CONCLUSION

Through the history of classical sociology, it was widely implied that modern nations developed through processes of legal and political inclusion, and, quite generally, that the nation state evolved as a body of institutions legitimized by the ability actively to legislate over national populations. In some works of classical sociology, notably those of Weber and Durkheim, it was argued that national states possess deep inclusionary powers, which permit them to integrate even dramatically polarized social and economic groups, and the institutions of national societies draw legitimacy from the fact that they establish cohesive structures of inclusion for their populations. To this degree, classical sociology generally accepted the basic construction of nationhood arising from the French Revolution, which proposed the nation and the nation state as alternatives to the pluralistic societal and legal-political order of the *ancien régime*. Furthermore, some classical sociologists developed the view that national society is constructed as a system of integration through the progressive societal sedimentation of *rights*. As indicated above, Durkheim, Marshall and Parsons all assumed that national societies can be stabilized by the production of rights, by means of which they sustain some basic unity, despite their endemically conflictual, pluralistic and functionally differentiated character: on this account, rights allow national societies to resist disintegration, despite their rising functional complexity. Partly for these reasons, most classical sociologists had little interest in international law and internationally defined rights, which they saw as artificial, even

fictitious constructs, with little purchase on socially embedded patterns of interaction, lacking foundations in vitally experienced processes of social formation. Classical sociology, in short, tended to be shaped by a strong belief in the inclusionary force of national societies and national political institutions, and it tended to posit, at least implicitly, a dualist construction of the relation between domestic law and international law.

Of course, it barely requires emphasis that the perspectives and methodologies of classical sociology have been widely revised. Nonetheless, the original conception of national society as a system of legal integration and the resultant claim that international norms, especially norms regarding human rights, have origins external to national societies, have proved remarkably persistent in contemporary sociological analysis of the law. Much of the most influential research in current sociology is focused on global dynamics of social formation, and insofar as it is concerned with law, it accentuates the impact of global forces on legal norms. Yet, such analysis usually persists in separating the global legal domain from the forces underlying the construction of national law. As discussed, even those sociological accounts of international law that view inter- or transnational law sympathetically still observe such law as a set of constructions originating outside national society, so that the underlying linkage between international norm construction and national processes of societal integration do not come into view.

Against this background, this book develops four basic arguments.

First, this book argues that both the classical-sociological account of the nation and the classical-sociological account of international law were rather misguided; in fact, they never corresponded to a widely given factual reality. Few nations actually evolved through inner-societal processes of inclusion, and most national states struggled to assume stable inclusive form in face of the pressures which they encountered and were expected to internalize in their own societies. Even in the European heartlands of national statehood, few societies were able enduringly to converge, as nations, around stable state institutions until after 1945, by which time national legal systems were already beginning to be infused by international law.

Second, this book argues that, if we alter our historical view of the nation state, observing nation states, until recently, as still inchoate, half-formed entities, we can revise, but also productively extend, classical-sociological accounts of rights as media of social integration. In fact, the conception of rights, evident in some core sociological texts,

as components of a system of societal inclusion, has particular value for the way that it allows us to comprehend the current transformation of national society, and the role of international law in this process.

If we recognize that most national states only (if at all) approached final stage of construction very recently, we can see that, ultimately, international law, and especially international human rights law, played a deep and constitutive role in the formation of nations, centred around national state institutions. International human rights, assimilated in domestic constitutions, created instruments of inclusion, which were intricately implicated in processes of institution building and national consolidation usually seen as characteristic of national societies. The political systems of modern societies have typically evolved inclusionary structures, through which they transmit legislation and integrate actors from different social locations, by building complex systems of rights, initially formalized in national constitutions. In purely national societies, this system of rights usually contained *three* tiers: private rights, political rights and socio-material rights. However, most purely national states, insofar as they relied on solely national legal resources, were brought to crisis through their exposure to acute inclusionary pressures, caused by the fact that they were forced to promote the societal distribution of political and material rights to cement their hold on society. It was only as a *fourth* tier of rights, international human rights, came to sit alongside other tiers of constitutional rights that national states obtained more reliable inclusionary structures.

To be sure, international human rights law was partly constructed as an inter-state constitution, because of external pressures on national states. But it was also constituted, in domestic law, because of inner-societal inclusionary pressures and crises. Most societies only became nations and only established solid national states as they incorporated international law, usually translated into *trans*national law, in their domestic legal systems. Configured in this way, transnational law played a vital role in allowing national states to extend their reach across different social regions and sectors, and generally to build a differentiated inclusionary structure to support acts of law. With few exceptions, it was only to the extent that they established constitutions based, in part, in internationally extracted norms that national political systems established *structures of inclusion*, which were able to withstand and inclusively to absorb acute dynamics of inner-societal polarization, directed towards national state institutions through their role in mediating inter-class and centre-periphery conflicts. Prior to this, national societies had

tended to over-politicize their own processes of inclusion, and even the basic production of institutional legitimacy, and this led to deep experiences of crisis and fragmentation.

