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## The Reconstruction of Democratic Agency

### 5.1 New Forms of Democratic Agency: Multiple Articulations

On the basis of the above analyses, many of the classical principles that underlie democratic politics and its theoretical constructions now appear invalid, or require substantial qualification. In particular, the essential focus of normative authority, which supports the legitimacy of laws (both primary and statutory), is now widely extracted not from the concrete acts of citizens or from processes of popular will formation, but, to a large degree, from human rights norms, which are preserved and enacted within an existing transnational legal order. As a result of this, the original sources of authority for legislation have been – in part, at least – relocated from a position *outside* the legal system (the political will of the citizens, or the constituent power) to a position *inside* the legal system (basic rights, usually declared at an international level, and then internalized within domestic legal systems). At a most fundamental level, a model of democracy has begun to emerge in which *legal procedures* have dislodged *political procedures* as the defining focus of democratically legitimated legislation, such that, in a pattern of functional equivalence, the articulation of global legal norms appears as a primary mode of democratic agency. In Chapter 3, it was observed that the conceptual structure of classical democracy has been partly translated into a normative order in which legal procedures, conducted either within national courts, or in the interaction between international norm providers and domestic courts, perform core legitimational functions. In Chapter 4, it was observed that, across a range of different political systems, the factual-institutional form of national democracy has been engendered, at least in part, by procedures that take form within the law, reflecting a broad interpenetration between the national legal system and the global legal system. The essential concepts of democracy – such as people, nation, popular sovereignty and collective self-legislation – cannot now be used to capture this condition. Even the factual form of the national citizen only acquired full reality within the system of global

law. In democratic polities, the acts that establish authority for laws, both constitutional and statutory, are procedures in which human rights norms, already consolidated within the legal system, are articulated and reproduced as a normative framework for legislation. The fact that the legal system is centred on human rights, and that human rights project an overarching norm of legitimacy for legal/political acts, means that the legal system itself becomes a primary constitutional subject in modern democracy, and its internal procedures now form functional equivalents to classical acts of democratic formation, citizenship and constitution making.

In contemporary democracy, legitimacy for national legislation is constructed through multiple lines of communication around the political system, many of which are focused on the recursive reproduction and re-expression of existing global legal norms. In this setting, the citizen typically approaches the political system in a form mediated by global law, so that the claims to legal rights and legislative recognition made by citizens articulate principles of global law, and they link the political system directly to the global legal order. Classically, the citizen was a source of agency that channelled inner-societal claims directly into the political system, and the citizen generated legislation on that basis. Now, the citizen is partly translated from a political figure into a formal legal figure, and, as it engages with citizens, the political system also engages with global legal norms. In raising claims to rights, the citizen transmits claims towards the political system by linking such claims to global law, and especially to human rights established in global law. In so doing, the citizen connects the national political system directly to the global legal system, constructing a cycle of transmission between the national political system and the global legal system. The citizen was once the external societal environment of the political system. But the citizen now appears to the political system as part of the global legal system, partly detached from the realities of national society, such that, refracted through the citizen, the global legal system becomes the defining outer environment of the national political system. Indeed, in contemporary democracy, the citizen is partly separated from its factual social position, and it assumes law-making force by instilling globally formed norms into national legal orders and by locking national law into global law. This means that both in its global external orientation and in its national internal orientation, the national political system has become part of the global legal system, and, both nationally and globally, the political system is internalized within the law. Through the reconstruction of the citizen, in short, the political system of national society has become part of global law.

In consequence, democracy now assumes the form of a complex system of legal inclusion. In this system, naturally, the organs of classical legislative bodies still play an important role in articulating society's legislative functions to social agents. It is clearly not possible to have a democracy without a functioning legislature, and some interactions between polity and citizens run specifically through legislatures. However, contemporary democracy has evolved as a complex law-making system, in which the legislature loses its dominance as the primary channel for the translation of social claims into law, and legislative acts now take place in a number of different cycles of communication around the political system. In contemporary democracy, in fact, the political system is usually marked by three lines of communication with its societal environment, so that social claims assume legal form through separate processes. In each line of communication, interaction between national law and global law has assumed defining importance.

First, as mentioned, legislative functions are still performed by legislatures, mandated by popular elections. In such contexts, the citizen still appears as a primary political agent. However, the interactions between legislatures and their societal environments are pre-structured by global legal norms, and the content of legislation, even if produced in classical form, is broadly subject to global legal constraint.<sup>1</sup> As a result, global law pre-defines the normative form in which citizens can appear to legislative bodies, and standard legislative processes are configured through global law. Democratic legislation is never separate from global law, and classical legislative processes usually express, and give effect to, principles of global law.

Second, legislation is often produced through processes in which legislatures play a more marginal role, and many acts of legislation result from exchanges between national governments and persons in national society that occur within the legal system – through legal claims, legal mobilization, litigation and human rights activism. Law thus loses its status and particular dignity as an 'offshoot of politics' (Waldron 1999: 166). In such instances, legal exchanges act, alongside legislatures, as a second communication loop around the political system, and they assume core legislative functions. As discussed, such exchanges are often centred on articulations between national law and global law. In such contexts, the citizen appears as a legal agent.

Third, interactions between national legal bodies and global legal institutions are capable of creating legislation in autonomous fashion, so that

<sup>1</sup> See examples above at pp. 221–31.

global law can, *of itself*, create law, which is recognized as democratic, on autonomous foundations. As will be discussed below, in fact, articulations between bodies situated at different positions in the system of global law often create not only law, but the persons to whom laws are attached and attributed, and they allow new legal subjects to appear. The production of law now occurs in an increasingly autonomous domain, marked by highly contingent processes of subject formation. In such contexts, the citizen appears as an internal construction of the law.

On this basis, the reliance of democracy on functional equivalents means that that democratic citizen assumes a divided shape. At one level, the citizen still interacts directly through political procedures with legislative institutions. At a different level, however, the citizen interacts with the political system through more contingent processes and lines of exchange. The citizen is divided into a political form and a legal form, each of which communicates with the political system in a distinctive dimension. The political citizen remains vital for the formation of legislation. However, the legal citizen acquires underpinning legitimational functions, and it usually sets the leading norms for the political system as a whole, so that legislation that extends the societal frontiers of the political system is triggered by the citizen in its legal dimension. Society may acquire robustly enforceable legislation from classical legislatures, representing citizens in the political dimension of communication. Yet, it is the legal form of the citizen that communicates at the boundaries of the political system, and underpins new processes of normative integration and construction. This is usually caused by the fact that the citizen in its legal form attaches inner-societal exchanges to global norms, and it expands the structure of the political system on that basis. As discussed, in classical democracy, the political citizen extended the boundaries of the political system by communicating through rights. This function now falls primarily to the citizen in its legal form.

Overall, the contemporary model of political democracy is not fully centred on exchanges between the political system and factually existing citizens, and citizens, in their concrete/material form, have forfeited their original status as the primary authors of law. The democratic system is underpinned by a basic legitimational switch from the citizen to human rights, and communications that assume the form of law increasingly do so because they are articulated with the system of global human rights. Such communications produce legislation in multiple ways, splitting the citizen into multiple inner-legal forms, and they often do not require a foundation in physical acts of citizens.

What emerges through these processes is a reorientation of democracy towards a pattern of democratic practice in which democracy is no longer perceived as a *total form*, giving expression to freedoms in which citizens are comprehensively implicated. The citizen loses some of its reality as a factual actor, and it becomes, itself, a construct of law. The fact that the citizen as legitimational figure is split apart from the citizen as a factual collective agent means that the freedoms that the citizen is able to exercise are detached from deep-lying private/societal contests. The freedoms of citizenship are now often defined externally, in particular by judicial bodies applying international law. Further, democracy is no longer based on acts of political participation which imply an integral correlation between the collective will of citizens and decisions made within the political system.<sup>2</sup> The external stabilization of the citizen limits the contestation over the most basic normative order of society, and it often reduces the intensity attached to the exercise of citizenship rights. As the legitimation of the political system is linked to a formally determined subject, the total politicization of society becomes improbable, even impossible. In fact, as the citizen is constructed as part of global law, citizenship often loses connection with a fully material reality – it is primarily a figure through which the political system articulates itself with global law. In each respect, the main stimulant of legislation is provided by interactions between different norms within the global system, and the primary subject of law is the global citizen, located, in abstract legal form, outside national society.

This progressive translation of democracy into a sub-system of global law is widely treated with derision, as a political order that entails deep attenuation of human political potentials. Of course, such contempt for the construction of democracy as an inner-legal system is sometimes expressed in momentary political acts, in which governments or national populations act against global norms and external judicial institutions, especially those with transnationally founded authority.<sup>3</sup> However, some more refined legal observers claim that contemporary democracy reflects a socially compliant formalism, that it negates more effective patterns of democratic will formation, and that it eradicates basic political experiences of contestation

<sup>2</sup> Here I agree with the argument set out by Helmut Willke, stating that in contemporary democracy we need to give up the idea that 'all people participate in all areas' (2014: 158). However, Willke imagines alternative patterns of participation through specialized competence. My theory would also accommodate this, although I place greater emphasis on legal mobilization.

<sup>3</sup> Recent examples are the Brexit referendum in the UK and attacks on the Constitutional Court in Poland.

and grounded demands for emancipation from society.<sup>4</sup> In such instances, the inner-legal construction of democracy and democratic citizenship is observed as an illegitimate deviation from a political ideal type. In addition, some sociological analyses suggest that, partly owing to the growing power of international institutions, we have now moved beyond the realm of classical democracy, into a pattern of *post-democratic* political administration, in which democracy again loses its original meaning (see Crouch 2004: 104–6; Willke 2014: 49, 97). Alongside this, some theorists argue that the recent relative stabilization of democracy depends on a model of low-intensity democracy (Marks 2000: 57; Brunkhorst 2014: 460), or ‘low-intensity citizenship’ (O’Donnell 1993: 1367), even giving rise to a new global brand of monetary imperialism, in which the basic rights of citizens are constrained (Gills, Rocamora and Wilson 1993: 21). Across all these lines of research, the view is now commonplace, with variations, that the global form of society has reduced the basic autonomy and capacity of nation states, weakening classical resources of democracy.<sup>5</sup>

It is difficult fully to deny the justification of such claims. Clearly, the global intensification of inner-legal power has led to the institutionalization of systems of legal-political inclusion that only remotely resemble classical democratic ideals. As discussed, the current form of democracy is not easily combined with a theory of constituent power, and the principle, central to classical democracy, that the legitimacy of democratic institutions can be radically recast, through some regress to the original will of the people, becomes submerged in this system.<sup>6</sup> It has become difficult to understand democracy as a mode of political organization that is founded on substantial norms, prescribed by acts of collective agreement. It is difficult to see the legitimacy of political institutions as a phenomenon generated by primary volitional acts of a people. In particular, it is difficult to see democracy as a governance system in which legitimacy is produced through a simple factual chain of communication between political institutions and the citizens of a given national society. It is difficult to understand democracy as a system of political organization that is centred around single institutions, with deeply representative decision-making functions. It is also difficult to view democracy as a mode of social administration, in which single decisions can radically redirect existing political

<sup>4</sup> For different expressions of these claims see Tushnet (1984: 1384, 1394, 1989: 421, 438); McCann (1986: 188); Kennedy (2002); Douzinas (2007); Hirschl (2007).

<sup>5</sup> See a notable formulation of this claim in Markoff (1999b).

<sup>6</sup> See discussion above at pp. 36–7.

institutions. Under the recent form of democracy, moreover, citizens generally assume rights in uniform procedures, dictated by a global model, and rights are not constructed through deep-rooted lines of societal contest. Indeed, as the rights of citizens are increasingly defined in an external normative order, there are usually limits to the extent to which society can be politicized through legal claims and by mobilized legal actors.<sup>7</sup> In contemporary democracy, there is no obvious political citizen beneath the legal citizen, and the citizen is positioned in society by legal acts that are constructed through global norms. As mentioned, democracy widely presupposes the detachment of the citizen, as a focus of political rights and obligations, from real citizens in society.

In some respects, however, the inner-legal construction of democracy only appears deficient if democracy is observed through the literalistic lens of classical democratic theory, assuming the material presence of the citizens in government, and defining the factual politicization of society as the basic foundation of the political system. Indeed, critiques of inner-legal patterns of democratic formation can easily be seen as measuring the object of their criticism against false historical standards. As discussed, it is not easy to find a historical period in which more classical models of democracy actually existed, at least in moderately enduring form. Consequently, the assumption that democracy is in a state of decline or that we can speak of an endemic crisis of democratic politics is difficult to verify. If we were to accept the theory that we are witness to the rise of post-democracy or low-intensity democracy, the period between pre- and post-democratic societies or high-intensity and low-intensity democracies would have to appear very brief. We can, therefore, pose the question: *When was the era of full or high-intensity democracy?* More generally, the theory that national democracy has been brought to crisis by global forces is also very simplified. As discussed, national democracy was only created by global forces, and *national societies did not create democracy*: the dominant political form of national society was *incomplete democracy*, in which legislatures typically obstructed full democratization. It is difficult,

<sup>7</sup> For example, indigenous rights are obviously produced through social politicization (See below pp.437–42). Yet, owing to the international legal framework, this politicization takes place within pre-defined constraints, and it can be authoritatively controlled. Similarly, more individualized rights, such as health rights, land rights and medical rights, are evidently constructed through social mobilization. However, such mobilization is widely proportioned to rights that already exist, in international law. The granting of such rights in national law is, therefore, often a process that is controlled by pre-established legal norms.

therefore, to find a period of national democracy that was not deeply determined by global forces.

If democracy is viewed through the eyes of legal sociology, the fact that democracy was finally stabilized in a form that did not presuppose the active exercise of a popular political will ought not to appear surprising, and it ought not to be perceived as an indication of democratic crisis. Democracy has widely emerged as a political system in which the basic construction of law's origin, classically attached to the idea of the citizen, has been displaced from the political system into the legal system. Through this displacement, the paradoxical problem of law's original authority is translated into a legal problem, in which the legal system provides its own normative constructions, largely based on international law, to sustain the authority of the political system. To a sociological perspective, this might easily appear as a quite expected outcome of the essential fictionality of democracy, which early sociology identified, and the inner-legal construction of the figure of the citizen, acting as the primary author of laws, might seem a necessary resolution of the historical difficulty in solidifying the political source of law's integrational obligatory force. The fact that democracy became global through the displacement of the citizen from the political system in fact provides deep corroboration for the primary intuitions of legal sociology. The argument proposed in classical legal sociology – that democracy itself contains insoluble paradoxes, that many of its core constructions are fictitious, and that the term democracy overlies very contingent processes of social inclusion and political-systemic construction – might appear much more plausible than theories of endemic political-democratic crisis in explaining why contemporary democracy is centred on weakly formed political agency. On this basis, there is nothing surprising in the fact that democracy developed around a model that reduced the participatory role of the citizen.

For more practical reasons, further, the reconfiguration of democracy described above should not be observed solely as a process that diminishes society's capacities for collective self-legislation and decisive legal authorization. The fact that the growing autonomy of the law separates political agency from monolithic concepts of peoplehood, sovereignty and nationhood means that the legal system can establish categories of political agency more attuned to the factual, pluralistic reality that characterizes most societies. In freeing society from the fictitious expectation that laws can have their legitimational origins in founding acts of collective will formation, the contemporary democratic model splits democratic agency, communication or citizenship into a multiplicity of forms. Through this



process, the basic quality of citizenship – participation in the political system through the shaping of legislation – experiences a process of diffusion, and many actors, in different dimensions of society, acquire legislative force. The inner-legal proceduralization of political agency, therefore, often gives rise to a more pluralistic form of citizenship, at least within the secondary dimension of the global constitution. As such proceduralization separates the form of the citizen from actual material agents in national society, it allows the citizen to assume multiple forms and multiple roles, and it avoids the compulsive homogeneity that, as discussed, easily inheres in citizenship models centred around legislatures. Consequently, it is not necessarily the case that the rising differentiation of the legal system eradicates classical expressions of politics (dispute, will formation, conflict, deliberation, contested agency) from society, or that such expressions lose articulation with legislative processes. Dispute, contest and conflict clearly remain salient dimensions of societal exchange. Such patterns of politicality are widely internalized within the law, and their transmission through legislative processes occurs inner-legally, through the law, using procedures constructed through the global legal system. In some ways, however, this generates an intensification of political practice.

Overall, we can see the following process at the core of modern democracy. It is now established that the citizen that authorizes law is, at least partly, a fiction, separated from the real people, and stabilized as an internal reference within the legal system. However, this stabilization of the citizen as a fiction has real implications for the interactions that connect the political system and persons in its social environment. In particular, the fact that the citizen that underpins the political system is distinct from physical citizens means that the rights of citizens, and rights to shape legislation, can be claimed by many agents, in many different domains and procedures, and in many lines of legal-political communication. Global rights soak into the fabric of national law, and these rights are able to configure new forms of citizenship, sometimes detached from real material subjects, in highly contingent ways. This allows the emergence of new partial or *segmentary* patterns of citizenship, in which many actors outside the legal/political system can assume legal/political subjectivity, often of a momentary nature. On this basis, in contemporary democracy a rapid multiplication of citizenship occurs: persons in society can enter into interaction with the legal/political system in many ways, and the legal/political system opens itself to exchanges with societal actors through many different rights. Persons exercise citizenship rights by communicating with the political system through the rights that exist in its environment, in the

system of global law. This means that citizens can communicate immediately with political institutions, phrasing their communication in relation to global rights. This then gives rise to a legal/political system which has multiple articulations with citizens in its environments, both national and global. In some cases, the legal/political system communicates, through global rights, with citizens that exist, factually and materially, in society. In some cases, as discussed below, the legal/political system communicates with citizens that it itself engenders, so that the citizen itself appears as a construct of the law.

The emergence of a political system on this global design was partly anticipated in the social theory of Niklas Luhmann, who imagined the modern political system – the political system of *world society* – as a system that is able to sustain flexible and pluralistic interactions with different social domains. As discussed, Luhmann rejected the idea that the political system has a dominant position amongst other social systems or that it concentrates a total will or a total rationality for all societal interaction (1981b: 22–3). Importantly, he argued that the political system translates social impulses into law through multiple channels, and it relies on the institutionalization of complex and contingent interactions between the political system and individual citizens (1983 [1969]: 34). Moreover, he observed how human rights act as media of inclusion, connecting the political system to actors in its societal environments in measured, differentiated fashion.<sup>8</sup> In each respect, he suggested that the political system communicates with social agents through a wide range of procedures, implying that the production of legitimate law is perceived in deeply simplified form in classical accounts of democracy. Similar concepts have been carried over into the thought of sociologists influenced by Luhmann, who view the claim that the state contains a cognitive intelligence that is valid for all society as illusory (Willke 1998: 14; Ladeur 2006: 5). Indeed, the multiplication of society's political procedures has already been observed, in more normative fashion, in theories of democracy that stress the mismatch between classical democracy and the complex and acentric form of society as a whole. Important examples of such theories argue that the political system should limit its functions to supervisory oversight of the relations between different social systems (Willke 1996: 335), even advocating the formation

<sup>8</sup> In particular, Luhmann claimed that the conception of persons as holders of rights of freedom and dignity creates a generalized basis for 'communicative behaviour' and for the 'generalization of communication', which the political system itself presupposes (1965: 70–1).

of a decentred political system, containing organs of representation in different functional domains (Willke 2016: 109, 137).<sup>9</sup>

However, Luhmann's theory was not finally adequate for understanding the contemporary political system, and he struggled to describe the concrete features of the political system of global society that, conceptually, he imagined. In particular, Luhmann did not evaluate the transformation of the political system through its position in a global environment. Strikingly, he paid little attention to the emergence of international organizations or the effects of international norms, and he viewed the multi-articulated exchanges of the political system as occurring within a regionally delineated society. In fact, he envisioned the political system, finally, as a classically ordered social system, extracting legitimacy from conventional processes of political communication, focused on the production of simple acts of legislation, directed towards aggregated groups of people (1971: 62). As discussed, in Luhmann's thought the classical construction of law's collective authorship is preserved.

The political system of global society is now assuming concrete shape in a way that Luhmann had not anticipated. A fact that requires stronger emphasis in analysis of the global form of the political system is that the political system is itself no longer the sole site of political practice, and functions of legitimate legislation are not ordered solely in procedures that pertain to politics. An adequately multi-centric construction of the political system needs to observe ways in which the legal system itself has become a domain of legislation, and more pluralistic patterns of interest articulation result from the centration of politics around the legal system. Indeed, the heightened differentiation of the law means that the legal system often becomes the domain in which social agency presents itself in political form. The law itself, increasingly, becomes the site in which a society channels its primary conflicts, in which it contests underlying grammars of legitimacy, in which it produces experiences of participatory citizenship, and in which it establishes and renews its primary norms.

