingly, however, contemporary society has severed its inclusionary structure from the people. The capacity of the political system to legitimate legislation, as it is exposed to highly complex demands for legislation, depends on an order of *transnational rights*, which permits the political system of global society to perform acts of legal and political inclusion at a rapidly rising level of abstraction and autonomy. Through this process, the political system of society is no longer easily definable as a distinct set of collectively mandated institutions or organizations. Instead, the political system appears as a contingent construction of the law, which emerges in society wherever

collectively binding regulation is required. In some dimensions, therefore, the political system acquires the capacity to constitute itself *without the people*, and the simple internal reference to transnational rights, constructed through multiple inter-judicial interactions, forms the constitutional basis for society's production and legitimation of political decisions.<sup>110</sup> *Transnational rights* are thus in the process of becoming a *fifth tier* of rights in society's inclusionary structure, and many acts of political inclusion are now based not in rights exercised by particular persons or groups of persons or populations but in rights constructed contingently, *within the law*.

The political functions of society – the legitimation of authority, the legitimation of law, the making of binding decisions – are increasingly distilled into the form of an *auto-constituent transnational legal/political system*. The political system of global society is positioned in different locations, some in the classical domain of national law, and some in the precarious domain of extra-national law. The national and the international parts of the system simply cannot be detached from each other. Overall, however, contemporary society is increasingly marked by a legal/political system that evolves spontaneously, that is exposed to highly contingent pressures for legislation and that, in reacting to these pressures, extracts its own constitution from transnational rights: global society underwrites its most elementary functions of political inclusion through an autonomous order of rights. In principle, contemporary society is capable of creating political-systemic order wherever social exchanges can be legally focused around rights, and it can generate a constitution for political-systemic acts in many locations, and many areas of practice.

<sup>110</sup> I concur with Benedict Kingsbury (2009a: 36, 57) in his claim that, even in the highly fragmented law of global society, we can still distinguish law from non-law. I also agree with Kingsbury's argument that law relies on constructions of publicness to support its lawfulness as traditional sources of authority for law become weaker. But I think that this publicness derives from the fact that law is sustained by reference to human rights. My construction of rights as a source of inner-legal constitutionality relates closely to the theory of 'publicness' – that is, 'the claim made for law that it has been wrought by the whole society, by the public' – proposed by Kingsbury (2009b). I refer here also to the argument by Bogdandy, Dann and Goldmann (2011: 22) that the 'basic principle of public law is human self-determination'. On my account, it is the fact that in global society the law is able to authorize itself through rights that allows it to retain a distinct quality of publicness, even when emanating from obviously private sources.