Historically, of course, many theorists reflected on ways in which pressures of class inclusion could be resolved. This concern runs through the backbone of classical social theory, from Hegel to Weber, both of whom claimed that the national state was defined by the fact it could reach across class boundaries to soften material antagonism and to integrate diverse sectors of national society. Most famously, of course, Marx argued that pressures in political institutions linked to class relations could only be erased through the end of class distinctions. Ultimately, however, problems of over-politicization in national society were only softened by the fact that national states learned to use international human rights, expressed in their domestic constitutions, to construct their legitimacy and authorize legislation. The construction of most national societies presupposed a stratum of international rights in domestic public law, through which national states dampened the politicization of inclusion caused by their previous allocation of political and socio-material rights, and international rights allowed societies gradually to evolve secure national institutions and secure structures of inclusion. It was only as the politics of class was replaced by the politics of international human rights that most societies developed stable systems of political inclusion. National societies and their political systems usually became national as they became post-national. The growth of transnational constitutional law reflects these two processes.

Third, this book argues that pressures on the inclusionary apparatus of national states have had a formative impact on the political system of global society. Increasingly, global society is in the process of acquiring a multi-level, although diffusely configured, political system. This is largely formed as a system of constitutional rights, in which judicial bodies play a hinge role in connecting different layers of legal structure, and it assumes constitutional form at two levels – above and within national societies. Although partly located in the inter-state domain, the global political system has two closely linked constitutional dimensions – outside and inside national legal systems. The global political system is very deeply embedded in national societies, and the fabric of rights around which it is constructed reflects its deep interwovenness with histories of national formation. In particular, the global dimensions of the contemporary political system are partly produced through a process of *functional overspill*, in which national

institutions position themselves within an inter- or transnational system of rights in order to stabilize the strata of rights through which they performed domestic functions of inclusion.

Arguably, the classical idea of sovereign nationhood confronted states with an impossible problem: as nation states, states were required constitutionally to extract their legitimacy from an entity (a sovereign nation), which did not exist, and, in attempting to create this entity, these states were forced into highly politicized cycles of rights-based constitutional integration, which overstrained their inclusionary resources. As a result, national states were exposed to demands for national inclusion which they, as national states, could only rarely perform. This paradox was most visible in the rise of authoritarian corporatist political systems, created in Europe in the interwar era, in post-1945 Latin America and during decolonization in Africa. These polities obtained constitutions that committed them to deep-reaching societal inclusion as a source of legitimacy. However, these polities invariably collapsed in the face of the inclusionary pressures which they confronted. This crippling paradox of national statehood was only weakened as national states were locked into a constitutional system of transnational human rights norms, and as they added a further layer of international rights to their basic constitutional structures. As they developed transnational constitutions, national states stabilized their relation towards the populations and constituencies from which they purported to extract their legitimacy, and they broke the escalatory cycles of inclusion promoted by the original constitutional ideals of national sovereignty and national constituent power. Key to this process was that the stratum of international human rights solidified in transnational constitutional law separated the constituent power of nation states from the organizational forms (typically, economic associations) which this power had assumed through conflicts over labour law, and it allowed states to build an inclusionary structure which was not defined by external material conflicts.

The emergence of a global legal/political system, explaining functions of inclusion through transnational constitutional rights, is sociologically explicable as a reaction to the inherent paradoxical impossibility of the national state. Ultimately, in most cases, the rise of transnational judicial constitutionalism as the primary norm of inclusionary structure building created far more inclusive political systems than the pure models of democracy based in national sovereignty. In some societies, judicial inclusion, based in international human rights, evolved

as an alternative to corporatist inclusion, based in socio-material rights. In other societies, especially those marked by deep ethnic divisions, judicial inclusion evolved as a system, in which the people can assume a normatively unified appearance for the political system, while also preserving a factually pluralistic form. In both settings, the fact that judicial constitutionalism partially separated state legitimacy from the will of the national people eventually made it possible for the state to include this national people in reasonably controlled fashion, distinct from the factual material and ethnic divisions running through the national people. As discussed, constitutional normativity is often seen as attached exclusively to national processes of will formation. In fact, however, constitutionalism did not become sustainable until it severed the link between legal/political inclusion and the exercise of national sovereign power: this was accomplished as international human rights supplanted constituent power as the basic form of legitimacy. As a result, the logic of political inclusion initiated in classical constitutionalism culminated, through necessary overspill, in the formation of transnational constitutional order, in which states acted as parts of a global legal/political system.