The differentiation of the global legal system through the inner reference to human rights marks, at one level, the end of classical democracy and the weakening of classical democratic agency. Of course, classical political procedures still exist in democratic societies, and, as discussed,

<sup>9</sup> Willke's work is one of the most important attempts to configure a sociologically refined model of the contemporary political system. However, like Luhmann, he proceeds from the view that legislation is the 'core of politics' (1997: 27), and he retains a neo-classical view of the role legislation in managing the interaction between social systems.

legislatures still possess a central role as organs of legislation. However, the overarching, norm-founding scope of such procedures is limited; they do not express the basic political will of society; they do not have a monopoly of society's legislative acts. At a different level, however, the differentiation of the legal system releases and helps to institutionalize new modes of legal/political agency and subjectivity, and it projects a pervasive legal grammar for society, in which political contests can be transposed into law (or refracted through law) in a number of different ways, and by a plurality of different subjects. In many societies, although originally distilled at an international level, human rights norms now form a deeply ingrained part of social structure, and they establish a variety of normative channels, in which social agents, as citizens, are able to form legally constitutive articulations with each other, with their governments, and with other norm providers. In some cases, human rights law forms a normative system, which is able to obtain recognition across very diffusely connected regions within national societies, even amongst actors and groups originally marginalized from national societies, and which allows a direct articulation between these actors and the legal/political system. As discussed, in many societies, human rights form a normative system of inclusion that penetrates much deeper into national societies than more classical, vertically ordered state institutions.<sup>10</sup>

As a result, the global conversion to self-referential or inner-legal democracy that has defined the recent globalization of democracy has been marked by a conversion to a model of *multi-centric* democracy. In this model, law can be contested, defined, legitimated and produced within parameters internally constructed by human rights law, by many different procedures, by many different interactions, and by many different actors.<sup>11</sup> As the global legal system constructs the *primary norms* for legal acts, the range of subjects able to construct *secondary norms* for legal acts necessarily increases. Such subjects are typically able to engage formatively in the production of law by explaining their interests in relation to partial rights: secondary subjects are able to assume a norm-giving role in contemporary society to the extent that they translate particular social interactions and particular disputes into the primary systemic diction of

<sup>10</sup> See discussion of the impact of human rights law on complex societies above at pp. 350–419.

<sup>11</sup> For a conception that parallels this view, see the theory of subjective rights in Colliot-Thélène (2010b: 197), which also argues for a multiple politics of rights as a socially adequate pattern of citizenship. To my perspective, Colliot-Thélène is inadequately attentive to the transformation of subjective rights through the domestic penetration of global human rights.

human rights. The splitting of the primary form of the citizen from real persons generates multiple *secondary patterns* of citizenship, in which citizens can engage with the legal/political system and shape legislation through a growing range of rights. This process does not suppress political conflict. On the contrary, it creates new figures of multiple citizenship and new political subjects.

This multiplication of democratic agency naturally occurs in a range of different ways in different societies, and it can be placed at diverse points on a spectrum of democratic organization. In many cases, as discussed, this conversion to multi-centric democratic formation occurs as a process that sits alongside and reinforces more classical patterns of political democracy.<sup>12</sup> In some cases, this occurs as a process that creates quite distinct modes of democratic inclusion. For example, this can occur as a process that compensates for the weakness of more classical democratic institutions, or that progressively transforms existing democratic organs. However, the inner-legal splitting of democratic subjectivity is now a universal feature of democracy. This is widely reflected in the fact that, in most political systems, legislation is triggered by pressures on the system of global law, often linked to different patterns of legal mobilization.

Important in this regard is the fact that the formation of the inner-legal citizen creates the most expansive openings for the exercise of transnational citizenship. Despite the projected ideals of some theorists, to be sure, we cannot identify institutions of an evolved world polity or transnational democracy in contemporary society.<sup>13</sup> Even in more consolidated transnational political entities, such as the EU, transnational citizenship is not fully established beyond a relatively thin tier of formal personal rights.<sup>14</sup> Citizenship does not exist at the global level in the sense of legal affiliation to a distinct community, and it does not exist globally as a claim to democratic participation.<sup>15</sup> However, as discussed, in some of its dimensions, democratic citizenship is of itself intrinsically transnational. As a focus of

<sup>12</sup> See in particular the discussion of Colombia at pp. 270–1 above.

<sup>13</sup> See p. 181 above. See the most expansive claim for the existence of a 'system of cosmopolitan governance', in which people might 'enjoy multiple citizenships' in Held (2003: 524).

<sup>14</sup> For sample attempts to bridge the divide between the given construction of EU citizens as legal subjects, with market-based rights, and the construction of citizens as political agents see Shaw (1998: 316); Wiener (1998: 252, 290). Experiences in the UK show that rights (putatively) held by EU citizens can be easily removed by national governments, and they do not fully qualify as citizenship rights.

<sup>15</sup> Some theorists have tried, rather fancifully, to imagine a model of global 'discursive democracy', which does not necessarily presuppose 'electoral democracy': i.e. a democracy in which it is not necessary to vote (see Dryzek 2006: 25, 154). Purely discursive patterns of

legal agency, the citizen is palpably capable of participating in transnational law-making processes, and many legal acts of citizens help to stabilize rights that have a transnational character. In fact, the primary rights attached to the citizen in national society can easily be transferred either to the global domain or into other polities – many such rights originate in the global domain, and core normative elements of citizenship converge between the national and the global dimensions of society.<sup>16</sup> If the citizen is conceived, in the global context, not as a political actor, but as a legal actor, transnational citizenship can easily develop as a set of practices with a participatory, politically formative content.<sup>17</sup> Through legal engagement, people can easily shape law in contexts in which they do not have state-conferred political rights, so that political citizenship acquires a form that is distinct from national citizenship. If the world citizen is to emerge as more than an agent demanding protective rights, the form of the world citizen is likely to develop through acts of legal engagement and legal mobilization. Indeed, it is as a legal agent that the world citizen becomes politically manifest: the world citizen assumes political form not through a world polity, but through engagement in world law.

In each respect, the increasing autonomy of the global legal system has, in its subsidiary dimensions, created multiple pluralistic patterns of democratic subjectivity, citizenship and legal/political norm construction. In some ways, this remedies the exclusionary dimension of citizenship discussed above, as it offsets the focus on homogeneous rights that citizenship necessarily implies.<sup>18</sup> The renunciation of the democracy of the total national citizen in favour of the democracy of the partial world citizen has created new patterns of segmentary political agency and liberty. To appreciate this, it is necessary to renounce classical constructions of politics.

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democracy can easily exist at the global level. Currently, however, global equivalents to electoral democracy do not exist.

<sup>16</sup> For different accounts of the movement of rights from the global to the domestic level see Linklater (1998: 34); Delanty (2000: 80); Bosniak (2000: 491); Soysal (1994: 165); Münch (2001: 190–1); Cohen (1999: 262, 2012: 216–7); Weinstock (2001: 59); Sassen (2002a: 287); Stokes (2004: 133); Goodhart (2005: 133); Habermas (2005: 240); Benhabib (2009); Sikink (2011); Ramirez and Meyer (2012: 21); Glenn (2013: 197); Brunkhorst (2014).

<sup>17</sup> In agreement with this, see the theory of Kapczynski (2008). Kapczynski argues that through strategic use of law ‘coalitions, political identifications, and publics can be built across national boundaries and among geographically dispersed communities’ (880). I would go further – as mobilized litigant, the citizen is almost of necessity a member of a global public. See the account of different patterns of transnational public community in Fox (2005: 193–4), which also identifies legal activism as a mode of citizenship. For similar views see Bader (1995: 235).

<sup>18</sup> See p. 20.

## 5.2 New Democratic Subjects: Formal Persons

The emergence of more pluralistic patterns of citizenship and norm formation is visible in the construction of primary norms for national democracies. The creation of democratic constitutions and the consolidation of democratic institutions now widely occurs as a process in which many participants engage, often exercising very atypical resources of political agency. Usually, this is due to the fact that the underlying preconditions of national political systems are defined through reference to international human rights law, which, at a *primary* level, creates prior immovable constitutional limits for the political system as a whole. The underlying institutional form and legitimacy of national democracy are thus pre-defined, as one part of the global legal system. On this foundation, however, a range of *secondary* democratic subjects are able to appear and to assume a role in processes of constitutional norm formation and institution building. Such subjects do this, typically, by claiming to represent and to enact interests related to human rights, by correlating social claims with already established rights and by intensifying the standing of international norms (usually linked to human rights) in national societies. Human rights, accordingly, form a line of articulation in which different actors across society can acquire constitution-making and constitution-reinforcing authority. In so doing, such actors express social prerogatives and contests in a form to which the political system, as part of the global legal system, is already sensibilized, and they present multiple claims in the register of human rights, which then have a possibility of being translated into law. As national laws lose their status as primary laws, the range of actors engaged in the making of constitutional law can easily be expanded, and such actors exercise extensive constituent power, within pre-stabilized limits.

This is seen, first, in cases in which new democratic actors possess a quite clearly defined legal/political personality, and such actors acquire relatively conventional recognition for rights of constitutional participation.

### 5.2.1 *New Democratic Subjects: NGOs and Social Movements*

One example of this multiplication of democratic agency is seen in the activities performed by NGOs, which in recent years have assumed an important position as political norm setters. At a most obvious level, it is now increasingly widespread for NGOs to appear as distinct legal agents during constitution-making processes. In the drafting of some constitutions, different organizations, typically claiming a stake in constitutional

foundation through their interest in the protection of human rights law, have been able to act as factual constituent subjects.<sup>19</sup>

Still more widely, NGOs act as subjects that implement and give firm reality to established constitutional provisions, assuming authority either to ensure recognition of constitutional rights in national societies, or directly to enforce international human rights as *de facto* constitutional principles. This can occur in many different ways. For example, this sometimes occurs as NGOs enter formal consultative relations with national government bodies about enforcement of human rights norms, often acting as norm-setters with transnational effect (see Schuppert 2006: 212). This also occurs as NGOs pressurize national governments to recognize constitutional or international norms through media engagement, through monitoring activities, participation in meetings with supranational organs, or submission of reports to the UN or to other supranational bodies (see Merry 2006: 58; Simmons 2009: 32–5; Sikkink 2011: 64). This occurs, most importantly, as NGOs engage or assist in litigation against government agencies. In many societies, NGOs now play a leading role in initiating human rights cases against national governments, often securing recognition of established rights, and, in some cases, creating new constitutional rights.<sup>20</sup> In each instance, the realm of democratic agency is markedly broadened by the fact that NGOs can articulate a personality for themselves through reference to international human rights law. By claiming a legal personality in this way, many such organizations assume positions at least analogous to that of more classical political-constitutional subjects.

Less securely, the same can also be said of social movements, whose political position has become increasingly institutionalized through their role in solidifying human rights law. Like NGOs, in some settings, social movements have been partly co-opted in constitution-making processes.<sup>21</sup> More generally, social movements have been able to acquire a direct articulation with national governments through pressure-group activities,

<sup>19</sup> Cases of this can be found in Bolivia, Colombia, South Africa and Kenya. By way of example, for analysis of the role of human-rights activists in creating a constitution-making situation in Colombia, see Tate (2007: 129); Grajales (2017: 160–2); on similar processes in South Africa, see Klug (2000: 59).

<sup>20</sup> The classic example in Latin America is the Centre for Justice & International Law (CEJIL). Founded in 1991, in its first two decades CEJIL represented over 13,000 victims of human rights violations in more than 300 cases and proceedings for protective measures within the Inter-American System of Human Rights. In the early 1990s, CEJIL monopolized the System, being responsible for almost 90 per cent of the cases decided by the IACtHR.

<sup>21</sup> See discussion of Colombia above at p. 355.



focused on human rights questions, so that they perform constitution-reinforcing functions. Clearly, the emergence of social movement politics is very closely linked to the importance of human rights as a constitutive political vocabulary, which creates a shared diction for political agency outside conventional procedures and even across the boundaries between national states and their constituencies.<sup>22</sup> The fact that human rights define particular themes in society as demanding political attention projects a normative order in which political agency can be concentrated around single questions or relatively free-standing demands for recognition, which are not necessarily correlated with universal socio-political outlooks or holistic ideas of citizenship. As a result, society is able to mobilize around particular social interests, such as gender politics, ethnic politics, educational politics, sexual politics, environmental politics, health politics and reproductive politics, and such mobilization is often channelled through social movements. In such processes, the vocabulary of rights forms a medium in which actors in different spheres of agency can aim to obtain authoritative recognition, exercising sectoral/segmentary citizenship or even sectoral/segmentary constituent power. The vocabulary of rights creates a network of articulations around the political system, in which social actors can emerge in relatively spontaneous fashion and intensify constitutional norms across distinct spheres of society. Often, this means that social actors can circumvent formal political procedures, and they can gain immediate access to political influence (i.e. they can make laws) by interacting directly with the political system through rights.

In these examples, the fact that human rights law frames the legitimacy of the legal/political system means that democratic institutions obtain a widened periphery, in which many groups and many citizens can gain inclusion in constitutional and legislative procedures. Moreover, the prominence of human rights law means that diverse societal claims can be transmitted directly into the legal system, and the legal system is centred on norms that permit the rapid translation of originally diffuse societal claims into formal law. The freeing of political agency from unitary subjects creates new openings for the politicization of society. Indeed, it creates opportunities for the emergence of new modes of sectoral, or even

<sup>22</sup> Foweraker and Landman (1997: 42, 227); Keck and Sikkink (1999: 91); Tsutsui and Wotipka (2002: 613); Tarrow (2005: 188). Some observers see the growth of social movements as a process that challenges the power of thinly rooted, rights-based democracies (Gills, Rocamora and Wilson 1993: 24). This may of course be true. But social movements are also products of this system and its segmented patterns of citizenship.

segmentary, citizenship, in which political acts of citizens refer to functionally distinct experiences.

### 5.2.2 *New Democratic Subjects: Ethnic Population Groups*

A further example of this transformation of democratic agency is visible in the fact that recent processes of democratic foundation and democratic solidification have brought heightened recognition for ethnic communities as political-constitutional subjects.

This is particularly visible in Latin America. In some societies in Latin America, indigenous communities have obtained legal recognition as collective participants in constitution-making processes. In Bolivia, for example, the present constitution, in force since 2009, was created through the exercise of a multi-centric constituent power, of which indigenous groups formed a core part, and indigenous groups now occupy a distinct, elevated position under the constitution. In some settings in Latin America, further, superior courts have independently ascribed formal legal or even ius-generative personality to indigenous populations. In Colombia, the Constitutional Court has declared that indigenous communities form a distinct 'collective subject', which is not simply to be viewed as the sum of 'individual subjects that share the same rights or diffuse or collective interests'.<sup>23</sup> In consequence, the rights that are asserted by indigenous groups, unless they are contrary to higher constitutional norms, are viewed as having greater force than those asserted by less clearly authorized subjects.<sup>24</sup> In addition, some constitutions have been established in Latin America, in which indigenous communities obtain formal protection for customary rights and even for the administration of communal justice, so that, within higher-order constraints, powers of self-determination and sub-national citizenship are allotted to ethnic groups. Constitutional provisions for indigenous rights of self-determination have had far-reaching impact in some societies, notably in Bolivia and Colombia. In Colombia, the right to self-determination of indigenous groups includes, formally, the right to select communal government, the right to determine the form of political institutions, the right to create laws in conformity with inherited customs and the right to determine procedures for election of indigenous authorities.<sup>25</sup> As mentioned, the Colombian Constitutional Court has adopted

<sup>23</sup> T-380/93.

<sup>24</sup> T-143/10.

<sup>25</sup> T-601/11.

a policy of maximization to secure indigenous rights of self-determination. Such constitutional provisions clearly represent a multiplication of democratic agency, establishing multi-level patterns of citizenship, and, in some cases, ensuring that the societal form of the constitution, even after ratification, remains open to impulses from a range of constitutional subjects.

In most Latin American societies, the construction of indigenous groups as distinct political subjects was partly shaped by the fact that, prior to the emergence of the particular constitution-making situation, these groups had been able to claim rights and protective guarantees under international law, notably under Convention 169 (1989) of the ILO (ILO 169). ILO 169, which was quickly ratified in many Latin American societies, includes provisions to ensure that indigenous communities can assume governmental influence and rights of consultation in matters affecting their livelihood. In states that ratified ILO 169, these provisions often acquired great authority in domestic law, and they immediately altered the normative hierarchy of society. In Colombia, ILO 169 was incorporated as part of domestic higher law, and it was integrated in the block of constitutionality.<sup>26</sup> This implies that the constitutional subjectivity of indigenous populations was established under international human rights law *before* it became part of domestic law. In fact, the agency asserted by indigenous groups in helping to create, or in seeking recognition under, multi-centric national constitutions entailed the concrete exercise of rights that had already been defined within the system of international law. Such acts of constituent agency involved the realization and consolidation of rights that *already existed*, and they assumed constituent force, in part, because they transposed rights from the transnational level of the global legal system onto the national level, extracting political resonance from these rights within domestic locations.

One illuminating case of articulation between ILO 169 and domestic constitutional processes is evident in Colombia, where the 1991 Constitution was written during ratification of ILO 169. The growing international concern with indigenous rights at this time meant that indigenous groups could utilize the vocabulary of rights to position themselves in the national constitution-making process.<sup>27</sup> This was facilitated by the

<sup>26</sup> Colombian Constitutional Court SU-039/97.

<sup>27</sup> Indigenous groups had three representatives in the Assembly that wrote the 1991 Constitution, and they obtained rights of representation and self-governance. Most of these rights were already envisaged in existing international norms and instruments.

fact that Colombia had a long tradition of protecting indigenous rights,<sup>28</sup> and many indigenous leaders were trained in law. International human rights instruments thus created distinct mobilizational opportunities for indigenous organizations, whose rights were more robustly secured in the 1991 Constitution.

An alternative case in which indigenous rights acquired political strength through international law is visible in Bolivia. In Bolivia, indigenous communities obtained an important position in the Constituent Assembly that wrote the 2009 Constitution under Evo Morales. They justified this position, in part, by extracting authority from a pre-existent normative structure, largely based on international human rights provisions. To be sure, indigenous communities in different parts of Bolivia had a long history of spontaneous social mobilization, and the decades prior to the writing of the 2009 Constitution had seen intensified activism focused on claims to indigenous rights (see Van Cott 2000: 207; Yashar 2005: 55; Blomberry 2008). This was partly caused by the fact that the traditional corporatist mechanisms for promoting national integration of indigenous communities, based on vertically ordered peasant trade unions, had been weakened in the 1980s,<sup>29</sup> and indigenous affiliations, distinct from the centralized apparatus of formal trade unions, assumed greater significance as a focus of contestation. This was also partly caused by decentralization laws passed in 1994, which created a more stable municipal framework for indigenous political representation (K. O'Neill 2005: 63; Postero 2007: 5–6; Bazoberry Chali 2008: 171). Moreover, indigenous populations in Bolivia do not form a united political subject, and the vocabulary of indigenous rights is not a universally accepted formula of mobilization. Many indigenous groups, especially larger communities located around the Andean plateau, construct their identity in more general terms, as members of the *first nations* (*naciones originarias*) of Bolivia; this term is clearly distinct from the concept of indigenous peoples (*pueblos indígenas*). In fact, even the most successfully mobilized indigenous populations are not ethnically homogeneous. In consequence, generalized pronouncements about indigenous mobilization and political subject formation in Bolivia are to be avoided. Nonetheless, the process in which, under different self-constructions, indigenous peoples became active political subjects in Bolivia intersected formatively with the rising grammar of indigenous rights in international

<sup>28</sup> Law 89 of 1890 established some rights for indigenous communities – although it also referred to them as ‘savages’.

<sup>29</sup> For background see Liendo (2009: 109–10); Balenciaga (2012: 147–8).

law. Indeed, in a number of respects, the principles of ILO 169 sank deeply into the daily logic of indigenous constitutional politics in Bolivia, and this created a distinct pattern of constitutional-political agency.

The impact of ILO 169 in Bolivia is visible in the fact that, first, generally, the indigenous groups that assumed positions of influence in the Bolivian constitution-making process utilized it as an important foundation on which they were able to justify their position and to assert collective rights.<sup>30</sup> Indeed, the constitution-making process was supported by the assumption that the constitution would give effect to ILO 169, so that internationally defined norms were located from the outset at the centre of the constitutional order.<sup>31</sup> This meant that some norms concerning rights of sub-national subjects were already taken for granted during the constitution-making process, such that elements of the eventual constitution were separated out from factual contest. As a result, the constitution that came into force in 2009 contained extensive provisions for the autonomy of indigenous communities and rights of consultation in matters affecting them. Article 269 of the Bolivian Constitution states that Bolivia is to be organized into departments, provinces, municipalities and rural native indigenous territories. Article 30 established cultural rights and rights of consultation for indigenous peoples. Articles 289 and 296 provide for certain powers of indigenous self-government and the creation of autonomous indigenous regions. Moreover, it is generally axiomatic in the constitution that indigenous law stands on equal footing with ordinary law. These provisions of the constitution should not be taken too literally; the constitutional order created under Morales has not delivered on all its promises, and hard restrictions have been placed on the exercise of political, jurisdictional and even civil rights by indigenous communities. In particular, the principle in the constitution that indigenous law and ordinary law should have equal status in the legal hierarchy of society has not been

<sup>30</sup> Before the writing of the 2009 Constitution in Bolivia, ILO 169 had already inspired constitutional reforms in 1994. One account argues that international instruments regarding human rights and indigenous rights were the 'direct source' for the recognition of indigenous communities as distinct actors at this time (Tamburini 2012: 250). On the importance of international precedents for the growing autonomy of indigenous communities see Molina Saucedo (2015: 278).

<sup>31</sup> One critical account states that ILO 69 was one of the most important points of reference as the constitution was being written, but argues that indigenous leaders used ILO 169 to gain rights of autonomy far more extensive than those that it actually foresaw (Lazarte 2015: 69). A different account lists ILO 169 first amongst legal precedents, national and international, for the constitutional provisions for indigenous autonomy in Bolivia (Molina Saucedo 2015: 278).

fully honoured.<sup>32</sup> Nonetheless, the wording of the Bolivian Constitution is not entirely fictional, and it has instituted certain forms of ethno-political pluralism and multiple subject formation.

Most notably, second, the interaction between domestic and international law in Bolivia is expressed in constitutional provisions for the creation of autonomous communities (*autonomías*) by indigenous peoples (Articles 271, 290, 304). In this respect, communities seeking autonomy are required to draw up a statute to determine their governance arrangements, and so, in essence, to establish a secondary constitutional form for regional self-determination, within the broader constitution of the state. On completion of the draft statute, communities seeking autonomy are expected to secure authorization for their legal order by submitting their statute to the national Constitutional Court. If endorsed by the Constitutional Court, the statute needs to be approved by means of a local plebiscite. Notably, the first indigenous community to constitute itself as an autonomous region – that is, the Guarani people in Charagua, which is located close to the Paraguayan border – achieved this, in part, by positioning its statutory order within the hierarchy of international norms.<sup>33</sup> Other communities that have endeavoured to obtain autonomy have also given high standing to international law in their founding statutes.<sup>34</sup> The Statute of Charagua reflects this hierarchy in that it specifically defines indigenous self-governance institutions as elements in a system of international law, authorized by ILO 169 (Article 3). Moreover, it recognizes all obligations of the Bolivian government enforced by international treaties (Article 13, Article 29). In assessing the compatibility of the Statute of Charagua with the constitution, the Bolivian Constitutional Court stated that assumption of autonomy by indigenous peoples is justified under international law, especially ILO 169. Moreover, it declared that any recognition of the *autonomía* as a self-governing region presupposes its formal acceptance of the hierarchy of constitutional law and international law. The Court declared as a point of procedure that ‘indigenous autonomy must be subordinate not only to ratified treaties and conventions that address indigenous peoples, but also to ratified treaties and

<sup>32</sup> This provision was cut down severely in Law 073 of 2010, which set out a long list of matters that could not be subject to indigenous jurisdiction. See Nuñez del Prado (2015: 219).

<sup>33</sup> See the Estatuto de la Autonomia Indígena Guarani Charagua Iyambae, ratified in 2015.

<sup>34</sup> See Article 89(2) of the Estatuto Autonomico Originario de Totorá Marka, which was not approved by local plebiscite.

conventions that address the nation more widely.<sup>35</sup> By implication, therefore, the Court stated that the autonomous powers of the Charagua community were both constituted and circumscribed by norms of international law, and they were legitimated by a balance between different international-legal provisions.

In both Colombia and Bolivia, membership of indigenous groups has emerged as a distinct source of constituent agency at different societal levels. This is due, in large part, to the fact that such agency is authorized, or even partly pre-formed, under international law. This process of subject formation became visible, in both societies, in the creation of the national constitution. However, this remained visible in subsidiary constitutional processes, in which the constituent position of ethnic membership groups was articulated – expressly – as a secondary enactment of primary, originally international, norms. Notably, contemporary Bolivia is often observed as a site of radical democratic experimentation, in which sub-national population groups are granted far-reaching powers of autonomy. This is often presented as a process that depends on the recuperation of political sovereignty through the autonomous mobilization of pluralistic communities within the national population itself, entailing an at times express negation, or at least relativization, of international norms (Sousa Santos 2012: 12–14). In many respects, however, the patterns of agency that are constitutive of contemporary Bolivian democracy are pre-determined by international law, and they assume and explain their legitimacy, in part, as secondary articulations of principles already established in the global legal system. In fact, these patterns of agency appear as points in a complex constitutional loop, in which primary rights, established in the global legal system, are singularly concretized at a secondary, national level. In each respect, human rights permit a multiplication of constitutional subjects and a proliferation of new modes of citizenship. Indeed, political acts of citizens acquire distinctive emphasis because they give emphasis to rights that are conserved in the global legal system, and because they mediate directly between national and global law. Citizenship, in other words, becomes a contingent practice of articulation between national and global legal norms.

### 5.3 New Democratic Subjects: From Citizens to Litigants

In the cases discussed above, the transformation of democratic agency through the differentiation of global law is observable in the fact that new

<sup>35</sup> Declaration of the Constitutional Court 0013/2013 p. 30

constitutional subjects are emerging that, although in fact exercising secondary constituent power, appear in some respects as analogues to more classical constitutional subjects. Notably, social movements, NGOs and indigenous community representatives are capable of organizing themselves in a fashion similar to conventional constituent actors, and they can assume relatively ordered organizational form within constitution-making processes. Although their access to constitutional power is usually determined by prior inner-legal norms, these subjects can sometimes claim, and indeed appear, to possess a distinct legal identity that enables them to act *before the law*, as *primary democratic norm setters*.

Alongside this, however, the general shift to inner-legal democratic agency has meant that some actors that have little resemblance to classical constitutional subjects now assume authority to make laws, and even substantially to define the basic order of government. In particular, the fact that primary norm-setting acts occur partly within the legal system means that functions of legislation classically accorded to political actors and to processes of democratic will formation are now often imputed to persons acting not as legislators or as citizens, but as *litigants*. In many settings, litigation has become a core mode of law production, and litigation in relation to human rights often replaces political participation, or more institutionalized modes of citizenship, as a foundation for law-making. Much law, both constitutional and statutory, is now generated through *litigation loops*, in which legal claims are filed in national societies, which forge a link between national litigation and international legal norms, ultimately leading to the permeation of international norms into domestic law, at times with clear constitutional effect. Often, in consequence, it is in their quality, not, in the classical sense, *as political citizens*, but *as litigants*, that members of society acquire their greatest political importance, and their greatest impact on legislation. The global solidification of the rights around which social conflicts congregate means that litigation over rights becomes a core pattern of citizenship, which is able to create laws with close to constitutional rank in particular national societies, and in particular social spheres.

### 5.3.1 *Litigants as Citizens 1: Individual Litigation*

The role of litigation as a surrogate for classical expressions of democratic agency can be seen in litigation initiated by single persons. One consequence of the differentiation of the global legal system is that, under certain circumstances, individual persons can mobilize legal claims around



global human rights norms, and, in so doing, they can substantially alter the part of the legal-political order to which their acts of litigation relate.

This can be observed in many ways.

First, the legislative effect of litigation is most manifest in national societies that are tightly integrated into supranational human rights systems. In societies in this position, the attempts by single persons to obtain redress in acts of litigation, especially in those acts relating to the exercise or withdrawal of internationally sanctioned human rights, can easily transform the existing order of democracy. Examples of this can be found in Europe, in which cases brought from national societies before both the ECtHR and the ECJ have led to deep alterations in the fabric of national democracies, and at times created new rights in domestic law.<sup>36</sup> Far-reaching examples of this can be seen in Latin America, in which cases brought before the Inter-American Commission on Human Rights and the IACtHR have had substantial implications for national societies. In some cases, single acts of litigation have led to the establishment of new rights and new guarantees. For instance, acts of litigation have led to the establishment of new categories of crimes, especially for vulnerable social groups,<sup>37</sup> and new rights of property ownership.<sup>38</sup> Indeed, in some cases, national courts have used norms of international law that are not domestically incorporated to create new rights, and they have utilized authority implied in international law to acquire legislative functions. For example, the Argentine Supreme Court has ruled that there is a right to health on the basis of international treaties.<sup>39</sup> The Colombian Constitutional Court has declared that it can give 'binding effect' to rights that 'are not expressly included in international treaties ratified by Colombia'.<sup>40</sup> As mentioned, it has also integrated international soft-law rights for displaced persons in the domestic constitution.<sup>41</sup>

<sup>36</sup> See discussion of the right to proportionality and the right to substantial judicial review in the UK at p. 266.

<sup>37</sup> In Brazil, a special law, Law 11.340/2006, or Law Maria da Penha, was created to address violence against women as a response to the Report published by the Inter-American in 2001 in consideration of a petition filed before the Inter-American Commission in 1998. See Inter-American Commission on Human Rights, *Fernandes v. Brazil (Maria da Penha)*, Case 12.051, Report N. 54/01, OEA/Ser.L./III.111.

<sup>38</sup> IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgment of 31 August, 2001.

<sup>39</sup> Causa A.186 XXXIV "Asociación Benghalensis y otros c/ Ministerio de Salud y Acción Social – Estado Nacional s/ amparo ley 16.986"; causa C 823. XXXV. "Recurso de Hecho – Campodónico de Beviacqua Ana Carina c/ Ministerio de Salud y Acción Social – Secretaría de Programas de Salud y Banco de Drogas Neoplásicas".

<sup>40</sup> T-477/95.

<sup>41</sup> T-967/09.

In many countries, further, litigation concerning human rights has led judges to create new rights not by assimilating international law in domestic law, but by expanding on the existing jurisprudence of international courts, and by spontaneously giving broader scope to rights than international courts.<sup>42</sup> In all such cases, litigation has been able to initiate a complex chain of interaction between domestic law and international law, leading directly to the production of laws, sometimes with constitutional standing, whose primary authority is extracted *from the law itself*.

In close relation to this, second, some constitutions specifically institutionalize provisions for human rights litigation, in which single agents are clearly entitled to expand existing constitutional rights. In India, notably, Article 32 of the Constitution allows individuals to file suit against the government on human rights grounds, and the Supreme Court has sought innovative ways of allowing parties to use this facility.<sup>43</sup> Some cases of this kind have had far-reaching constitutional consequences.<sup>44</sup> Perhaps the most important example of this can be found in Colombia. As mentioned, an important aspect of the Colombian Constitution is that its basic rights texture is open and subject to expansion. Moreover, in Article 86, the 1991 Constitution provides for the submission of *tutelas* to the Constitutional Court: that is, it establishes procedures for challenges to decisions of public agencies that are perceived to violate human rights in cases in which legal redress is not procedurally guaranteed. Taken together, these features create potent instruments, which allow litigants to construct new rights. Notably, after 1991, the Constitutional Court in Colombia rapidly expanded the range of rights that could be addressed by *tutelas*, and, in so doing, it expanded the range of rights accorded constitutional rank. *Tutelas* were first conceived as mechanisms for the protection of fundamental constitutional rights that are ‘abused or at risk’ and for the provision of orders against the persons perpetrating the violation.<sup>45</sup> However, the Court soon widened its *tutela* jurisdiction, claiming that it could also hear *tutelas* in cases in which rights were affected that, by connection, had implications for more strictly defined and protected

<sup>42</sup> See examples above at pp. 227–8.

<sup>43</sup> See the submission by informal letter of a third party in the prison-rights case: *Sunil Batra v. Delhi Administration* on 20 December 1979, Equivalent citations: 1980 AIR 1579, 1980 SCR (2) 557.

<sup>44</sup> See pp. 251–2. Note more sceptical reflections on this in Shankar (2009: 154), stating that most constitutional rulings relied on prior laws.

<sup>45</sup> T-597/93.

fundamental rights.<sup>46</sup> Within a short period, the Court developed a *tutela* jurisprudence that revolved around the principle that the state had positive obligations to promote conditions in which basic rights could be broadly enjoyed, and state actions were subject to petition by *tutela* if they did not positively facilitate exercise of rights by as many social actors as possible. In particular, this implied that the government had expanded responsibilities towards socially marginalized persons, and that the 'adoption of measures favouring marginalized groups' was a primary duty of the state.<sup>47</sup> As a result, the range of matters open to challenge by *tutela* extended rapidly, and courts were able to hear *tutelas* in cases in which the government was expected to fulfill social obligations, defined by the Constitutional Court itself. *Tutelas*, in fact, soon formed a very important line of socio-political communication between the government and a broad range of persons and social groups, traditionally located outside the reach of state power.

The widespread use of *tutelas* in Colombia has led to the consolidation of core constitutional rights, and it has helped give reality to formal human rights provisions. Equally importantly, as discussed, litigation through *tutelas* has substantially altered the range of rights that are given constitutional protection.<sup>48</sup> In Colombia, judges initially established a doctrine of *connectedness* to expand the reach of *tutela* jurisprudence, and this soon led to a widening of existing constitutional rights, and to the establishment of guarantees for supplementary rights. Notably, for example, the 1991 Constitution did not fully guarantee health rights as fundamental rights. However, in an early *tutela*, the Constitutional Court declared that, although rights to health benefits are not in principle protected by *tutelas*, *tutelas* could be used to claim these rights if violation of such rights affected, or was *necessarily connected to*, primary rights, such as the right to life or the right to dignity.<sup>49</sup> On this basis, the Court ruled that there exists both a right to health and a right to health care assistance, because such rights form a precondition of the right to life.<sup>50</sup> In parallel, further,

<sup>46</sup> This expansion meant that *tutelas* could be used, for example, to claim health rights (e.g. T-597/93) or rights to a clean environment (T-257/96; T-046/99).

<sup>47</sup> Sentencia T-025/04.

<sup>48</sup> At an early stage, the Constitutional Court argued that it is not only fundamental rights that can be protected by *tutela*. This can also apply to rights obtaining less than fundamental protection – for example, the right to social security. On this account, the extent to which a right is classifiable depends on the given case; if absence of a non-fundamental right (e.g. welfare) jeopardizes other rights (e.g. the right to life), such a right may be seen as fundamental by contagion. See for example T-491/92.

<sup>49</sup> T-597/93.

<sup>50</sup> T-485/92.

the Constitutional Court applied the logic of connectedness to determine that citizens possess a fundamental right to education. This right was constructed on the ground that education is closely connected to other established fundamental rights contained in the constitution, and it is connected, constitutively, to the right to the development of personality, to civil and political rights, to rights of personal self-determination, and to the right to work and to equality.<sup>51</sup> A similar logic has been applied to rights of protection from environmental damage. Even the Supreme Administrative Court (*Consejo de Estado*) in Colombia, whose human rights jurisprudence was originally more restrictive than that used by the Constitutional Court,<sup>52</sup> has greatly widened the existing corpus of constitutional rights in order to reinforce environmental rights.<sup>53</sup> In the most far-reaching administrative law case in this domain, the *Rio Bogotá* pollution case (2014), the *Consejo de Estado* replicated aspects of *tutela* jurisprudence, and it established generalized collective environmental rights.<sup>54</sup> In most spheres, in fact, the Constitutional Court ultimately moved beyond its reasoning that promoted the expansion of rights owing to *connectedness*. For example, it ultimately established rights to health and to education as free-standing fundamental rights.<sup>55</sup>

Overall, it is difficult to see Colombian *tutelas* as categorically distinct from a mode of constituent action. *Tutelas* often secure more effective inclusion of marginalized citizens in society in law-making processes than is possible in more classically centralized patterns of constitution making and political engagement. As discussed, judges in *tutela* cases have also established differential categories of human rights protection, creating special rights for designated vulnerable constitutional subjects.<sup>56</sup> Through *tutelas*, therefore, a pluralization of legal/political subjectivity

<sup>51</sup> T-1227/05.

<sup>52</sup> See discussion in López Cuéllar (2015: 51).

<sup>53</sup> On the complex relation between the superior courts in Colombia, with the Constitutional Court favouring a less formalist, more individual-centred approach see López Martínez (2015: 103–4).

<sup>54</sup> Sentencia n° 25000-23-27-000-2001-90479-01(AP) de Consejo de Estado – Sección Primera, 28 March 2014. In this case, the *Consejo de Estado* actually amplified environmental rights guaranteed by the Constitutional Court, and it set out a list of directives for public agencies to secure environmental rights, and especially rights to clean water, for persons affected by pollution of the Bogotá river. This case can be seen as the equivalent in administrative law to T-025/04 in constitutional law. Notably, the *Consejo de Estado* has also implicitly interpreted international biodiversity treaties to create rights for animals. See 25000-23-24-000-2011-00763-01 (2013).

<sup>55</sup> For an early leading case concerning this principle see T-491/92.

<sup>56</sup> See p. 271 above.

occurs, which is proportioned to the sectorally complex structure of society. Naturally, litigation associated with *tutelas* is widely related to international law, and new rights substantiated through *tutelas* are commonly supported by reference to international norms.<sup>57</sup> In an important early statement concerning questions which could be brought before the Constitutional Court as *tutelas*, it was argued that the protection of a right under international law was a core ground for its designation as subject to *tutela* protection.<sup>58</sup> New lines of political articulation and subject formation are thus directly stimulated by the autonomy of the global legal system.

Third, at a more general level, there is an increasing tendency, in many societies, for litigation to fix on questions of rights, and the establishment of human rights as central principles of legal argumentation almost inevitably means, in different national societies, that legal claims gravitate around rights. As a result of this, litigation now widely involves the translation of separate social disputes into a common normative vocabulary (rights), which is generally accepted as democratically necessary, and through which legal claims can easily be transposed into legislative acts. As litigation is increasingly phrased in relation to rights, moreover, separate acts of litigation produce norms with relevance for all society, across different functional spheres, and litigation has an increasingly broad capacity for creating and solidifying uniformly binding norms. In many settings, the growing convergence of legal disputes around claims over basic rights means that single legal claims intensify a common grammar of constitutional normativity in society.

One important example of this broad constitutional impact of litigation is the USA, where, as discussed, the expansion of basic rights jurisprudence in the 1950s and 1960s led to deep processes of constitutional transformation. Notably, the increasing prominence of rights as a normative register in the USA at this time meant that claimants were able to present single cases in a normative diction that could be easily elevated to a high degree of formal abstraction, across different legal spheres and different geographical regions. As discussed, the fact that the salience of human rights was linked to the rise in federal power created a situation in which single acts of litigation could both harden existing rights and generate new rights, which were then expanded, across the entire federal polity, as parts

<sup>57</sup> The right to environmental protection was constructed on the basis of a number of international norms and agreements (T-154/13). The right to housing also presupposed citation of international instruments (T-239/13).

<sup>58</sup> T-002/92.

of the constitutional architecture of democracy. In some ways, accordingly, litigation became constitutionally formative of the USA as a national state, and it extended the reach, and supplemented the relatively weak regulatory capacities, of the federal government (Friedman 2002: 480; Kelemen 2009: 1). This is visible in leading civil rights cases, which greatly impacted on the material constitution of national society as a whole. This is perhaps most clearly exemplified by *Griswold v. Connecticut* (1965), in which a ruling on reproductive liberties implied the existence of a system of corollary rights, applicable across all states, required to give effect to primary rights set out in the constitution itself.<sup>59</sup> Notably, further, the increasing importance of civil rights jurisprudence gave rise to an intensified culture of litigation, in which new legal actors assumed prominence and new issues, articulated through new rights claims, could be brought to the attention of the courts, and translated into recognized legal norms (see Epp 1998: 69; Friedman 2002: 460–7).

An alternative example of the wider constitutional impact of litigation is the UK. As, in the 1970s, British public law slowly began to assimilate formal human rights law from the ECHR, litigants increasingly raised questions relating to formal human rights law, and claimants endeavoured to present cases in a register that was open to rights.<sup>60</sup> As a result, as discussed, the courts began to harden the status of human rights in UK law, aligning common-law rights to international human rights. After the passing of the HRA (1998), then, it was increasingly accepted that human rights imposed normative uniformity on UK law, dictating principles to be applied across all parts of the judicial and legislative systems.<sup>61</sup> Ultimately, the view became prevalent that the courts were required actively to develop a shared system of rights, suffusing all spheres of law, reflecting a growing cross-fertilization between the common law and the ECHR. Accordingly, it was reasoned in leading judicial rulings that human rights derived from the ECHR should not be seen as forming ‘a discrete body of domestic law derived from the judgments of the European court’. Instead, it was argued, ECHR rights should be observed as norms that soak through and permeate all relevant areas of the law,<sup>62</sup> and courts had a particular duty to

<sup>59</sup> See analysis in Luban (1999: 37).