On this basis, on one hand, this book sets out a distinctive sociological theory of national statehood, focused on the interaction between national law and international law. It argues that the national domain is largely co-original with the transnational domain: nations only became national societies, based in processes of inclusion that were, to some degree, securely centred around national states, as they were circumscribed by an overarching, international system of constitutional norms. On this basis, moreover, this book sets out a distinctive sociological theory of rights. Most theories of rights, reaching back to the natural-law doctrines of the Enlightenment, assert that rights act as supra-positive norms, projected by the deductive powers of reason and prescribed as limits on the positive power of state authority. As discussed, this notion has been widely expressed in theories of international law, both in the positivist tradition, and in anti-positivist theoretical approaches. The argument proposed here, however, is that rights are not in any way external to processes of societal formation; different layers of rights are produced by societies as they construct centralized institutions, as they abstract free-standing structures of legal and political inclusion, as they bind together the diverse constituencies that they incorporate. To this degree, rights are not limits on the positivization of law. On the contrary, rights are the essential foundation of law's

positivization. Rights allow political institutions to manufacture relatively uniform terrains for the distribution of law and power across society, they support the differentiation of the legal/political system as an inclusionary centre of society, and they maximize the reserves of power possessed by national political institutions. This applies to all the different tiers of rights produced in society: all rights generate an inclusionary structure for the positive distribution of power and law across society. But this applies in particular to international human rights, often seen as supra-positive legal instruments par excellence, obdurately checking the power of national states. As they enter national constitutions, international human rights become vital inner elements of the power of national states, and they are key prerequisites for the effective and reproducible production of law in complex modern societies. In fact, international human rights instil positive force in the law – they create a stratum of inclusion in which law can be produced relatively autonomously, in which recourse to external processes of legitimation is not required to support the societal distribution of law and in which the political system can stabilize itself against external societal organizations. In societies requiring high volumes of positive law, therefore, formally abstracted rights are indispensable elements of societal formation. As society's legal structure is founded in international human rights, society acquires a more autonomous, more differentiated system of legal/political inclusion, which is able to produce law at an increased degree of abstraction and at a heightened level of positive iterability. As a result, international human rights are inseparable from the processes of political institution building and positive legal construction, which generally underpin the historical form of modern society. As mentioned, the constitutional grammar of international human rights usually forms a precondition for the completion of trajectories of institutional formation characterizing the evolution of national societies.

Underlying the formation of modern society, in consequence, we can observe a process in which structures for legal inclusion have become more differentiated, and more autonomous. From the first emergence of modern national societies, the existence of an autonomous structure of legal/political inclusion was a core precondition for the functional stability of society's political system. Modern societies, liberated from their pre-national local form, always relied on extensible legal structures through which they could authorize overarching acts of legislation and preserve authority for legislation across rapidly widening

geographical and temporal spaces. Modern society first constructed its system of inclusion around the notion of the sovereign nation or people, often reflected in the form of a constituent power. Society then began to accord a material form to the sovereign people by generating deep-set layers of rights, embodied in constitutional laws, in which the national people increasingly entered the political system as a real presence. These processes acted to harden the position of the legal system in society, and to extract a structure of inclusion able to penetrate deeply into society. The constitutional distribution of rights was linked, from the outset, to the consolidation of an independent legal structure in society. As discussed, however, few societies were able to survive their rights-mediated centration around the sovereign people, and most societies were forced by their inclusion of the sovereign nation into catastrophic cycles of fragmentation, privatization and de-nationalization. It was only as the essential ground of socio-political inclusion was located from the *national people* to the *people under international human rights law* that societies learned to conduct inclusionary processes effectively, and to stabilize an enduring and relatively autonomous inclusionary structure. In fact, it was only where they began to derive constitutional legitimacy from international human rights that national states were able enduringly to allocate other sets of rights, i.e. private, political and socio-material rights, without fragmentation. Through this process, the political system's extraction of legitimacy from an external constituent power was superseded by the use of internally stored rights as the source of law's authority. This internalization of legitimacy greatly simplified the responsibilities for positive inclusion, regulation and law production by which national states are defined. On this count, again, international law forms an essential foundation for the emergence of an autonomous structure of legal inclusion in national societies.