<sup>60</sup> See discussion of this tendency by Ackner LJ in *Wheeler v. Leicester City Council* [1985] AC 1054, [1985] 2 All ER 1106.

<sup>61</sup> *Wilson v. First County Trust* (No 2) [2003] UKHL 40 (Earlsferry LJ).

<sup>62</sup> *R (Osborn) v Parole Board* [2013] UKSC 61.

expand the general reach of and elaboration of human rights.<sup>63</sup> In other words, human rights assumed a dynamic pervasive force within the UK legal order, and, in all areas, single acts of litigation were able to circulate and entrench generalized norms across society. In some cases, notably, rights that had only been tentatively acknowledged in common law were more strictly formulated through the fusion of ECHR norms and common law principles.<sup>64</sup>

Perhaps the most striking illustration of this diffuse impact of human rights litigation can be observed in the FRG, gaining particular momentum in the 1950s and 1960s. During this time, the presumption was progressively reinforced in the courts that the basic rights expressed in the constitution were co-implied in all legal exchanges, and that all legal cases brought before the courts were subject to basic rights, originally extracted from international human rights.<sup>65</sup> This principle was explained, most famously, with reference to the distinction between public law and private law. In this regard, it was decided in the Constitutional Court that basic constitutional rights implied an overarching constitution for all society, binding both on vertical interactions between persons and the state and lateral exchanges between individual persons. This principle instilled a deep dynamic of subjectivization in the domestic legal order, in which each person was constructed, in all social relations, both as a holder, and as an active interpreter, of constitutional rights, and all legal relations, vertical and horizontal, were defined on that basis.<sup>66</sup> In this setting, acts of litigation became a mainspring in promoting the construction of a relatively uniform rights-based constitution, and litigation necessarily deepened the penetration of constitutional norms into society.

A very distinctive example of the widening constitutional implications of human rights litigation can be found in Russia. In Russia, the assimilation of international human rights law in domestic law has been a complex, contested and tortuous process, at times obstructed, but generally encouraged, by actors in the political executive. As discussed, however, as domestic law became articulated with international law, individual acts of litigation began to acquire a distinctive force in the wider legal order. In a society marked historically by extreme institutional diffuseness, the fact that citizens were able to articulate legal claims through the relatively

<sup>63</sup> See also *A v. British Broadcasting Corporation* – [2014] All ER (D) 65 (May).

<sup>64</sup> See the creation of a strengthened, effectively constitutionalized guarantee of a right to appeal a judicial ruling in *FP(Iran) v. Secretary of State* [2007] EWCA Civ 13.

<sup>65</sup> See discussion above at p. 317.

<sup>66</sup> See for theoretical articulation of this Häberle (1975).

universal diction of human rights linked agents in society more directly and more uniformly to the institutions of the federal state, and it expanded a relatively consistent legal order across society. In fact, human rights litigation was clearly promoted by government bodies as an activity that instilled greater legal uniformity across society, and which established a basic normative structure to stabilize society around the political system. For this reason, litigation was officially activated as an instrument for institutionalizing national patterns of citizenship, and litigation was deliberately constructed as a practice that promoted systemic nationalization. Striking in this respect, above all, is the fact that in Russia citizens were particularly encouraged to initiate litigation on grounds linked to international human rights norms. As discussed, after 2000, the citation of international human rights law in Russian court hearings became more frequent, and court reforms and reforms to procedural codes were introduced to bring domestic courts into line with international standards. This meant that legal cases related to internationally defined rights came to act as a primary source of public legal and even political-systemic construction, placing stricter constraints on acts of public agencies, and correcting the historical weaknesses in the linkage between state and society. In each respect, the broad translation of legal disputes into a register of rights acted to spread a formally constituted legal order across all parts of the law and across all parts of society. In each respect, this process was driven by the fact that domestic law became more permeable to international law, which meant, over time, that single acts of litigation linked individual agents more immediately to the global system.

In each of the above respects, the growing autonomy of the legal system means that the basic constitutional-political form of society is produced through multiple processes, in which single acts of litigation, initiated by many different subjects, have a primary position. Often, in fact, human rights law promotes a radical multiplication or segmentarization of democratic citizenship, creating openings for law-making practices in a number of different roles, social dimensions and functional spheres.

### 5.3.2 *Litigants as Citizens 2: Collective Litigants*

Rights-based litigation has had the most profoundly transformative effect on the nature of democratic practice, not through the actions of singular persons as litigants, but rather through the emergence of new collective litigants. In some cases, engagement of collective actors in litigation is clearly equivalent to political or even constituent practice. For example,



it is now commonplace for some collective litigants to assume significant positions in longer processes of democratization. Many processes of political democratization have been partly propelled by collective agents pursuing human rights litigation against oppressive governments.<sup>67</sup> In addition, some processes of political democratization have been immediately stimulated by mobilization around demands for particular collective rights – for example, for health rights.<sup>68</sup> In such instances, human rights have created a focus of collective mobilization, located within the law, which has initiated wider political-systemic changes. However, the importance of collective litigation is not specific to democracies prior to, or in, a process of transition, and the importance of collective litigation does not only appear prior to, or in, classical constitution-making processes. On the contrary, collective litigation forms a mode of inner-legal political practice in which many groups, in both new and (nominally) more established democracies, can engage. In some settings, collective litigation constitutes a *sui generis* practice, in which international norms penetrate deep and fluidly into society, articulating with hidden groups and hidden subjects, at times unearthing new political agents. The fact that law is not anchored in fixed political subjects means that, in litigation, new subjects can appear within national societies, and new political personalities can be made visible within historically formed constitutional structures. Indeed, in some cases, collective litigation facilitates the emergence of new citizen groups, especially amongst actors traditionally excluded from legal personality and effective citizenship rights. In collective litigation, therefore, global law acquires constitutive political force at a unique level of autonomy.

### 5.3.2.1 Indigenous Peoples and Other Collectives

The role of litigation as a pattern of collective practice and collective subject formation is visible in legal actions relating to indigenous peoples. In different settings, indigenous groups have begun to act as distinct political subjects, with distinct reserves of politically formative agency. Historically, of course, indigenous groups were often invisible amongst dominant population groups in national societies. In many cases, moreover, indigenous peoples have a specific transnational character, as they claim identities that pre-exist national societies, often inhabiting territories that cross state

<sup>67</sup> See discussion of Argentina above at p. 211.

<sup>68</sup> Note for instance the democratizing impact of popular campaigns for health rights in Bolivia in the 1980s, in which mobilization around health care rights led, ultimately, to a broader deepening of democracy as a whole. See on this Torres-Goitia Torres, Torres-Goitia Caballero and Lagrava (2015: 116–24).

boundaries. On both grounds, indigenous population groups have struggled to assert a distinctive legal subjectivity, and to acquire recognition as holders of collective rights. In some cases, however, the recent differentiation of the law's authority from the will of factual populations has begun to disarticulate indigenous groups within their societal settings. In such cases, indigenous groups emerge as new political subjects, and the fact that the legal system is not bound to a factual material citizen means that such groups can assert new modes of collective citizenship. Litigation has central importance in this process.

Even in societies in which plural rights attached to ethnicity have long-standing protection, ethnic membership has been consolidated as a distinct category of legal/political subjectivity. Examples of this can be found in parts of the former Soviet Union: that is, in the Republics and constituent units of the Russian Federation. In Russia, Federal Law No. 82-FZ (1999), 'On Guarantees of the Rights of Indigenous Peoples of the Russian Federation,' recognizes distinct rights of indigenous populations, and it makes special provision for their legal representation and standing before the courts. However, the construction of indigenous groups as collective democratic subjects is most striking in Latin America. As discussed, a number of Latin American societies now designate indigeneity as a distinctively protected legal title. In consequence, indigenous communities possess elevated status as claimants to constitutional protection, and they engage directly with the political system, as free-standing political subjects, as they pursue litigation for separate rights. Successful rights claims in Latin America made by indigenous groups are widely sustained either by reference to ILO 169 or by reference to rulings of the IACtHR, which has proactively supported indigenous rights.

A significant feature in litigation regarding indigenous rights in Latin America is that this is not a static process, in which already established rights are ascribed to already existing and categorized legal subjects, or in which formalized rights are simply moved from one legal domain to another. On the contrary, litigation for indigenous rights often involves the inner-legal construction of new rights, and, in some cases, of quite new, contingent collective subjects. Significantly, in many cases, rights ascribed to indigenous communities have not been primarily established on the grounds that the claimants are indigenous, and rights granted to indigenous groups are not defined as rights of an absolutely unique nature, pertaining exclusively to indigenous communities for some material-anthropological reason. To be sure, it is now quite common for Latin American courts to acknowledge a series of distinct rights that are specific

to indigenous communities. For example, one core right amongst the set of rights assigned to indigenous groups is the right to occupy ancestral land.<sup>69</sup> A further core right imputed to indigenous communities is the right to consultation in matters affecting occupancy of ancestral lands – for example, road building and extractivist activities.<sup>70</sup> In securing such rights, litigation for indigenous rights has clearly assumed legislative force, and indigenous groups, as litigants, have evolved as concrete democratic subjects, able, through litigation, to expand and intensify formal provisions for their rights. Important in this respect, however, is the fact that most indigenous rights have been created not as free-standing rights, or as rights that are generically attached to indigenous subjects, but as rights derived from other rights, which are more generally protected. In such processes, indigenous groups often emerge as rights-holding subjects, in more spontaneous fashion, through the actual practice of litigation. As a result, litigation by indigenous groups appears as a mode of democratic agency, or even as a mode of democratic subject formation, in which new rights are formulated, and in which new legal/political subjects are transformed, or become visible, through the act of claiming rights. To this degree, such rights have been elaborated on inner-legal foundations, as relatively contingent outcomes of litigation processes.

To illustrate this, leading cases of litigation concerning the land rights of indigenous peoples in Latin America have established indigenous rights through the extension of other private and civil rights, and especially through an amplificatory reading of the right to life.<sup>71</sup> Similarly, indigenous rights to consultation are not of a fully *sui generis* nature. In some countries, for example, the right of a group to be consulted about matters affecting its wellbeing is not exclusive to indigenous population groups, but has been extended to other groups affected by extractivist or similar activities.<sup>72</sup>

<sup>69</sup> See the Peruvian case: *Comunidad Nativa Tres Islas Y Otros* EXP. N° 01126-2011-PHC/TC (9/11/2011); and see the Bolivian case SCP 0572/2014. In fact, this right is protected in Article 231, § 3° of the Brazilian Constitution.

<sup>70</sup> See the Peruvian case: Constitutional Court (Grand Chamber), STC N° 06316-2008-PA/TC (11/12/2009). See also the Chilean case: Supreme Court Rol 10.090-2011 (22/03/2012). In one case, C-030/2008, the Colombian Constitutional Court invalidated an entire piece of legislation because there had been no prior consultation with indigenous communities.

<sup>71</sup> See above p. 269.

<sup>72</sup> See the Brazilian case, JFPA, Sentença na Ação Civil Pública n° 3883-98.2012.4.01.3902, UHE São Luiz do Tapajós. Decision of 15 June 2015. The right to free, prior and informed consultation to indigenous population affected by the construction of the São Luiz do Tapajós dam is upheld in this decision. This ruling also advocates an expansion of the right to be consulted to other traditional communities. This case established the very important concept of 'traditional communities' to create rights for populations with some

In most cases, the recognition of indigenous rights becomes possible because legal rights are severed from entitlements that are materially attached to ethnicity as an objective social quality, and indigenous groups acquire rights, constitutively, as they are legally separated from their material social form. In each respect, the subject of the indigenous citizen is constructed within the law itself, and the law itself produces conditions of multi-centric citizenship. In most cases, indigenous rights have resulted from the expansion of rights already consolidated in international law, and the legal subjectivity of indigenous peoples has been partly formed through inner articulations between national and global law.<sup>73</sup>

Similar patterns of political subject formation can be seen in Africa. In many African countries, legal claims attached to ethnicity have a particularly sensitive position, and contests over indigeneity can easily trigger very delicate political and constitutional reactions. This is the case, above all, because of the ethnic composition of governing elites in most African societies. Latin American societies are still primarily governed by elites of Hispanic extraction, and the category of indigeneity can easily be applied to non-Hispanic population groups to produce rights as a means of supporting societally disadvantaged sectors. By contrast, in much of Africa, government functions are almost exclusively vested in persons with strong claims to membership in indigenous groups, and it is usually impossible to make a distinction between various social groups by differentiating between

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similarities to indigenous groups. Recently, in SU-133/17, the Colombian Constitutional Court has extended rights accorded to indigenous communities to professional groups, in particular miners, attributing to them a distinct personality on the basis of their 'mining identity'.

<sup>73</sup> As discussed above (p. 269), line of reasoning that expanded the rights to life to create rights for indigenous peoples was cemented in the IACtHR. Notably, judges in the IACtHR initially created land rights for indigenous peoples through a broad interpretation of the right to life, enshrined in Article 4 of the ACHR. In particular, they expanded this right to argue that the right to life entails a notion of *vida digna* – the right to live in dignity. In essence, the concept of *vida digna* indicates that the fundamental right to life is not exhaustively defined as the simple negative right not to be deprived of life. On the contrary, the right to life is seen to contain, by inference or by necessary extension, a cluster of positive rights, including the right to gain access to the conditions (broadly defined) that guarantee a dignified existence (see Pasqualucci 2006: 299). This concept can be traced to earlier decisions in India and Colombia. For the key Indian precedent, see *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*, AIR 1981 SC 746. But this concept first appeared in the IACtHR in decisions such as *Villagran Morales (Street Children) v. Guatemala*, 19 November 1999, and *Instituto de Reeducación del Menor v. Paraguay*, 2 September 2004, which addressed legal claims of marginalized social groups, especially vulnerable children. However, this concept is now often applied in cases involving indigenous people.

them on grounds of indigeneity or non-indigeneity. As a result, reference to indigeneity as a legal designation can easily be seen to promote special treatment for particular communities, and even to justify a privileging of one population group over others. Indeed, in distinguishing between different population groups on the same territory, the concept of indigeneity can even give rise to separatist claims. In consequence, this concept is often opposed in Africa because it might appear to legitimate demands amongst distinct population groups for secession from existing nation-states, causing further depletion of already weak state institutions.<sup>74</sup> In the longer period of decolonization, significantly, African states routinely adopted very defensive conceptions of state sovereignty, and both single governments and inter-state agreements refused to acknowledge claims to autonomy or partial autonomy by ethnically distinct communities (see Ndahinda 2011: 171).

Not surprisingly, therefore, recent processes of democracy-building in Africa have been marked by great reticence in the acknowledgement of claims to rights made by ethnic collectives. Few African constitutions make strict and express provision for the protection of indigenous people. Such rights are recognized in the Preamble to the Constitution of Cameroon and in Articles 6 and 148 of the 2015 Constitution of the Central African Republic. Other constitutions, such as those of Mali, Burundi and South Africa, provide more general protection for indigenous groups, especially under clauses and declarations acknowledging rights of linguistic, cultural and epistemic diversity. In 2011, the Congo introduced a new national law on the rights of indigenous peoples. The Ethiopian Constitution is based on a model of power-sharing ethno-federalism, which gives clear powers of autonomy to different ethnic groups, in sub-national units. Also, in many cases, protective provisions for minorities implicitly cover indigenous peoples. For instance, the Kenyan Constitution (2010) does not specifically protect indigenous peoples. However, it prescribes affirmative action for minorities and marginalized groups (Article 56). In many African societies, further, the collective rights of indigenous communities are quite broadly protected under constitutional and statutory guarantees for the validity of customary law (Ndahinda 2011: 93; Ibhawoh 2000: 847). Notable examples of this are found in the constitutions of Kenya (Article 63),<sup>75</sup>

<sup>74</sup> Following the UN Human Rights Council's adoption of the Declaration of the Rights of Indigenous Peoples in June 2006, a group of African States reacted with caution. They expressed concerns that, considering 'Africa is still recovering from the effects of ethnic based conflict', the concept of indigenous presented might be 'threatening the political unity and the territorial integrity of any country' (African Group 2006: paras 2.2, 3.2).

<sup>75</sup> The Kenyan Constitution (Article 63) protects community land held under customary law. Kenyan legislation also protects African customary law as a valid source of law in civil cases.

and South Africa (Articles 211–12).<sup>76</sup> Under the 1992 Constitution of Ghana, the institution of chieftaincy and traditional systems of administration as established by customary law and usage are recognized (Article 270).<sup>77</sup> In fact, in Article 11(3), the Constitution recognizes and supports patterns of customary law in Ghana as practised and applied by the various ethnic groups. In Ghana, further, ethnic rights relating to land ownership are constitutionally protected.<sup>78</sup> More generally, however, even the most progressive African constitutions usually avoid attaching strict legal titles to indigenous groups, and they tend to protect indigenous groups by more implicit provisions. Generally, models of democracy have been promoted that are based on overarching patterns of national affiliation and popular sovereignty.

Alongside this, acceptance of international norms regarding indigeneity in Africa is limited. For example, most African states have refused to ratify established international instruments for guaranteeing indigenous rights in domestic politics. At the time of writing, the Central African Republic is the only state in Africa that has ratified ILO 169. Even in cases before international tribunals, where judges have recognized claimants as possessing collective rights as peoples, the formal recognition of indigeneity has been very cautious, and subject to clear qualifications.<sup>79</sup> For a long time, the African Commission on Human and Peoples' Rights was very reluctant to recognize indigeneity as a meaningful term to describe African peoples (see Bojosi and Wachira 2006: 390, 394). Notably, important cases heard by the African Commission regarding indigenous groups have been processed without cooperation of the respondent states.<sup>80</sup>

In recent years, to be sure, there have been changes in international recognition of indigeneity. A majority of African states recognized the (non-binding) UN Declaration on Indigenous Rights (2007). The African

<sup>76</sup> For debates see note 87 below.

<sup>77</sup> On chieftaincy as institution in Ghana see Ray (1996); Brydon (1996).

<sup>78</sup> On the constitutional creation of an enforceable trust in relation to skin and stool lands see *Owusu v. Adjei* (1991) 2 GLR 493 at 516.

<sup>79</sup> In an important early ruling concerning indigenous peoples, the word 'indigenous' was not used. See African Commission, (SERAC) and *Center for Economic and Social Rights (CESR) v. Nigeria*.

<sup>80</sup> The Commission heard Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of *Endorois v. Kenya* without Kenya's full cooperation. It referred the next case against Kenya (*African Commission on Human and Peoples' Rights v. the Republic of Kenya*, filed 2012) directly to the African Court on Human and Peoples' Rights.

Commission has begun to promote a progressive construction of indigeneity, and, in its rulings, it has recognized indigenous communities as claimants to specific collective rights. This attitude has now also been replicated in the recent case law of the African Court on Human and Peoples' Rights.<sup>81</sup> In fact, the African Commission created a Working Group on Indigenous Populations/Communities, which cautiously promoted recognition of indigeneity within established states.<sup>82</sup> Cases heard by the African Commission have seen a progressive elaboration of the concept of an indigenous people, bearing collective legal rights, and based on common history, identity and tradition.<sup>83</sup> Nonetheless, in accepting the existence of such rights, the African Commission has declared that sub-national self-determination can only be exercised in a fashion that fully acknowledges 'principles such as sovereignty and territorial integrity'.<sup>84</sup> In fact, wide endorsement of the UN Declaration in Africa resulted partly from the observation of the African Commission that its provisions should be applied in a fashion commensurate with general international norms concerning territorial integrity (see Crawhall 2001: 26). The Working Group of the African Commission declared that recognition of indigeneity can only occur if 'due regard' is shown for the sovereignty of national states (2005: 75). Overall, therefore, even in accepting indigenous rights, the African Commission has expressed caution about the implementation of the UN Declaration in African societies,<sup>85</sup> and it has shown wide respect for anxieties regarding secession and the destabilization of national boundaries attached to the establishment of such rights.<sup>86</sup> Notably, the Working Group Report stressed that the African Commission should only acknowledge indigeneity in the 'analytical form of the concept', to be applied to 'marginalized groups' in order 'to draw attention to and alleviate the particular form of discrimination they suffer from' (2005: 88). On

<sup>81</sup> See African Court on Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v. the Republic of Kenya*, Application No. 006/2012 (2013), Judgment 26 May 2017 at para 107.

<sup>82</sup> This Report stated that the title of indigeneity can be justified by groups claiming 'a special attachment to and use of their traditional land' (African Commission's Working Group of Experts on Indigenous Populations/Communities 2005: 93).

<sup>83</sup> *Kevin Mgwanga Gunme et al./Cameroon* Comm. No. 266/03 (2009) at para 179.

<sup>84</sup> *Katangese Peoples' Congress v. Zaire*, African Commission on Human and Peoples' Rights, Comm. No. 75/92 (1995).

<sup>85</sup> See Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples.

<sup>86</sup> *Kevin Mgwanga Gunme et al./Cameroon* at para 1999.

this basis, indigenous communities are partly defined in terms that are unlikely to fuel secessionist movements or claims to political autonomy.

Despite this, however, ethnic groups have recently emerged as constitutional-political subjects in Africa in several quite distinct ways. First, in some national cases, indigenous communities in Africa have been allowed to assert a claim to certain collective rights, such as privileged access to land and resources. Indigeneity has been used as a distinctive explanation for such rights.<sup>87</sup> Second, international judicial bodies in Africa have begun to establish indigeneity as specific grounds for legal claims. This has also led to international recognition of rights to land and resources.<sup>88</sup> Notable in such cases, both in national and supranational law, is the fact that, as in Latin America, collective claims to rights by distinct ethnic communities in Africa are often secured through reference to other more generally recognized rights, which already enjoy national and international protection. For example, the rights of indigenous groups are often established through litigation over rights to land, to water or to cultural integrity, and these rights create a situation in which rights particular to the life of ethnic communities can be recognized and preserved. Even in cases where indigeneity is admitted as the ground for an entitlement, rights attached to indigeneity are usually constructed through the expansion of other primary rights, often on the basis of international instruments.<sup>89</sup> Moreover, rights granted to indigenous communities in Africa, as in Latin America, are not categorically bound to indigeneity as a

<sup>87</sup> See the Botswanan case *Sesana and Others v. Attorney-General* (2006) AHRLR 183 (BwHC 2006) 117. For comment on the taboo-breaking nature of this ruling see Zips-Mairitsch (2013: 346). See the South African cases *Richtersveld Community and Others v. Alexkor Ltd and Another* (488/2001) [2003] ZASCA 14; [2003] 2 All SA 27 (SCA) (24 March 2003) 26 and *Alexkor Ltd and Another v. Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003). See the Kenyan case *Joseph Letuya and 21 Others v. Attorney General and 5 Others* [2014] eKLR.

<sup>88</sup> See the following rulings of the African Commission, *Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria* (2001) AHRLR 60 (ACHPR 2001); *Katangese Peoples' Congress v. Zaire*, Comm. No. 75/92 (1995); 276/03 *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council)/Kenya*.

<sup>89</sup> See the Kenyan case *Charles Lekuyen Nabori and 9 Others v. Attorney General and 3 Others* [2008] eKLR, p. 78. See the Botswanan case *Mosetlhanyane and Others v. Attorney General of Botswana*, Civil Appeal No. CACLB-074-10. Judgement 27.1.2011 This ruling overturned the far more restrictive ruling of the High Court, delivered in *Mosetlhanyane and Another v. the Attorney General* [2010] 3 BLR 372 HC.



material or extra-legal substrate. Indeed, these rights are often widened so that they can be exercised by other subjects that are exposed to analogous deprivations.<sup>90</sup>

In these processes in Latin America and Africa, opportunities created through litigation focused on human rights law have enabled ethnic communities to become political or even constitutional subjects in many different ways. In a range of settings, indigenous populations now form important democratic actors, partly separate from national constituencies, often shaping the institutional structure of democracy by expanding and solidifying a spectrum of specific collective rights claims. In such cases, however, the emergence of indigeneity as a source of political subjectivity occurs mainly as an articulation of a prior, given legal structure, and factual group membership is not essentially constitutive of group rights. Indeed, ethnic populations usually appear as political subjects through the constructive mobilization of rights that are already established at a primary (that is, global) constitutional level. As discussed, in many cases, these rights do not pertain generically to indigenous subjects, and they are attached to indigenous subjects through an inner-legal process of secondary rights generation. In many cases, the legal substance of indigeneity evolves through the course of litigation itself, and the legal personality of indigenous groups is generated through the amplification of existing rights. It is habitual for theorists of indigenous law to see indigenous rights as an element of legal pluralism that is asserted by concretely embedded subjects, which resist incorporation in the formal legal system of society (see Merry 1988: 873; Tamanaha 2008: 399). In most cases, however, autonomous indigenous rights are established through the secondary enforcement of increasingly unified global norms, and such rights become real, not as the attributes of factual anthropological subjects, but as determinate instantiations of a primary system of global human rights.

### 5.3.2.2 Displaced Peoples

Analogies to the formation of indigenous peoples as litigants capable of exercising political agency can be found in legal cases regarding internally displaced persons, forced into inner-societal migration by, for example, violence, ethnic conflict or environmental crises. In such cases, patterns of inner-legal interaction have created fora for the substantiation of displaced

<sup>90</sup> The Kenyan courts have constructed rights of indigenous communities and rights of displaced communities on the same grounds. See *Satrose Ayuma and 11 Others v. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme and 3 Others* para 15.

persons as visible political subjects, sometimes acting to modify the basic structure of national democratic systems. In fact, the emergence of displaced communities as distinct legal-political subjects provides particular evidence of the constituent force of interactions between different spheres of global law, and it illuminates the capacity of litigation to supplement democratic agency as a constitutive source of legal norm construction. Notably, the legal position and constitutional impact of indigenous communities was originally defined and protected under international law, agreed in inter-state treaties, so that they progressively gained constitutional protection because of this. By contrast, internally displaced persons possess a much weaker personality under international law, and much more precarious claims to effective citizenship, and they have been forced to establish legal personality without clear formal international protections. As a result, legal protection for displaced populations has been created in much more contingent processes, in which acts of litigation play a key role.

The relatively weak legal protection of displaced peoples is due, first, to the fact that the presence of internally displaced persons often presents a threat to established national legal systems, defined by the primacy of sovereign state institutions. Internally displaced persons are typically victims of violence, in which domestic political institutions have some degree of complicity, or, at least, which they lack the power or will to prevent (see *Phuong 2005: 209*). Indeed, states may themselves be in breach of international treaty norms by virtue of the fact that displaced persons exist within their territories (*Vidal López 2007: 107*). Consequently, persons in a condition of displacement find it difficult to channel legal claims towards domestic state institutions, and they are usually only able to obtain weak remedies under domestic law (*Geissler 1999: 467*). Some societies that have recent experience of large numbers of internally displaced persons, notably Kenya and Colombia, have introduced legislation to protect them.<sup>91</sup> Moreover, displaced persons are of course covered by general human rights law. However, the robustness of such provisions is questionable, especially as many displaced persons specifically wish to preserve invisibility in face of public authorities, in order to avoid exposure to renewed persecution.

<sup>91</sup> For Kenya, see *The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act (2012)*. For Colombia, see *Law 387 on Internal Displacement (1997)*, *Decree 173 of 1998 adopting the National Plan for Comprehensive Assistance to Populations Displaced by Violence (1998)*, and, above all, the *Victims' Law (Law 1448, 2011)*.

The weak protection for displaced persons is due, second, to the fact that, unlike cross-border refugees, whose legal position is defined and determined by a complex and well-entrenched corpus of international law, internally displaced communities are not easily visible to international norm setters, and their claims are primarily directed to national state organs. International protection regimes do not easily accommodate displaced persons (see Luopajarvi 2003: 686; Deng 2009: 250). UN guidelines on internally displaced persons, notably the Deng principles and the Pinheiro principles, are viewed by some states as *de facto* binding, and some states use them in domestic law (Cohen 2004: 469). However, these guidelines only have soft law status, or even, as one commentary observes, mere *secondary soft law status* (Luopajarvi 2003: 708). Regional instruments regarding displaced persons also have variable and patchy application. To be sure, the jurisprudence of the IACtHR contains clear norms for treatment of displaced persons,<sup>92</sup> and it has articulated an effective *right not to be displaced*.<sup>93</sup> Some states in East Africa have also acceded to the Great Lakes Protocol on Internally Displaced Persons. However, the only international convention with binding force that is specifically concerned with internally displaced persons is the Kampala Convention of the African Union. Notably, the application of these documents remains uneven; the Kampala Convention, although formally binding, is difficult to enforce (Kidane 2011: 77–84). In Africa, moreover, the African Charter has not generated hard protection for internally displaced persons. Notably, the African Commission has established certain norms in this regard, but it has encountered obstacles in implementation.<sup>94</sup>

One obvious consequence of their lack of recognition in international law is that internally displaced persons have limited significance for the international community. Indeed, they are not widely seen as persons of relevance for states beyond the affected state, and other states have limited legal or humanitarian interest in their welfare. One further consequence of this is that internally displaced persons are located in a very uncertain legal environment, in which the normative framework for their rights is unclear and necessarily in flux. Indeed, in many cases, the causes of internal displacement often destroy the institutions capable of providing legal protection for displaced persons. Countries with large internally displaced

<sup>92</sup> *Case of the Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia* (2013).

<sup>93</sup> *Case of the 'Mapiripán Massacre' v. Colombia*. Judgment of 15 September 2005.

<sup>94</sup> For comment see Abebe (2009: 164).

populations, such as Somalia and Sudan, also have very weak judicial systems (see Maru 2008: 2).

Partly owing to such uncertainty, however, legal cases addressing the rights of internally displaced persons have given rise to a complexly structured body of transnational law, integrating elements of international hard law, elements of international soft law and elements of domestic human rights law (Orchard 2010: 286). In fact, internally displaced persons often require international legal assistance within their own states, which means that acts of litigation in support of internally displaced persons result in transnational norm production, creating laws that incorporate international norms immediately within national sovereign states. In some respects, accordingly, internally displaced persons have emerged as *transnational constitutional subjects*, which have established rights in a legal zone between the domestic and the international domains, in the consolidation of which judicial actions have played a crucially formative role.

Some examples of this are evident in Kenya. In recent years, the Kenyan government has been required to accommodate large groups of internally displaced persons. These groups included persons uprooted by inter-population violence following the 2007 elections, but they also included numbers of people exposed to mass eviction for other reasons. In the aftermath of 2007, remedies for displacement were mainly provided by the political branches of government, notably in legislation of 2012, *The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act*. Moreover, Kenyan courts have in the main been unwilling to ascribe liability for displacement to government agencies, arguing that inter-ethnic conflict after the 2007 elections ‘was in many ways spontaneous’, so that the ‘State cannot be said to have been aware in advance just how widespread and how destructive the violence would be.’<sup>95</sup> Nonetheless, displacement has emerged in Kenya as an issue around which national and international norms coalesce, and in which litigation articulates new legal norms with far-reaching impact.

First, for example, the legislation of 2012 was partly prompted by legal activists, and it involved the domestic incorporation of both the UN Guiding Principles on Internally Displaced Persons and the Great Lakes Protocol on Internally Displaced Persons. Alongside this, although persons uprooted in 2007 have been reluctant to file cases, Kenyan courts have independently used international norms to establish basic rights in

<sup>95</sup> *Paul K. Waweru & 4 others v. Attorney General & 2 others* [2016] eKLR at p. 4.

cases regarding displacement of persons caused by ethnic conflict.<sup>96</sup> As discussed, moreover, they have also used international law in other cases relating to mass internal displacement, determining that large-scale forcible evictions entail a violation of the right to accessible and adequate housing. Such arguments have been underpinned by reference to the ICCPR, to the UDHR and to other UN guidelines with soft law status. Moreover, such arguments have been backed by reference to rulings on the right to housing in the South African Constitutional Court.<sup>97</sup> In a number of cases, Kenyan courts have used international norms to define the rights of persons in a state of displacement caused by eviction, stipulating access to health care and resources, and 'legal security of tenure' as norms for treating displaced population groups.<sup>98</sup> In one recent Court of Appeal case concerning mass eviction, the Court tried to weaken the effect of international law in Kenya,<sup>99</sup> and it attempted to re-establish a political question doctrine, to restrict judicial intervention in and supervision of political decisions.<sup>100</sup> The legal position of displaced persons thus appears as a prism for deep-lying conflicts around the sources of law, and the displaced person forms a highly contested figure of constitutional agency.

The most important examples of the emergence of displaced persons as legal/political subjects are evident in Colombia, the state with the largest number of persons displaced by civil conflict. To be sure, the normative framework in Colombia for addressing internally displaced persons is now based on a substantial body of legislation, especially in Law 387 (1997) and Law 1448 (2011) (see Lemaitre Ripoll and Sandvik 2014: 387). However, the rights of displaced persons have been substantially constructed through judicial practices, notably through the *tutela* jurisprudence of the Colombian Constitutional Court. In fact, Colombian law is distinctively able to address the claims of displaced population groups, who may of themselves be reluctant to file suit, because it permits representation of marginal groups in *tutelas* by proxies – that is, by *agencia oficiosa*.<sup>101</sup> Notably, Law 2591 of 1991 specifically declares that, where social groups affected in their basic rights are legally undefended or disadvantaged,

<sup>96</sup> *Florence Amunga Omukanda & another v. Attorney General & 2 others*, [2016] eKLR.

<sup>97</sup> *Ibrahim Sangor Osman v. Minister of State for Provincial Administration & Internal Security*, eKLR [2011].

<sup>98</sup> *Kepha Omondi Onjuro & others v. Attorney General & 5 others* [2015] eKLR.

<sup>99</sup> *Kenya Airports Authority v. Mitu-Bell Welfare Society & 2 others* [2016] eKLR at para 118.

<sup>100</sup> *Kenya Airports Authority v. Mitu-Bell Welfare Society & 2 others* [2016] eKLR at para 141.

<sup>101</sup> The Constitutional Court specifically ruled that *agencia oficiosa* could be used to represent displaced persons in T-267/11.

legal representatives distinct from these immediately affected, and without any legal contract with such persons, may submit *tutelas* to defend them. *Agencia oficiosa* may thus be used in contexts in which applicants lack linguistic skills, or are prohibited by geographical, educational or monetary factors from effective petition, a fact which creates important litigation opportunities for internally displaced persons.<sup>102</sup>

Especially notable in Colombia, first, is the fact that, in leading *tutela* cases lodged by representatives of internally displaced persons, the Constitutional Court has decided that groups of internally placed persons are defined by a 'condition of extreme vulnerability'. On this basis, displaced persons form a separate legal subjects, requiring 'particular protection', and demanding interventionist remedial measures from the judiciary.<sup>103</sup> As discussed, extensive legislation concerning displaced persons was dictated by the Court in *tutela* T-025/04,<sup>104</sup> in which, and in subsequent *autos*, the Court ordered a thorough 'structural reform of the government's humanitarian response to internal displacement' (Lemaitre Ripoll and Sandvik 2015: 7). Importantly, second, the courts have made extensive use of international norms in seeking to stabilize society in the wake of the mass population movements. As mentioned, the Constitutional Court decided that international soft law principles, especially the Deng principles and the Pinheiro principles, should be applied as a binding source of domestic rights. Through this process, relevant soft law was incorporated within Colombia as part of the *block of constitutionality*,<sup>105</sup> and displaced persons are able to acquire immediate constitutional rights from international soft law. Moreover, third, the Court has used norms based on international humanitarian law to measure and improve the government's progress in remedying the displacement crisis.<sup>106</sup> As discussed, the Court observed the mass violation of the rights of displaced persons as a generic failing of the state – as an unconstitutional state of affairs – which required exceptional judicial supervision of the government and strict interventions to ensure satisfaction of basic rights. In this respect, the Court used international law to spell out distinctive sets of rights for displaced persons, including the right to truth and justice, the right to full restitution of property and the right to protection from repeated displacement.

<sup>102</sup> See T-342/94; T-380/93.

<sup>103</sup> T-239/13.

<sup>104</sup> T-025/2004.

<sup>105</sup> See T-327/01; T-068/10. On the hardening of soft law in the Colombian Constitutional Court see Vidal López (2007: 79).

<sup>106</sup> See A-178/05, A-109/07.

Moreover, it struck down sections of laws relating to the displaced population that did not adhere to these principles.<sup>107</sup>

In such cases, litigation conducted by or on behalf of displaced persons forms a practice in which, in a social and legal situation defined by acute socio-political instability and extreme institutional weakness, a new subject of rights has been able to take shape and gain recognition, constructing hard rights from a fluid mix of normative sources (see Vidal López 2007: 107). In this setting, rights-determined litigation itself gives rise to new legal persons, to new articulations of democratic practice, and to more robustly defined constitutional norms. Subjects with no obvious political or representative status become important sources of law, often replacing or acting alongside classical patterns of citizenship. In each respect, constitutional agency, and indeed the basic form of the constitutional-political subject, emerges as a construction *of* and *within* the law, outside or between the politically formalized domains of national and international law.

### 5.3.3 *Litigants as Citizens 3: Public Interest Litigation*

The most striking example of ways in which litigation act alongside more classical modes of democratic agency appears in the realm of public interest litigation.<sup>108</sup> That is, the potential of litigation for supplanting standard citizenship practices is most evident in third-party litigation against public bodies concerning collective interests, which are defined as separate from the constitutionally defined rights of particular persons or groups. Such litigation usually has a strategic character, and it often reflects collective or group-led mobilization around particular claims, aimed at the prevention of future violation of collective rights. It is a characteristic of such litigation that classical private-law restrictions on rights of standing are relaxed, and litigation can be initiated by a widened set of parties, claiming an interest in the case on the grounds that it represents a broad public concern or that a wide public interest has been violated. In some cases, public interest litigation has necessitated revision of deep-seated constitutional principles.<sup>109</sup>

<sup>107</sup> C-715/12.

<sup>108</sup> The transformation of the legislative process through public interest cases was noted early by Chayes, who argued that it necessitated a 'transformed appreciation of the whole process of making, implementing and modifying law', and that, owing to this, representation is no longer conducted 'alone through the voter or by representation in the legislature' (1976: 1315–16).

<sup>109</sup> See below pp. 472–5.

Public interest litigation is not new. In fact, the origins of such litigation can be traced to Roman law. More recently, precursors of contemporary public interest rules can be found in much civil legislation in Latin America, for example the Brazilian Class Action Law of 1965 (Law 4.717/1965). Indeed, provision for public-interest cases acquired constitutional standing in the Spanish Constitution of 1978. Moreover, such litigation is not universal. In some countries, it is not formally foreseen by the constitution, but it exists at a more informal level, and is currently in a process of expansion. In Germany, for example, where strict rules on standing apply, there are currently legislative initiatives designed formally to introduce collective litigation. In some countries, public interest litigation is suppressed, at least intermittently, for political reasons.<sup>110</sup> In some countries, it is technically possible, but it is restricted by traditional rules on standing.<sup>111</sup> Furthermore, as discussed, public interest litigation is not always separable from other modes of litigation by collective legal subjects. As a result, in different jurisdictions, it overlaps with class action cases, with *tutelas* and with general administrative litigation.<sup>112</sup>

In recent years, however, public interest cases, in a range of variations, have begun to form a very important legal domain. In most countries, rules on standing have been liberalized, and the widening of access to justice for third-party litigants has assumed an important role in most processes of democratic polity-building. In such cases, litigation is initiated not by persons claiming to suffer measurable damages, but by persons claiming to protect public interests, in their general role as defenders of collective interests – *as citizens*. Such cases, therefore, are shaped by socially generalized interests, in which individual persons engage with law in generic categories of political agency. Moreover, such cases often entail a societal deepening of the public domain, in which citizens are able to impose intensified principles of constitutionality on different social spheres, and private actors and organizations can also be bound by norms pertaining to

<sup>110</sup> See discussion of Egypt below at p. 472.

<sup>111</sup> For the UK, see the widening of standing rules in *R v. HM Inspector of Pollution ex p. Greenpeace* (No 2) [1994] 4 All ER 329. Historically, the UK had narrow rules on standing. This flows from the fact, as discussed, that UK public law construed rights as rights of individuals, either based in common law or asserted against single abuses of the powers conferred under particular statutes. Under this scheme, it is naturally difficult to accept a violation of rights held collectively by all citizens. Accordingly, many defenders of the classical model of the political constitution are hostile to public interest litigation (see Harlow 2002: 5).

<sup>112</sup> In Colombia, one commentator speaks of a 'necessary overlap' between the *tutelas* and public interest cases (Borrero Restrepo 2008).



public law, often based on human rights (see Vining 1978: 180–1; Fletcher 1988: 225). In such cases, the separation between litigation, constitutional norm formation and general democratic practice has become very blurred, and legal activism manifestly shapes the form of democracy. In fact, we can see a variety of ways in which litigants exercise legislative and quasi-constituent power, and they often generate new constitutional rights. Naturally, as outlined below, public interest litigation leads to different constitutional outcomes in different polities, and its efficacy is often determined by the degree to which democratic governance is already formally entrenched. Although its outcomes are contingent on polity type, however, public interest litigation has acquired an almost global constitutional force. Across different polity types, public interest litigation is closely linked to the assimilation of international law, and collective litigants often establish premises for action on global legal foundations.

### 5.3.3.1 Public Interest Litigation and the Strengthening of Democracy

As one example, we can find cases of litigation with a public interest element, in which litigation serves to consolidate the position, and, above all, to extend the societal reach, of provisions for rights contained in an existing constitution. Such litigation commonly possesses a clearly anti-systemic dimension, mobilizing norms implied within the domestic constitution against the existing governance system. However, in such cases, anti-systemic litigation occurs within already relatively secure normative parameters, so that litigation acts democratically to solidify constitutional norms across society, and to intensify the penetration of established democratic norms. In such cases, public interest litigation serves the reinforcement, or the deepening, of democracy.