Finally, *fourth*, this book proposes the argument that the national processes of structural formation that are reflected in the domestic assimilation of international law allow us to examine the formation of a body of distinctively *transnational* constitutional law in recent years. In particular, this book argues that in contemporary society, constitutional norms are formed through a process in which law and politics tend to converge, and the law autonomously produces foundations for acts of political inclusion. On the argument proposed here, the construction of transnational constitutional norms is driven by two processes. On one hand, as stated, the inclusionary structure supporting the political system of modern society is generally defined by an increase in autonomy. Once

the inclusionary structure of society is fully centred on human rights, the political system automatically detaches itself from external sources of authority, and it constructs itself in increasingly free-standing fashion and is able to reproduce itself, at different social locations, without loss of legitimacy. The emergence of a transnational legal domain, able to constitutionalize itself at a high level of autonomy, is thus originally caused by orientation towards legal autonomy inherent in the fabric of national society. On the other hand, the rise of transnational constitutional law is driven by the fact that contemporary society is exposed to hyper-inclusionary demands: it experiences multiple demands for inclusion and multiple demands for legislation, which cannot easily be covered by authority derived from conventional sources of political agreement. As a result, the demand for law in society has to be covered by alternative means, and society is forced to generate law, and in fact to construct patterns of political-systemic formation, through the establishment of increasingly autonomous structures. Contemporary society becomes increasingly reliant on human rights because rights allow society to produce legislation in systemically internalistic fashion, and they make it possible for society to presuppose constitutional authority for acts of law making, in even the most precarious, unsupported environments. Transnational society, in short, increasingly requires highly contingent, easily iterated authority for its laws, and rights norms, remotely originating in international law, provide the most reliable source of authority for such acts. As a result, transnational rights are core elements of modern society's inclusionary structure, solidified to insulate society against unbearable demands for legislation.

Transnational rights are gradually appearing as a *fifth tier* of rights, supplementing private, political, socio-material and international human rights in the emergence of the political-systemic form of today's increasingly global society. Transnational constitutional norms, however, are not entirely separate from inner-societal patterns of inclusion and law production. Transnational constitutional norms are produced as part of a long logic of differentiated legal structure building, which began with the legal formation of domestic societies. In fact, transnational rights can be seen as an inevitable outgrowth of the other tiers of rights through which contemporary societies have ordered their actions. As discussed, modern national political systems presupposed a relatively autonomous legal structure to underpin their functions. Eventually, states produced an inclusionary structure outside themselves, enabling them to operate as states; this structure now shows signs of

becoming *fully autonomous*. The deep impetus towards the autonomy of the law which accompanied the rise of modern, differentiated societies is now in the process of creating a legal/political system that produces and authorizes law *on its own*.

In global society, in sum, we can increasingly identify a number of transnational constitutional configurations. These are visible, first, in the constitution of the inter-state domain; second, in the constitution of national states within the global political system; third, in an emergent auto-constituent constitution, which now fluidly crosses these separate dimensions of global society. In these constitutional domains, to different degrees, the legal system now internalizes many functions that once were characterized as political. In fact, the law is rapidly evolving a capacity to constitute itself, and the construction of constitutional norms to support political acts in society now often simply occurs as an inner function of the legal system. If observed sociologically, however, the growing auto-constituent contingency of the law is not in all respects a new phenomenon. On the contrary, it can be traced back to deep-lying social and constitutional processes; in fact, the transnational constitution that is emerging in different parts of global society still retains deep inner-societal foundations and continuities. As discussed, historically, modern differentiated political systems could only evolve as such because they relied on the law as a more fully and more rapidly differentiated system, which was able, through its own abstracted normative fabric, constitutionally to insulate and stabilize political institutions against their complex constituencies and environments. Throughout recent history, the advanced differentiation of the law was almost always a precondition for the differentiation of a political domain in society, and transnational constitutional law originally evolved as a normative structure in which the political system learned to support its autonomy by integrating the more reliably autonomous forms of the legal system (especially human rights). In recent history, law was always of necessity more autonomous and more differentiated than the political system, and, because of this, in different contexts, it facilitated the constitutional differentiation and stabilization of political institutions. In consequence, the propensity for the law to assume the functions of politics was always ingrained in the structure of modern differentiated societies, and, as political systems became exposed to more complex demands and more extended societal environments, it was always probable that the law would become the leading system in society. The contemporary emergence of transnational constitutional

domains, based primarily in human rights norms, can be seen in essence as the inevitable consequence of law's accelerated differentiation, and the ability of law to assume political functions without reliance on more classical patterns of political agency was in some ways always determined by more classical processes of institutional formation. Indeed, it is possible that highly complex global societies can no longer construct simple political systems, and some of the functions typical of a political system must inevitably be transferred to law. In complex global societies, arguably, even the basic distinction of politics as a social or systemic category must become questionable. The most recent tendencies in constitutional norm formation, reflecting an internalization of political functions in the law, can be observed as part of this broad sociological constellation, whose origins lie at the core of modern national societies.