Early examples of such public interest litigation can of course be found in litigation connected to the Civil Rights Movement in the USA. *Brown v. Board of Education* (1954) is widely recognized as the result of a long strategy of contestation devised by civil rights advocates, dedicated to deploying litigation as an instrument of social/constitutional transformation, and promoting the enforcement of new constitutional rights of social equality.<sup>113</sup> As discussed, this case occurred in a setting marked by the expanding impact of human rights law in American society (Dudziak 1988: 94). This case reflected the beginnings of a pattern of legal practice, in which

<sup>113</sup> See Yeazell (2004: 1976); Klarman (2004: 344–442). For an account that more broadly contextualizes the role of the courts in this process see Mack (2005: 258).

lawyers began to pursue litigation as a means of structural transformation for all society, pursuing litigation as part of a long 'social process,' with ramifications and implications reaching far beyond any particular case (see Tushnet 1987: 144). The contemporary model of public interest litigation in the USA was established in the Circuit Court case, *Scenic Hudson Preservation Conference v. Federal Power Commission* (1965), in which provisions for standing were extended to collective organizations with interests in particular cases.<sup>114</sup> Laws on standing were then relaxed in amendments to federal rules on civil procedure. Over a longer period, subsequently, public interest lawyers in the USA made increasing use of human rights law as an instrument for shaping judicial rulings and sharpening obligations placed on public agencies (see Cummings 2008: 985). Eventually, public interest litigation gave rise to a series of landmark court rulings, with deep impact on American constitutional law and American society more broadly. In this process, public interest cases were pursued to trigger legislation in a number of different areas, notably with regard to prison law, gender equality, health law and reproductive law. One account calculates that in the early 1970s public interest groups stimulated over 30 pieces of significant legislation (McCann 1986: 125).

Similar consequences of public interest litigation can be found in Canada. Laws on standing were widened in Canada in the 1970s, notably in *Thorson v. Canada (AG)* (1974), and *Nova Scotia Board of Censors v. McNeil* (1975).<sup>115</sup> Broad standing was eventually established in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, in which the Supreme Court strategically promoted widened access to justice. The reasoning in this case was specifically intended to secure social and political rights for marginalized professional groups, in this instance prostitutes.<sup>116</sup> Moreover, analogies to the democracy-reinforcing role of public interest litigation can be found in Brazil, where, at an early stage in the process of constitutional reform beginning in 1984/85, a law enabling the filing of class action claims was introduced, with the symbolic design of heightening public engagement with the political system. This law was the Civil Class Action Law of 1985, which simplified collective legal actions against government bodies. In Brazil, there now exists an array of provisions for defending collective

<sup>114</sup> *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608 (2d Cir. 1965).

<sup>115</sup> *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265.

<sup>116</sup> *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society* [2012] SCC 45.

rights of groups and diffuse collective interests, enabling diverse groups to promote social interests through the law. The Brazilian Constitution of 1988 (Article 5, LXXIII) provides guarantees for the filing of public interest suits by citizens (*ação popular*), although these guarantees are more restrictive than in some other countries in Latin America, and rulings in such cases do not necessarily have *erga omnes* effect.<sup>117</sup> Moreover, in Article 129 (III), it enables filing of public-interest cases through the public prosecutor's office (*ação civil pública*). The constitution thus contains two distinct mechanisms for the channelling of public interest litigation, the *ação popular* granting *locus standi*, and *ação civil pública* covering a more comprehensive set of rights.<sup>118</sup> In some countries, where relatively tight laws concerning *locus standi* still prevail, courts have recognized the democratic importance of public interest litigation and shown some willingness to relax conventions determining which person, and with what type of interest in the outcome of proceedings, might be a party to a case.<sup>119</sup> In all such examples, public interest litigation was perceived as an instrument of democratic enhancement.

The 1991 Constitution of Colombia has created particularly strong protections for public interest litigation. Colombia had a strong tradition of protecting collective interests in private law long before 1991, and the right to litigate for public interests was secured in Articles 1005 and 2359 of the Civil Code of 1887. The expansion of public interest litigation (*acciones populares*) was then a particular objective of the Constituent Assembly in 1991, which clearly observed such litigation as a core democratic practice, and enshrined it in the constitution (Article 88) (Londoño Toro 1999: 109). In Colombia, some cases with a public interest dimension are obviously filed as *tutelas*, under Article 86. As discussed, the most important *tutela*, T-025/04, was a public-interest case. In the wake of this case, the Constitutional Court gradually elaborated the concept of the 'subject of

<sup>117</sup> See the principle set out in the landmark case 'Raposa Serra do Sol' that decisions issued in a suit of *ação popular* do not have *erga omnes* force, although a decision of the Supreme Court necessarily possesses strong persuasive force: Pet 3.388 ED, rel. min. Roberto Barroso, j. 23-10-2013, P, DJE de 4-2-2014.

<sup>118</sup> Although *ação civil pública* is subject to a restricted *locus standi*, the Public Prosecutor's Office has employed it to litigate on a wide range of matters, including readjustment in tuition fees (Súmula 643); rights of children and adolescents (AI 698.478, rel. min. Joaquim Barbosa, decisão monocrática, j. 18-5-2012, DJE de 28-5-2012.); environmental rights (RE 464.893, rel. min. Joaquim Barbosa, j. 20-5-2008, 2ª T, DJE de 1º-8-2008.); public transport ([RE 379.495, rel. min. Marco Aurélio, j. 11-10-2005, 1ª T, DJ de 20-4-2006]. = RE 228.177, rel. min. Gilmar Mendes, j. 17-11-2009, 2ª T, DJE de 5-3-2010); fees for public street lighting (RE 213.631, rel. min. Ilmar Galvão, j. 9-12-1999, P, DJ de 7-4-2000).

<sup>119</sup> See the liberalization of standing in the UK in *R v. Secretary of State for Foreign Affairs, ex parte World Development Movement Ltd* – [1995] 1 All ER 611.

special constitutional protection, to designate groups requiring intensified legal support to obtain full enjoyment of rights.<sup>120</sup> In the longer implementation of T-025/04 a large number of social groups were identified that, owing to the *inter comunis* standing of the initial ruling, were able to claim distinct collective rights, and to demand inclusion in legislation aimed at remedying the cause of the *tutela*. In such litigation, the courts have effectively widened the lines of articulation between state and society, allowing a range of collective actors in society to enter an immediate relation to the government, and to acquire collective rights. One account describes such collective litigation in Colombia as a form of ‘juridical experimentalism’ which creates a political dialogue between new collective actors in society and the state and even, in so doing, forms a primary ‘mechanism of political legitimation’ (Latorre Iglesias 2015: 12, 116).

Alongside *tutelas*, however, provisions for public-law litigation in Colombia also allow for filing of public interest cases in a stricter definition of the term. Unlike *tutelas*, public interest litigation is placed in the sphere of administrative law, under the jurisdiction of the *Consejo de Estado*. Notably, in Article 88, the constitution allows litigation in cases in which members of the public, not necessarily organized as an identifiable legal person, experience a threat to acknowledged collective interests – regarding, for example, the environment, the quality of public space, or administrative morality. These constitutional provisions were later solidified in legislation of 1998 (Law 472), which, in Article 12, defines the categories of person, including single persons and NGOs, which are authorized to initiate public interest cases. Importantly, in Article 35, this law states that rulings in public interest cases are binding both for the particular parties and for the public as a whole, so that case rulings have *erga omnes* force. In fact, this principle has been consolidated in the *Consejo de Estado* to the effect that judicial decisions in public interest cases have equal effect for the entire ‘interested community’, and the ‘holders of an interest’ in the case, to whom rulings are applicable, do not need to be identical with the actual claimant. The protected interest in public interest cases, thus, is distinct from the persons actually filing the case, and, as in *tutelas*, rulings can easily obtain broad structural impact.<sup>121</sup>

The formative democratic importance of public interest litigation in Colombia has been accentuated in case law of the Constitutional Court, which has accorded to such litigation a clearly political, constitutive

<sup>120</sup> A-073/14.

<sup>121</sup> Consejo de Estado, 18001 23 31 00 2011-00256-01 (AP) 22 January 2015.

force. In leading opinions of the Court, which define the scope of public interest litigation, it has been declared that public interest cases should be encouraged as an instrument for promoting 'law based in participation and solidarity'. Moreover, the Court has sharply distinguished public interest cases from class action litigation. In this respect, public interest litigation is construed as a practice for protecting interests of a very strictly collective nature, of relevance for all citizens, not attached to specific subjects, and not registered through damages to clearly identified rights.<sup>122</sup> Notably, in leading relevant case law, it is stated that, in public interest cases, matters should be treated that do not have a 'subjective or individual content', and which do not relate to a 'damage that can be repaired subjectively'.<sup>123</sup> In consequence, such cases are focused on 'collective rights, in contrast to individual rights': on rights that 'belong to the entire community', and whose holder 'is a plurality of persons'.<sup>124</sup> Standing for filing such cases, accordingly, depends solely on membership in the national community, and no other interest is required to justify legal proceedings.<sup>125</sup> Through this, collective litigation becomes a core expression of democratic citizenship.

### 5.3.3.2 Public Interest Litigation and Disruptive Citizenship

In parallel to the democracy-enhancing force of litigation, we can find cases of public interest litigation in which such actions have a more challenging or constitutionally disruptive impact on the order of government. Such cases reflect a more emphatically contentious constitutional practice, which is often only tolerated because of the precarious legitimacy of the regime in which it is exercised.

A very informative example of this is Egypt in the years before the end of the Mubarak regime, in which cases with a public interest element formed an important domain of contestation, often with very unsettling implications for the government. Notably, in Egypt, formal rules regarding *locus standi* were historically restrictive. By way of example, Article 12(1) of the State Council Law (Law 47/1972) prohibited the administrative courts from hearing claims brought by people with no personal interest in the matter. Moreover, under the Mubarak regime, the courts themselves at times used restrictive criteria to address questions of standing. Such formal

<sup>122</sup> C-215/99.

<sup>123</sup> T-528/1992.

<sup>124</sup> T-254/1993.

<sup>125</sup> T-528/1992.

restrictions notwithstanding, however, administrative litigation emerged as an important avenue of legal/political opposition under Mubarak, and much administrative litigation possessed a public interest dimension. It is widely documented that contention expressed through such litigation proved very destabilizing for the regime, as it opened up an alliance between anti-regime activists and the courts, at times supported by transnational human rights groups (see Moustafa 2003: 884; El-Ghobashy 2008: 1613; Odeh 2011: 996). Prior to 2011, in fact, litigation played an important role in creating a new constitution-making situation, in which global norms acquired high directive authority. Since the collapse of the Mubarak regime, judicial policies have been introduced in Egypt in order to restrict public interest litigation, reflecting the progressive renewed turn to authoritarianism. This is notable in Law 32/2014, which limits standing in challenges to the probity of government contracts. This clearly reflects the volatility attached to such litigation. Despite this, however, the disruptive potential of public interest cases has not entirely vanished. Indicatively, the legality of Law 32/2014 has been publicly challenged.<sup>126</sup>

The politically disruptive role of public interest litigation is also salient in the case law of the Kenyan superior courts. Kenyan rules on standing were historically restrictive.<sup>127</sup> However, they were liberalized under President Moi, before the establishment of the new democratic constitution, in the Environment Management and Co-ordination Act of 1999. Now, the democratic constitution of 2010 gives particular protection, in Articles 22(1)(c) and 258(2)(c), to rights of public-interest litigation (Sang 2013: 40). After 2010, public interest litigation, although often following *ad hoc* strategies, acquired an important role in the process of embedding the new 2010 Constitution in society, and in bringing reality to the rights contained in the constitution. On one hand, since 2010, public interest litigation in Kenya has clearly followed the Indian model, discussed below, as a legal practice aimed to promoting social rights jurisprudence, and public interest cases have been instrumental in hardening legal recognition of social rights.<sup>128</sup> At the same time, however, public interest cases have also been initiated to ensure that public bodies act within constitutional parameters, and to ensure the integrity of public officials.<sup>129</sup> Notable

<sup>126</sup> See for discussion of this case and relevant matters Hazzaa and Kumpf (2015).

<sup>127</sup> See *Maathai v. Kenya Times Media Trust Ltd* [1989] eKLR.

<sup>128</sup> See above p. 247.

<sup>129</sup> See *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 others* [2014] eKLR.

in the post-2010 Kenyan setting, above all, is the fact that public interest litigation often occurs in an attritional environment; it encounters resistance both from the government and judicial actors, and litigators and litigants often face implementation gaps in respect of remedies. The degree of democratic consolidation in Kenya is often measurable by the outcomes of public interest cases, and government retrenchment against the legal implications of the democratic transition can clearly be seen in restrictive rulings in such cases.<sup>130</sup>

Even before ratification of the 2010 Constitution, public interest litigation had assumed a distinctive constitutional significance in Kenya, and it played an important role in setting the basic form of democracy. In fact, the new constitution was cemented in a setting that was deeply marked by public interest litigation, and it was discernibly shaped by relevant court rulings. During the process of constitution writing, for example, public interest litigation was used to obtain rights of political representation for minority groups, allowing minorities to 'articulate their distinct concerns and seek redress and thereby lay a base for deliberative democracy'.<sup>131</sup> Unusually for the public law of African states, in some cases, distinct ethnic communities were able to secure recognition of unincorporated international instruments (especially ILO 169) regarding minority or indigenous rights in domestic law.<sup>132</sup>

Especially noteworthy in the Kenyan setting, is the famous case *Njoya and Others v. Attorney General and Others* (2004).<sup>133</sup> In this case, a Presbyterian pastor, together with other applicants, challenged the authority of the National Constitutional Conference (an adjunct to the sitting parliament) to approve a new constitution. Significantly, the applicants argued that the sitting parliament was not entitled to claim the right to exercise constituent power, and a new constitution could not be accorded validity by an already elected government. In addition, the applicants protested against the division of the Kenyan nation into separate districts during the writing of the constitution, claiming that this accorded undue privilege to distinct ethnic groups, and generally impeded the formation of a nationally legitimated constitution. Ultimately, the court found

<sup>130</sup> See *Kenya Airports Authority v. Mitu-Bell Welfare Society & 2 others* [2016] eKLR.

<sup>131</sup> *Lemeiguran and Others v. Attorney-General and Others*. This case was initiated by representatives of the Il Chamus community, relying on a wide grant of standing. The ruling was extensively supported by the African Charter and general international human rights law.

<sup>132</sup> *Lemeiguran and Others v. Attorney-General and Others*.

<sup>133</sup> *Njoya and Others v. Attorney-General and Others* (2004) AHRLR 157 (KeHC 2004).

in favour of the applicants, declaring that a new constitution could only acquire legitimacy if established by a higher-order political will, and that it needed to extract its authority from the single and sovereign national people, acting not as part of a parliamentary assembly, but as a primary constituent power. Decisively, the Court ruled that ‘every person in Kenya’ had an ‘equal right to review the constitution’ and even to participate ‘in writing and ratifying the Constitution.’ It concluded that a referendum was required to endorse the constitution, and it declared that the applicants possessed a ‘constituent right’ to ‘adopt and ratify a new Constitution,’ and even that this right was the ‘centre-piece of a people-driven constitutional review process.’<sup>134</sup> The collective right to exercise constituent power assumed particular weight, the court argued, because of the regionalistic bias of the institutions responsible for drafting and approving the constitution, which, allegedly, sought to ‘fragment and balkanize the Republic of Kenya into ethnic mini-states.’<sup>135</sup> In marked contrast to conventional jurisprudence in Kenya, which had usually accentuated the primacy of domestic law in over international law, the Court also cited Article 21 of the UDHR to reject the apparent discriminatory composition of the constitution-making body. The eventual practical result of this case was that a new constitution was drafted, which in 2010 was approved by referendum. The theoretical result of this was that, to all intents and purposes, public interest litigation acted as a source of constituent power, and the basic form of the national polity was distilled by the courts in the course of a litigation procedure. In fact, public interest litigation generated a *right to constituent power*.

Overall, the longer constitution-making process in Kenya was punctuated by important cases, in which public interest litigation had palpable impact on the basic normative fabric of the political system, effectively setting out new constitutional rights in parallel to the writing of the constitution itself. In each respect, litigation challenged the limits of the constituent form of the people, and it supplemented the more regular expression of constituent power. Notably, during the Kenyan transition, public litigation was increasingly underpinned by international law, which, as discussed, eventually became an important part of the constitution and subsequent constitutional jurisprudence.

<sup>134</sup> Kenya Law Reports [2004] 1 KLR 238.

<sup>135</sup> Kenya Law Reports [2004] 1 KLR 239.



### 5.3.3.3 Public Interest Litigation and Compensatory Democracy

As a further alternative, there are also a number of polities that did not traditionally, in the strictest sense, permit public interest litigation, but which have established analogues to such proceedings, and which have increasingly allowed, or even encouraged, litigation on grounds of public interest concern. This is widespread in societies in which formal opportunities for political agency are curtailed, so that collective litigation acts as a distinct sluice for articulations of social interest and opposition. This can be observed in China, where, despite restrictions on political agency, public interest litigation is now tolerated.<sup>136</sup>

A most illuminating case in this regard is Russia, where, in recent years, opportunities for public interest litigation have been markedly extended. On one hand, the Russian legal system follows the traditional German model in preventing private parties from litigating on behalf of collective public interests. The Russian legal system still requires a state agent – the public prosecutor – to bring cases in the public interest, or, in Russian terminology, cases that are filed ‘on behalf of an unidentified number of persons’.<sup>137</sup> In such cases, the number of suits filed by the public prosecutor is not insignificant. In fact, public prosecutors initiate on average 700,000 cases of this type per year, with very high levels of success (about 90 per cent).

Alongside this more classical mode of public interest litigation, however, recent years have seen the liberalization of Russian laws concerning public interest litigation. As mentioned above, rules on standing for individuals and associations are in the process of being relaxed. In particular, laws have been introduced which make it possible for proxies, including *inter alia* ombudspersons, data protection agencies and the Federal Chamber of Lawyers, to file cases with a public interest element. One of the most visible recent changes in the Russian public law landscape is that the federal ombudsman and the regional ombudspersons have the right to initiate cases in the interest of an unidentifiable number of persons. Before 2015, an ombudsman could only represent individuals in court, including the Constitutional Court, if their rights and freedoms had been violated by a public body and if they requested legal representation.

<sup>136</sup> For example, environmental NGOs have been admitted as plaintiffs (see Mingde and Fengyuan 2011: 232). Public interest lawyering has also become quite widespread (see Fu and Cullen 2008).

<sup>137</sup> See clarification of this principle in Plenum of the Supreme Court Resolution No. 25 of 23 June 2015 ‘On Application by the Courts of Some of the Provisions of Section I of the First Part of the Civil Code of the Russian Federation.’

The new Administrative Litigation Code of 2015 now names the federal ombudsman and regional ombudspersons in the list of proxies that are authorized to bring administrative cases in the interests of unidentifiable number of persons. The Federal Law 'On the Ombudsman' was also altered in 2015, stating in Article 29(1) that the federal ombudsman can bring such cases against a public body or any other organisation performing public functions.<sup>138</sup> In 2014, as mentioned, a new Federal Law 'On Citizens' Oversight' was adopted.<sup>139</sup> Under this law, any public association or NGO can perform *functions of citizens' oversight* prescribed by the federal law: i.e. any association is permitted 'to submit claims to court in the interests of an unidentifiable number of persons against public bodies' (Article 10(1)(7) of the Federal Law). Citizens' oversight can take various forms. For example, individuals can inspect the activities of state agencies, or offer expert services, while public associations and NGOs can carry out monitoring functions or engage in public discussions of governmental initiatives. Through the law 'On Citizens' Oversight', the government has created a significant opening for a new form of anti-government litigation, available to a wide circle of subjects, in order to motivate individuals to bring public authorities to court and to raise the legal accountability of the state.

Such revisions to classical rules on standing in Russia have been initiated as part of a wider reform process, discussed above, which has been promoted in order to comply with constitutional requirements and the international obligations of Russia. Like the rise of litigation more widely, the expansion of public interest litigation in Russia can be viewed as one element in a political strategy for linking organs of state and agents in society more closely together. Consequently, public interest litigation in Russia is not strictly, or at least not exclusively, of an anti-systemic nature. It is promoted, in part, by the government as a means of socio-constitutional inclusion, in which individual agents are integrated more immediately into the governance system. In some ways, in fact, litigation compensates for the relatively weak consolidation of other patterns of political agency, especially as litigation has increased at a time of broad political retrenchment. Nonetheless, a growing range of subjects can acquire standing in Russian law, thus also acquiring increased degrees of legal recognition, entitlement, and constitutional force. There are important public interest cases in which groups previously excluded from standing have been able

<sup>138</sup> As amended by the Federal Constitutional Law No. 1-FKZ of 8 March 2015.

<sup>139</sup> Federal Law No. 212-FZ of 21 July 2014 'On the Basics of Citizens' Control'.

to gain recognition as collective subjects. This has occurred, for instance, in cases regarding pensioners of a particular autonomous region,<sup>140</sup> and recipients of benefits relating to the Chernobyl disaster.<sup>141</sup>

#### 5.3.3.4 Public Interest Litigation and New Rights

Alongside such cases, we can also find polities in which courts, on their own initiative, have deliberately facilitated public interest litigation in order to expand and transform the sets of constitutional rights existing in society. In such polities, courts themselves acquire a constitutionally formative position, and they deliberately promote the multiplication of democratic agency. In such instances, the courts have often strategically decided to relax laws on standing in order to simplify access to law for classically marginalized legal actors, consciously allocating ius-generative force to new subjects, across a range of socio-economic variations,<sup>142</sup> and increasing the number of social agents assuming formative relevance for law. In fact, courts have intentionally utilized litigation to open the perimeters of the legal system, to intensify lines of articulation between government and its social environment, and to link the legal system more conclusively to its addressees (its constituents), especially those in marginal social locations. In consequence, in polities of this kind, public interest cases are able to give rise to many new rights, allocated to newly personified legal interests, such that public litigation over rights, actively encouraged by the judiciary, creates new founding norms, and it alters the basic constitutional structure of society. In such cases, international law is widely used to support the creation of new rights.

The *locus classicus* for such promotion of public interest litigation as a source of new rights can be found in the case law of the superior courts in India (see Sathe 2001: 71–2, 2002: 17, 202). In such rulings, the Indian Supreme Court has linked its jurisprudence very directly to international human rights law, and, on this foundation, it has greatly expanded

<sup>140</sup> Supreme Court Ruling No. 51-V08-13/2008.

<sup>141</sup> Supreme Court Ruling No. 77-V07-10/2007.

<sup>142</sup> The cases discussed below occurred in common-law settings, and they saw a liberalization of standing rules partly because this permitted a shift away from English metropolitan law, towards a more decidedly post-colonial constitution. English laws on standing were traditionally very restrictive, as expressed in the following: 'a private person could only bring an action to restrain a threatened breach of the law if his claim was based on an allegation that the threatened breach would constitute an infringement of his private rights or would inflict special damage on him'. *Gouriet v. Union of Post Office Workers and others* – [1977] 3 All ER 70.

provisions for constitutional rights.<sup>143</sup> At the core of this approach is a constructive reading of Article 32 of the Constitution, through which the principle was established that constitutional rights can give rise to broad interests, and that persons other than immediately aggrieved parties can file suit to claim such rights.

In leading public interest cases, first, the Indian Supreme Court emphasized the importance of access to law for all persons in society. It expressly identified widened standing as a means for reconfiguring the constitutional domain of public law, and, in particular, for establishing Indian public law on free-standing foundations, separate from the legal legacy of colonialism. The implications of such cases are illustrated most notably by the Supreme Court case, *S.P. Gupta v. President of India and ors* (1981). In this case, the Court rejected classically restrictive rules on standing derived from English law, and it concluded that, in human rights cases, the courts had a duty to help 'to democratise judicial remedies'. Accordingly, the Court pledged to 'promote public interest litigation so that the large masses of people belonging to the deprived and exploited sections of humanity may be able to realise and enjoy the socio-economic rights granted to them.'<sup>144</sup> In a series of subsequent cases, the Supreme Court amplified these principles, and judges made grants of standing, in which the Supreme Court assumed authority to hear cases concerning human rights violations as a result of notification by concerned, yet otherwise unaffected, individuals.<sup>145</sup> In later public interest cases, standing was granted on the basis of 'bare interest', and it was presumed that a simple concern for the preservation of human rights could provide grounds to warrant standing.<sup>146</sup>

In such instances, the Indian Supreme Court created new categories of legal/political subject, and it widened the peripheries of the political system to allow these new subjects to impact on legislation. In so doing, the Supreme Court also created new sets of rights. In particular, it established

<sup>143</sup> The basic structure doctrine, asserting the absolute entrenchment of certain elements of the constitution, provided the original premise for the subsequent rise of public interest litigation. This doctrine was worked out through reference to international human rights law. See arguments in *His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr.* (1973) 4 SCC 225). Here it was reasoned that 'this Court must interpret language of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and the solemn declaration subscribed to by India'.

<sup>144</sup> *S.P. Gupta v. President of India and ors.* (1982 (2) SCR 365) (Bhagwati J).

<sup>145</sup> See *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC 161 (Bhagwati J). See excellent commentary on these points in Susman (1994: 57–9).

<sup>146</sup> *Chairman, Railway Board v. Chandrima Das* (2000) 2 SCC 465.

protective rights against class-based discrimination, rights against gender discrimination and rights against harassment.<sup>147</sup> It also established positive rights to legal services,<sup>148</sup> the right to a healthy environment,<sup>149</sup> the right to eat,<sup>150</sup> and the right to medical treatment.<sup>151</sup> In parallel to this, further, the Court began to devise expansive remedies to address the matters covered in public interest cases, often providing, through the innovation of continuing mandamus, for ongoing monitoring of the implementation of its rulings.<sup>152</sup> In this respect, the Court effectively supplanted normal legislative functions.<sup>153</sup> Notably, many new rights created by the Court were extracted from international law. The right to food was based on international law,<sup>154</sup> as were rights against sexual discrimination.<sup>155</sup> More generally, the Court adopted the principle that the UDHR should be read into domestic law,<sup>156</sup> and it has at times constructively interpreted constitutional clauses to give effect to international norms (Sathe 2002: 135).

Following these Indian examples, similar principles have been spelled out in cases in other jurisdictions, especially in countries influenced by Indian law, where courts have used public interest cases to promote a distinctive post-colonial jurisprudence. One primary example of this is Tanzania, where public interest litigation over social rights is widespread and often programmatically endorsed.<sup>157</sup> In Ghana, whose judicial

<sup>147</sup> See *Vishaka and others v. State of Rajasthan and others* (1997) 6 SCC 241, AIR 1997 SC; *Madhu Kishwar and others v. The State of Bihar and others* (AIR 1996 5 SCC 125).

<sup>148</sup> *Hussainara Khatoon v. State of Bihar*, AIR 1979 SC 1377.

<sup>149</sup> *Rural Litigation and Entitlement Kendra Dehradun and ors. v. State of Uttar Pradesh*, 985 SCR (3) 169.

<sup>150</sup> *PUCL v. Union of India and Ors*, Writ Petition (civil) 196/2001.

<sup>151</sup> *Paschim Banga Khet Mazdoor Samity & Ors v. State of West Bengal & Anor.* (1996) 4 SCC 37.

<sup>152</sup> See above p. 251.

<sup>153</sup> Strikingly, one analysis explains that the reinforcement of the Court was caused by the weakening of the legislative and executive branches, owing to corruption scandals (Mate 2015: 216–17).

<sup>154</sup> See the ruling of the Supreme Court in *Chameli Singh and Ors. v. State of U.P. and Anr.* [1996] 2 SCC 549 referring to Article 11 of the International Covenant on Economic, Social and Cultural Rights, 1966. The Court declared that the State parties recognize 'the right to everyone to an adequate standard of living for himself and for his family including food, clothing, housing and to the continuous improvement of living conditions.'

<sup>155</sup> *Vishaka and others v. State of Rajasthan and others* (1997) 6 SCC 241.

<sup>156</sup> *Chairman, Railway Board v. Chandrima Das* (2000) 2 SCC 465.

<sup>157</sup> See the Tanzanian case *Christopher Mtikila v. Attorney General*, Civ. Case. No. 5 of 1993 (High Court, Dodoma, 1993). Here the argument runs as follows:

The relevance of public interest litigation in Tanzania cannot be over-emphasized. Having regard to our socio-economic conditions, this development

system is relatively closed to international influence, public interest litigation has played an important role in expanding the range of given constitutional rights. In a line of Ghanaian case law from the 1990s, it is recognized that the 1992 Constitution grants relatively wide standing to plaintiffs acting on public interest grounds.<sup>158</sup> In one notable public interest case, it was decided that ‘every Ghanaian, natural artificial, had *locus standi* to initiate an action in the Supreme Court to enforce any provision of the Constitution.’ This case proved a breakthrough for recognition of social rights, rights to personal dignity and rights at the place of work.<sup>159</sup> Famous public interest cases in South Africa have had very wide-ranging implications for the protection of social rights, both in South Africa and beyond.<sup>160</sup> Most notably, strategic litigation for health rights in *Treatment Action Campaign* (2002), which created rights of access to HIV retrovirals, led to a situation in which a collective litigator (an NGO) was integrated into policy-making procedures.<sup>161</sup>

In Colombia, public interest litigation has also been promoted as a legal practice in which new rights are established. Collective litigation in

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promises more hope to our people than any other strategy currently in place. First of all, illiteracy is still rampant ... Secondly, Tanzanians are massively poor. Our ranking in the world on the basis of per capita income has persistently been the source of embarrassment. Public interest litigation is a sophisticated mechanism which requires professional handling. By reason of limited resources the vast majority of our people cannot afford to engage lawyers even where they were aware of the infringement of their rights and the perversion of the Constitution. Other factors could be listed but perhaps the most painful of all is that over the years since independence Tanzanians have developed a culture of apathy and silence. This, in large measure, is a product of institutionalized mono-party politics which in its repressive dimension, like detention without trial, sipped up initiative and guts.

My thanks are due to Elizabeth O’Loughlin for drawing my attention to this case.

<sup>158</sup> *New Patriotic Party v. Attorney General* [1997–98] 1 GLR 378.

<sup>159</sup> *Adjei-Ampofo (No 1) v. Accra Metropolitan Assembly & Attorney General (No 1)* [2007–2008] SCGLR. This reasoning ultimately, in *Adjei-Ampofo (No 2) v. Accra Metropolitan Assembly & Attorney General (No 2)* [2007–2008] SCGLR, allowed the plaintiff to defend rights of night soil carriers (excrement transporters from latrines) to work under dignified conditions.

<sup>160</sup> See especially *Minister of Health v. Treatment Action Campaign (TAC)* (2002) 5 SA 721 (CC).

<sup>161</sup> This process resulted in a policy document on Aids and sexual illnesses. See for comment on the policy implications of this case Heywood (2009).

Colombia has formed a core constitutional strategy for securing rights, especially historically unconsolidated rights, such as environmental rights and health care rights.<sup>162</sup> Justifications for such rights have usually been strongly backed by international law. As mentioned, the principle is pervasive in Colombian constitutional law that the list of rights formally enumerated in the constitution is not exhaustive, and both the Constitutional Court and the *Consejo de Estado* can develop new rights, reacting to legal claims through interpretation and adaption of existing provisions.<sup>163</sup> As a result, public interest cases act as a testing ground for the assertion of new rights and new collective subjectivities, and courts hearing such cases are able to assess whether the interests articulated in hearings warrant formal legal protection through more solidly guaranteed constitutional rights. Indicatively, in one leading case, the Constitutional Court ruled that collective interests actually only become concrete through the course of a legal hearing, and procedures relating to public interest cases make it possible for potential rights and potential collective legal personalities to appear before the law, and, if acknowledged, to assume legally elaborated form.<sup>164</sup> The actual process of public litigation thus forms a procedure in which the law experiences an intensified opening to constitutional claims, and new modes of agency and newly articulated collective concerns assume potential constitutional force.

In certain respects, the use of public interest litigation, combined with the overlapping use of *tutelas*, has led, across Colombian society, to the formation of a legal order that promotes participatory legal/political engagement in distinct spheres of social exchange. Indeed, it has stimulated rising legal/political activism in domains such as health care, service provision and environmental protection, which were historically not eminent objects of political will formation. Over a longer period, such litigation helped to establish, within the broad scope of the classical order of the constitution, a set of subsidiary or *sectoral* constitutional rights, focused on distinct societal domains: that is, a set of rights close in standing to a health constitution; a set of rights close to an environmental constitution, and even a set of rights close to a constitution of indigeneity. As discussed, the right to health was not originally established in the Constitution, and the right to a healthy environment was not classified as fundamental. However, it was established in the courts that these rights could be asserted through

<sup>162</sup> See analysis in Coral-Díaz, Londoño-Toro, Muñoz-Ávila (2010).

<sup>163</sup> C-1062/00.

<sup>164</sup> C-251/99.

public interest litigation, and they were constructed as fundamental rights because of their connection to other guaranteed rights – i.e. the right to life, the right to health and the right to physical integrity.<sup>165</sup> Analogously, the *Rio Bogota* public interest case has played perhaps the greatest role in solidifying hard environmental rights across Colombian society, instituting (and insisting on finance for) an integrated and coordinated system for decontaminating and managing water supplies around Bogotá.<sup>166</sup> In subsequent constitutional Court cases, nature itself, and even natural entities such as rivers, have also been accorded separate rights.<sup>167</sup> In each respect, litigation fleshed out a series of secondary, partial constitutions within the overarching normative system of national public law. In this respect, Colombian law is again emblematic of wider tendencies in global public law, and its emphasis on collective litigation stimulates segmented, legally constructed patterns of citizenship, through which new sets of rights are created.

Across this range of examples, generally, it is clear that public interest litigation can be used not only to give legal articulation to the will of the people, but also, in different ways in different settings, deeply to shape the legal architecture of democratic life.

#### 5.3.3.5 Public Interest Litigation and New Constitutional Subjects

In public interest litigation, quite generally, democratic practice is condensed into a legal process, in which a number of subjects play legally formative roles. In such litigation, self-evidently, litigants and their advocates assume a leading position in the creation of new legal norms and new constitutional laws. This is particularly the case because broad laws on standing and the relatively informal consultative procedures typical of public interest cases encourage an expansionary construction of given constitutional rights,<sup>168</sup> and they generate opportunities in which litigants can articulate new interpretations of existing constitutional norms. This is also the case because public interest cases are often focused on rights that are still ill-defined, not restricted to single social domains, and exercise of

<sup>165</sup> T-1527/00. This case was supported by the ombudsman.

<sup>166</sup> Consejo de Estado, 25000-23-27-000-2001-90479-01. Note that in Colombia lack of resources cannot excuse a public body for not fulfilling the terms of a ruling in a public-interest case. See Consejo de Estado 18001-23-31-000-2011-00256-01 AP (2015).

<sup>167</sup> See T-080/15; T-622/16.

<sup>168</sup> Close to this view see the account of public interest litigation as a source of 'destabilization rights' in Sabel and Simon (2004: 1020).



which is not the province of simply defined subjects. For these reasons, public interest cases do not only translate interests into law – they allow such interests constructively to articulate themselves, and they even allow new legal rights and new legal subjects slowly to assume effective shape. Additionally, in public interest litigation, members of the judiciary acquire a share in the process of constitutional construction, as the relaxation of rules of procedure enables judges to play a more proactive fact-finding role in hearing cases, simplifying communication between the legal system and its addressees and establishing new openings for cognitive norm construction (see Tobias 1989: 281).<sup>169</sup>

In both respects, public-interest litigation provides a forum in which political agency is both procedurally reconstructed and activated in precise form, proportioned to a clear legislative objective – the creation of new rights. Indeed, public interest litigation is at times capable of enacting a more integrally national mode of democratic agency than is possible in more classical, delegatory expressions of democratic mobilization: in open-ended processes of litigation, multiple actors, not historically classified as possessing distinct legal personality, assume inclusion in primary law-making acts, and they act to define the deep constitutional fabric of society. Not coincidentally, one key development in public interest litigation is that it often acts as a mechanism in which exchanges usually determined as belonging to private law are transferred into the domain of constitutional law, and it concretizes rights with a wider scope and with wider reach than is typical of either classical public law litigation or classical constitutional processes.<sup>170</sup> As a result, public interest litigation is able to constitutionalize new spheres of society, and it deepens the societal penetration of laws with strictly constitutional character. In one leading case in Colombia, it was specifically claimed that public interest litigation serves to ‘overcome the traditional division between public law and private

<sup>169</sup> See the following comment about public interest litigation (here, PIL) in India:

PIL cases must be based on constitutional claims and can be brought only against the government, not private parties. Unlike traditional litigation, PIL has looser procedural requirements, particularly in regard to legal standing. Furthermore, in a PIL case there is no trial; the governmental respondents are expected to cooperate with the petitioners, rather than act as opponents; objective third parties, such as *amici curiae* and expert committees, are often involved in the litigation; and the Court plays a particularly active role in directing the proceedings and monitoring the implementation of its orders (Sood 2006: 4).

<sup>170</sup> See for example the Indian cases above at pp. 479–80. In some cases, as discussed, public interest litigation has also been used to secure new rights regarding environmental protection, rights of recognition for sexual minorities and welfare rights.

law', altering the parameters of productive activities and market practices, and moving beyond the classical construction of human rights as a 'closed system' of public law norms.<sup>171</sup>

Especially notable in the rising importance of public interest litigation is the fact that it dramatically expands the range of social groups that constitute themselves as recognized political subjects. Indeed, it is an essential aspect of public interest cases that the law creates a normative environment in which new subjects, often minorities with limited political recognition, can acquire momentary legal/constitutional personality, as their interests are concretized through legal proceedings and reflected as relevant for society as a whole. In such cases, subjects claim to represent rights of collective reach and scope, and they differ markedly from persons assuming legal rights that are already clearly defined: collective actors in fact often acquire and enhance their legal personality *through the procedural act of claiming new rights*, and their emergence visibly expands law's sensitivity to new legal claims.

This was clear enough in the leading earlier public interest cases in the USA, in which minority groups secured heightened legal status and personality through strategic litigation. In other settings, distinctive political subjects have been able to coalesce, often momentarily, around litigation over sexual and reproductive rights. Important examples of this are found in India, in which groups with unifying interests owing to sexuality or position in the system of social stratification have been able to acquire collective legal force.<sup>172</sup> In South Africa and Latin America, health care users have been formed as distinct political subjects, often through use of elements of international law.<sup>173</sup> Even in legal systems, such as that of the UK, that place questions of standing firmly in the discretion of the courts, there has been a relaxation of attitudes to the personality of applicants, especially in cases regarding environmental litigation.<sup>174</sup> For each reason, claims to rights in public interest cases are formative of new political subjects, and human rights distil a vocabulary around which, within the law, new, pluralistic subjectivities are able to crystallize. Often, this creates a pattern of *sectoral subjectivization*, in which subjects are constructed in relation to distinct spheres of social exchange and to particular rights. Indeed, such

<sup>171</sup> Constitutional Court, C-377/02.

<sup>172</sup> See above p. 480.

<sup>173</sup> See examples above at p. 481.

<sup>174</sup> See discussion of the UK above at p. 467.

subjects often have no reality prior to their claim to rights, and they are formed through inner-legal procedures.

In many contexts, in sum, litigation has assumed a legally and constitutionally formative role far beyond its classical compass as a process framed by the already acknowledged norms of a constitution or a given democratic order. Across different societies and different legal traditions, litigation has now internalized a powerful democratic force, and it shapes the constitutional order of national societies in a number of different ways. The constitutional power of litigation illustrates the rising autonomy of the global legal system as a source of primary norms, and it usually assumes secondary constituent force because it elaborates and amplifies norms already stored, at a primary level, in the system of global law. In particular, the growing importance of rights-based litigation reflects a situation in which, through its relative differentiation, the law has institutionalized multiple channels between the political system and its addressees, so that the law now permits a *multi-centric, parallel proceduralization of democratic activity*. The fact that some communication between the political system and the citizen loops through the system of global law, granting high protection for certain rights, creates new configurations in the basic form of the citizen. Indeed, the fact that law is produced autonomously within the law, and that the law does not rely for its authority on an immediate homology with a single existing *people*, means that the law can construct, and form articulations with, the people in procedurally diverse fashion. This allows members of society to appear as citizens in multiple fashion, in multiple subjectivities, often of a contingent nature. The growing differentiation of the law as a realm of political practice has created new, pluralistic patterns of political agency, and it has enabled multiple democratic actors to emerge, beneath or alongside more homogeneous national political subjects. In some cases, the exercise of political agency through inner-legal actions often guarantees more refined representation to complex, multi-focal societies than is possible in democracies centred on political institutions as organs of societal mediation. On each count, the rising differentiation of the legal system means that society's responsiveness to political claims is not diminished. In fact, owing to the differentiation of the law and the inner-legal fabrication of new political subjects, society's capacity for phrasing political demands is transferred onto a more partial, acentric foundation, permitting multiple actors to promote the politicization of societal phenomena, to link sectoral concerns to the political domain, and so to shape the construction of legislation.

#### 5.3.4 *Citizens as Litigants 4: Human Rights and Segmentary Citizenship*

The increasing importance of the political role of the litigant implies, at an immediate level, that political agency becomes centred around the form of *the segmentary citizen*. That is to say, as politically formative litigation usually focuses on global human rights, and global human rights usually refer to quite specific positive values or protective concerns in society, the growing force of litigation tends to fragment society into segments of citizenship, in which the exercise of citizenship is oriented towards the realization of rights located in a distinct functional domains.

This tendency towards segmentary citizenship is clearly evident in the fact, as discussed, that, in many societies, patterns of collective legal personality are beginning to emerge, which are focused on the contestation of particular, functionally specific rights. This means, for example, that groups such as indigenous communities, other minorities, collectives affected by environmental problems, health care users, displaced persons and homeless persons, have acquired consolidated legal personalities in recent years. In the exercise of such personality, these groups have been able to harden rights, through litigation, within different spheres of society, or for different spheres of human interest. Indeed, in some societies, it is now possible to speak of a process of parallel constitutionalization, in which different rights have been cemented in different social spheres, and the construction of these rights has acquired dimensions not prescribed by a formal overarching constitution.<sup>175</sup> To this degree, the differentiation of the legal system as a site of citizenship has promoted processes of segmentary norm production and segmentary constitutionalization, in which citizens tend to detach their claims from the structure of society as a whole and construct them around functionally segmented experiences. Indeed, in some respects, this process generates transnational communities of segmentary citizens, as persons in different territories are connected by shared exposure to legal questions pertaining, for example, to health care, to the environment and to medicine. Increasingly, these persons are bound together across national frontiers by similar legal frameworks and even by similar jurisprudence regarding segmentary concerns.<sup>176</sup>

<sup>175</sup> This phenomenon was identified in the FRG in the 1970s in Scholz (1978: 219). For a more evolved example, see the discussion of Colombia above at p. 482.

<sup>176</sup> For example, we can see a global community of health-care users, engaged in similar patterns of litigation, using global health norms in similar ways. Displaced persons also form

At the same time, the growth of segmentary citizenship through litigation does not mean, exclusively, that the impact of citizenship practices remains restricted to discrete functional spheres. On the contrary, the functionally focused exercise of citizenship rights can also be seen as enhancing the quality of national democracy in its entirety, and even as creating conditions for the development of democracy *tout court*. Indeed, in key respects, litigation over fractional or domain-specific rights has a transfer effect in the general dimension of society, and it establishes a system of inclusion that promotes democracy in more universal terms. The rise of litigation might be seen, thus, as establishing a pattern of democratic agency in which the political emphasis on particular claims both consolidates functionally specific rights, and, by extended impact, solidifies the strength of democracy as a whole.

The general democracy-building role of litigation is seen, first, in the systemic dimension of democracy: that is, in the infrastructural capacity of democratic institutions. As discussed, for example, it is widely observable that litigation concerning specific rights serves to extend the penetration of democratic institutions into society, and it heightens the immediacy between citizens in society and the political system more widely. In some cases, such as Russia and Colombia, this occurs because litigation quite generally underscores the national penetration of democratic institutions, and weakens the effect of local or extra-systemic authority. In some cases, this occurs because litigation over a distinct set of rights forces national government to intensify its hold on society. The key example of this is civil rights litigation in the USA in the 1950s and 1960s. However, litigation over prison rights in the USA, in Colombia and in Brazil has had similar consequences.<sup>177</sup> In such cases, the exercise of citizenship rights in focused litigation has clearly had a spill-over effect, and it has helped to stabilize the foundations of democracy more widely. In each case, the inner-legal construction of the citizen has acquired functions not limited to law, and it has hardened the fabric of democracy more widely. As discussed, in such cases, litigation has usually been shaped by the reception of international law.

The general democracy-building role of litigation is seen, second, in the normative dimension of democracy: that is, in the extent to which legal norms promote wider democratic practice. For example, sectoral

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a global community. Even internet users may constitute a global community, whose legal order is likely to be formed, primarily, through litigation.

<sup>177</sup> As discussed, *tutelas* regarding prison conditions in Colombia led to the declaration of prison conditions as demonstrating an 'unconstitutional state of affairs', demanding the blanket imposition of human rights norms.

litigation over gender rights has far-reaching normative implications for national society as a whole, increasing social mobility access to educational resources, and widening professional opportunities for half of the population. Gender rights litigation might be seen as a process that eradicates obstacles to democratic participation, and which is normatively formative of democratic institutionalization as a whole. Similarly, litigation concerning minority or migrant rights promotes social, geographical and educational mobility, and it enhances access to processes of political inclusion.<sup>178</sup> Litigation over information rights can be seen to have similar outcomes, as it enhances discursive opportunities and cognitive qualifications for political engagement. Litigation over resources can also be seen as having similar results. Indeed, in many cases, litigation over resources, especially health care resources, is deeply interlinked with the quality of democracy as a whole, as effective exercise of citizenship rights clearly presupposes, or it is at least enhanced by, certain general health entitlements. In each respect, the singularity of rights claims plays a core role in creating qualifications for citizenship at a general societal level.

In these respects, the political significance of litigation resides in the fact that it can distil highly localized claims into a general political medium: that is, into rights, often linked to global norms. Litigation can construct patterns of agency that articulate the political system with single actors or small distinct groups of actors for whom more comprehensive multi-issue communication with the political system, for instance through political parties or broad social movements, would be difficult to establish. In some ways, litigation allows the citizen to appear to the political system in a functionally disaggregated form, it relieves the citizen of the need to assert a broad set of interests in entering political exchanges, and it gives voice to claims specific to distinct sectoral domains. As a result, where the citizen appears as litigant, the political system becomes sensibilized to different aspects of its multi-centric environment. Indeed, the very fact that the focus of courts is narrower than that of legislatures means that litigation is able to pick up societal contents that evade legislatures.<sup>179</sup> In some

<sup>178</sup> In important example is case 0260/2014 heard by the Bolivian Constitutional Court, in which a law fixing a minimum size for policemen was found to discriminate against indigenous people, so creating enhanced professional opportunities for a large number of population groups. Note the impact of litigation in UK regarding professional exclusion on grounds of sexual orientation. This is discussed above at p. 267.

<sup>179</sup> See the classical analysis in Friedman (1975: 233). Nothing, therefore, seems more inaccurate than the radical claim that rights embody a 'one-size-fits-all emancipatory practice' (Kennedy 2004: 13).

respects, this simply results in the distinctive constitutionalization of different social spheres. At the same time, however, litigation re-articulates a more comprehensive construct of the citizen at the general level of national democracy, providing a basis for broader processes of inclusion.

It is sometimes argued, for various reasons, that litigation, especially for resources, is unreliable in achieving collectively beneficial goals. Indeed, some observers claim that it is inherent in the individualized remedies imposed by courts that they do not gain broad effect.<sup>180</sup> Others even argue that such remedies disproportionately benefit wealthier social agents, who are able to avail themselves effectively of expertise required for litigation procedures.<sup>181</sup> This claim is of course, also, widely refuted.<sup>182</sup>

Even if such critique has some validity, however, it slightly misses the point about the sociological or systemic function of litigation. The political outcomes of litigation are not solely defined by single remedies and their efficacy. Such outcomes are defined, more widely, by the fact that litigation configures, and adds new rights to, constructions of political citizenship, and it builds up, from everyday activities and requirements, a complex evolving profile of the claims and expectations that can be attached to citizenship. In particular, litigation is able to align legal claims to international norms, and it is able to graft new rights onto given legal expectations on this basis. Moreover, in changing the rights profile of persons in society, litigation is able to generate new legal subjects, and to bring into visibility legal persons that had historically not been recognized. As discussed, this process is at the core of the formation of national societies. Litigation thus creates models of citizenship that step beyond the limits of the aggregated rights defined and conferred by national bodies, to identify new legal/political subjects, and to trace out new potentials for broader legal-political mobilization and recognition. Outcomes of litigation need to be perceived, not only in terms of particular remedies, but in the fact that litigation projects leading norms for society as a whole. As a result, litigation intersects with, and often pre-defines, other patterns of agency, such as protest, lobbying, and policy promotion, to create multi-focal experiences of citizenship.<sup>183</sup> Crucially, litigation often reinforces

<sup>180</sup> The classic objection to the claim that litigation solidifies citizenship is that litigation outcomes do not easily extend beyond single cases, and they cannot acquire the broad effect or the broad legitimacy of legislative packages (see Stoddard 1997: 991).

<sup>181</sup> For this claim in different contexts see Dugard and Roux (2006: 119); Landau (2012: 201, 229–30); Gotlieb, Yavich and Báscolo (2016: 7–8).

<sup>182</sup> See discussion of the expansion of rights through litigation in Gauri and Brinks (2008: 303); Uprimny and Durán (2014: 42).

<sup>183</sup> See excellent analysis of this in Barkan (1979: 955).

other patterns of agency, establishing initial and anticipatory recognition for rights that subsequently undergo political expansion.<sup>184</sup> In this respect, too, the growing autonomy of the global legal system constructs new patterns of citizenship in national societies, and it creates opportunities for complex, sectoral democracies and for complex articulations between the political system and society. In most settings, it is only as the citizen enters the political system through two parallel communication loops, one based in common patterns of political representation, and one based in litigation attached to global norms, that the citizen acquires a form that is fully adequate to societal reality.

#### 5.4 Democracy and Legal Mobilization

In the large body of research on democracy, only relatively few publications examine the role of legal mobilization in the development and consolidation of democracy. Generally, outlooks in this body of research suggest that the willingness of social agents to engage in litigation, especially regarding human rights, acts both to elevate public trust in democratic institutions, and to increase the collective legitimacy enjoyed by these institutions. In other words, in this body of research, legal engagement through litigation is perceived as a core reflection of democratic confidence, which stands alongside political engagement as a source of strong democratic culture.<sup>185</sup> Of course, this body of research has also come under fire from authors who believe the transformative force accorded to legal practices to be exaggerated, and who stress the privileging of elite actors in legal process (see Rosenberg 1991; Brown-Nagin 2005: 1439, 1489). It is also common amongst radical legal theorists to question the extent to which rights obtained through litigation reinforce democracy more broadly, and such theorists often prefer instead a more holistic register of social critique and action.<sup>186</sup> However, the arguments set out above emphatically concur with the analysis that accentuates politically transformative role of litigation. It is becoming clear that legal mobilization through law, expressed in different patterns of litigation, is a practice that has far-reaching implications for the

<sup>184</sup> For very prominent examples, see the discussion above of civil rights in the USA, and health rights in Colombia. Recently, Krajewska and Cahill-O'Callaghan (2018) have observed, at a micro-level, how litigation over reproductive and surrogacy rights in the UK has invoked the ECHR to instil new rights into constructions of citizenship, ultimately leading to legislation to mirror and reinforce the rights intimated through litigation.

<sup>185</sup> See discussion in Zemans (1983); Eskridge (2001: 454–8); Yeazell (2004: 1990); Siegel (2006: 1333); Simmons (2009: 139).

<sup>186</sup> See, prominently, Tushnet (1989); Kennedy (2002), (2004: 9–11).



development of democracy, and the preparedness of citizens to pursue litigation typically indicates both deepening democratic institutionalization and socially proportioned multiplication of democratic agency.

In general, legal mobilization *supplements* classical patterns of political organization, centred around legislatures, and, in so doing, it creates more complete, more deeply articulated democracies than those focused solely on conventional legislative functions. It is sometimes claimed that the assumption of a political role by litigants contradicts the majoritarian principles of democracy (Harlow 2002; Redish 2003: 74, 125). However, this stance depends on a mono-centric conception of society's political system, and it is not adapted to a societal order in which political communication, by necessity, occurs through multiple channels. First, democracies in which legal mobilization has a prominent role make it possible for persons to enter the legislative system through multiple channels and multiple personalities, which legislatures, on their own, struggle to permit and recognize. Legal mobilization thus adds dimensions of lateral and vertical porosity to the political system, and it creates new legislative mechanisms in the state. Second, as discussed, the reinforcement of sectoral or segmentary rights generally helps to solidify democracy as a whole. Segmentary rights asserted through litigation usually have a tendency to transcend their segmentary or fractional nature, and they usually help to reinforce democracy more widely. In each respect, legal mobilization reflects the emergence of a new pattern of democracy, in which social claims are transmitted through separate openings into the political system.

In some instances, further, legal mobilization actually *stands in for* democratic agency, and it assumes a primary role in the process of creating legislation, both constitutional and statutory. In many of the cases discussed above, litigation forms a procedural order in which different legal collectives emerge as political subjects, directly expanding the rights fabric of society, outside their more regular position within institutionalized political-democratic procedures. Such legal collectives then engage in classical political acts, usually through litigation over rights. In some cases discussed above, the subjectivization of persons as litigants makes it possible for society as a whole to construct new reserves of political agency, proportioned to its factual pluralistic structure. Often, the system of political representation is articulated with society more comprehensively where political subjects are constructed, pluralistically, through reference to rights claims, via inner-legal procedures, than when they rely solely on more conventional patterns of political categorization and mobilization. The fact that democratic agency is relocated from a position *outside* to a position *inside* the legal system thus provides, in some cases,

for the emergence of patterns of political agency that more fully reflect the complex modes of subjectivity that actually exist in different societies. Paradoxically, the fact that the national citizen enters the political system through global law means that, in some ways, political order becomes more democratically representative than simple patterns of national will formation.

### 5.5 The Beginnings of Global Citizenship

Despite the transformation of democracy through the emergence and increasing autonomy of the global legal system, the above analyses of modified patterns of democratic agency do not imply that we are witnessing the formation of political subjects of a conclusively transnational nature. Global law clearly shapes new expressions of political agency, which often cut through the boundaries of national political orders, creating rights of transnational nature. However, the recognition of transnational subjects and the rights that they may create or exercise is, in the final analysis, still determined by national jurisdictions. In other words, although the practice of citizenship has an increasingly global nature, the effective exercise of citizenship still depends, to a large degree, on the conferral of political rights by nation states, whose institutions can, ultimately choose the subjects to which they accord rights of inclusion. New patterns of citizenship may arise from the integration of global law in national law, but states still act as the primary filters for this process. Nonetheless, in the above processes, certain emergent patterns of transnational citizenship can be observed: that is, we can see aspects of citizenship, in which legal practices generate rights and shape laws beyond the strict limits of nationally constructed legal orders. We can identify the beginnings of a domain of citizenship that stands independently of the acts of states, and this domain is formed, primarily, *through litigation* – through acts not of political engagement, but of legal articulation.

Such developments can be seen, first, in interactions between different international courts. As discussed, for example, the IACtHR has openly defined itself as the interpreter and producer of a corpus of international human rights law, which freely borrows from other courts, both national and international, in order to create rights for individual persons subject to its jurisdiction (see Neuman 2008: 109–110).<sup>187</sup> Human rights litigation

<sup>187</sup> The Court has reiterated that ‘human rights form a single, indivisible, interrelated and interdependent corpus iuris’, of which the Court as one interpreter: IACtHR, Juridical Condition and Rights of the Undocumented Migrants, Mexico, Advisory Opinion, Advisory Opinion OC-18/03, 17 September 2003.

before other courts contributes directly to the construction of rights in the IACtHR, and it applies rights originating outside its own regional jurisdiction. More specifically, distinctive human rights norms often migrate across global and regional jurisdictions in cases in which courts are confronted with new subjects and new claims, especially where these are of a transnational nature. To illuminate this, recent rulings in the African Court on Human and Peoples' Rights have, albeit without extensive citation, established both cultural and collective property rights for indigenous peoples very similar to those guaranteed in the IACtHR.<sup>188</sup> Litigation for particular rights in Latin America has thus, indirectly, generated similar rights in Africa.

Such developments can be seen, second, in legal communities marked by high levels of interaction between different courts. As discussed, legal cases in regionally influential courts generate norms that acquire higher-order status in other states, especially when these states are confronted with similar problems. As discussed, we can see examples in which litigation in Colombia has created rights in Chile, and litigation in India or South Africa has created rights in Kenya.

Third, such developments can be seen in the fact that human rights law is increasingly endowed with extra-territorial force. For example, Canadian citizens and German citizens are bound by domestic human rights law when acting outside their own societies.<sup>189</sup> Moreover, until recently, courts in the USA often heard alien tort cases against public officials and private actors responsible for human rights violations outside their national territory.<sup>190</sup> In the Pinochet cases, UK courts also asserted extra-territorial jurisdiction for crimes against humanity.<sup>191</sup> In these instances, the bonds between national citizenship and global citizenship have been strengthened, and, in acts of litigation, both persons and collective actors have been able to transport the political practices of citizenship to a global level.

To a lesser degree, fourth, such developments have also become manifest in the emergence of transnational sectoral communities. Increasingly, for example, persons engaged in transnational scientific practices create rights and regulatory frameworks in their specific domain, and it is possible

<sup>188</sup> See discussion at p.412 above.

<sup>189</sup> *Canada (Justice) v. Khadr* 2008 SCC 28; Verwaltungsgericht Köln, 3 K 5625/14 (27 May 2015).

<sup>190</sup> See the leading alien tort case concerning company liability for human rights violations, *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002).

<sup>191</sup> See p. 265 above.

to see an aggregate of practices close in quality to transnational scientific citizenship. Similarly, persons engaged in transnational sporting activities create and presuppose normative structures which reach outside and across national boundaries.<sup>192</sup> Internet users may also, in some respects, be viewed as a transnational community, with growing capacity for establishing a functionally specific normative order. In such cases, it is important not to overstate the solidity of transnational legal protection. Notably, rights that are commonly subject to transnational violation, such as intellectual property rights, are not easily protected outside the country where the right is held.<sup>193</sup> However, to the extent that it exists, the basic order of a transnational functional domain results, at least in part, from litigation, and litigation is a core practice of transnational citizenship in this context. For example, transnational sporting regulation is likely to be driven by litigation about players' transfers, mobility, corruption, use of performance enhancers, reputation, etc.<sup>194</sup> The community of internet users is also, demonstrably, inclined to construct its normative order through litigation regarding defamation, intellectual property, censorship and promotion of violence.<sup>195</sup>

Overall, it is still fanciful to imagine global citizenship as a condition that involves the exercise of a fully evolved set of political rights. However, as litigants, citizens are able to extend some conventional powers of citizenship into the global domain, and they are able to create and define rights and legislation without state-conferred entitlements. As agents in the system of world law, therefore, citizens are able to gain entry to national political systems other than their own, and they are able to shape legislation both across and beyond national boundaries.

## 5.6 Conclusion

The contemporary political system is marked by multiple articulations with the societal actors in its environment, and it channels social claims into law through a series of different openings. It is now simply illusory

<sup>192</sup> This argument is the property of Gunther Teubner. See discussion above at pp. 198–201.

<sup>193</sup> See *Starbucks (HK) Ltd v. British Sky Broadcasting Group Plc* [2015] UKSC 31.

<sup>194</sup> The ECJ ruling in *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman* (1995) C-415/93 had a deep impact on the sub-constitution of football. Currently, three Russian cyclists have taken legal action against the World Anti-Doping Agency (WADA) and Canadian doping investigator because of their exclusion from participation in the Olympic Games in Brazil. This has the potential significantly to alter core practices in sporting regulation.

<sup>195</sup> See the Australian High Court ruling in *Dow Jones & Company Inc v. Gutnick* [2002] HCA 56), addressing questions of global defamation.

to envision the political system as a volitionally constructed set of institutions for producing legislation. In the contemporary political system, to be sure, the citizen gains reality through regular processes of national political representation, which play a key role in creating legislation. But the citizen also gains reality through segmented or sectoral lines of communication, linked to demands for globally established rights, which also generate legislation. The citizen appears to the political system as a member of a national society, communicating through classical political procedures. However, the citizen also appears as a holder of global rights, and, in the second capacity, political exchanges between the citizen and the political system often bypass classical legislative processes, and they generate norms by linking the national political system directly to the global legal system. As discussed, national democratic political systems were not founded in solely national constructions of citizenship; they presupposed global additions to construct national citizenship. Once established, national democracies only partially structure their political systems around national citizenship, and they now conduct many processes of legislation and rights construction by articulating themselves with the differentiated system of global rights, through the global citizen, and by producing legislation through reactions to communications articulated around these rights. In key respects, it is the citizen as a construct of global law that underpins the legitimational and legislative functions of modern democracy, and this citizen is defined specifically by the fact that it is not identical with national citizens.

This transformation of the citizen into a global legal construct has implications for the political substance of democracy. In particular, it means that the primary political norms of the political system are not set by volitional political acts. As discussed, however, this does not erode the basic political substance of society. Within the normative order of global law, national political systems generate pluralistic patterns of political agency and citizenship, often achieving more socially proportioned patterns of political inclusion and engagement than under systems defined by highly politicized constructs of national citizenship. This is expressed in new modes of political participation, and even in new modes of political subjectivization, usually linked to inner-legal interactions between national and global human rights law. To capture this, we need a multi-focal construct of politics, adapted to the reality of a political system that generates society's laws through multiple articulations with social actors.