

## CHAPTER FIVE

# CONSTITUTIONAL RIGHTS AND THE INCLUSION OF THE NATION: SYSTEMIC TRANSFORMATIONS I

### INTERNATIONAL HUMAN RIGHTS AND POLITICAL STRUCTURE BUILDING

After 1945, international law had a deep effect on most national political systems, both in new and more consolidated democracies, and international law often profoundly transformed domestic constitutional law. There are of course some exceptions to this pattern. In some societies in North West Europe, for example, national constitutional formation was not immediately shaped by a very deep influence of international law. In most societies, however, international human rights law solidified an inclusionary structure for national political systems, and it played an important role in consolidating national political institutions as relatively autonomous actors, able to produce legislation across all parts of domestic society.

In the extended wake of 1945, as mentioned earlier, international human rights norms assumed structurally formative significance in new, still precariously consolidated post-colonial polities. Indeed, such polities often showed distinctive reliance on international human rights norms as sources of legitimacy and structural integrity. One particularly important case of this is the Indian polity after independence, whose constitution (in force from early 1950) was partly inspired by the rights enthusiasm of the post-1945 era. The Indian constitution accepted a basic dualist notion of international law, and it permitted parliamentary amendment of basic laws. However, it established powerful protection for human rights (Art 13), derived in part from early UN treaties (Sripati 1997: 101–2), and it made provisions for judicial

review by a Supreme Court (Arts 32, 131, 143 and others). Indian courts were generally very open to the assimilation of international norms. By the 1970s, the Indian Supreme Court had established a body of case law to extract certain rights from parliamentary encroachment, fleshing out the principle that there existed a *basic structure* in the constitution, including fundamental rights norms, which were exempt from parliamentary revision.<sup>1</sup> In key respects, the Supreme Court acted as a primary custodian of the constitution, despite periodic complicity with more authoritarian executives, notably during Indira Gandhi's emergency rule. Indeed, in developing the basic structure doctrine, the Supreme Court expounded a particular theory of constituent power, incorporating a doctrine of divided sovereignty, which located legal sovereignty partly in the judiciary.<sup>2</sup> Particularly significant in India is the fact that international human rights law helped to consolidate a legal order after the withdrawal of imperial authority, such that human rights were applied to mark a founding caesura between the new democracy and its colonial past (Austin 1966: 58–9), acting to distil legitimacy, *ex nihilo*, for the political system. Also significant is the fact that, in India, constitutional law was constructed in a society marked by extreme regionalism, low national integrity and formalized social gradations. As a result, the courts eventually assumed vital nation-building functions, expanding a fabric of human rights through society, and even encouraging litigation to promote the transfusion of constitutional values into society,<sup>3</sup> and to bring social agents, in very different locations, into a direct relation to national political institutions (see Craig and Deshpande 1989: 368). In both respects, human rights played an important role in a slowly deepening process of political structure building and national construction.

<sup>1</sup> See the progressive development of this doctrine in the Supreme Court rulings in *I.C. Golaknath & Ors v State of Punjab & Anr* (1967); *Kesavananda Bharati v. State of Kerala* (1973). For comment, see Austin (1999: 196–277), Sen (2007: 197) and Dalal (2008). The basic structure doctrine was widely supported by reference to international human rights law. In *Kesavananda Bharati v. State of Kerala*, for example, it was stated: 'while our fundamental rights and directive principles were being fashioned and approved of by the Constituent Assembly, on December 10, 1948 the General Assembly of the United Nations adopted a Universal Declaration of Human Rights. The Declaration may not be a legally binding instrument but it shows how India understood the nature of Human Rights'.

<sup>2</sup> See the arguments in *Indira Nehru Gandhi v Shri Raj Narain & Anr* (1975). See comment in Krishnaswamy (2009: 271).

<sup>3</sup> See in this respect the classic Indian cases of public interest litigation, which had profound implications for rights-based nation building in India and beyond, *Bandhua Mukti Morcha v Union of India* [(1984) 3 SCC 161]; *S.P. Gupta v. Union of India*, AIR (1982) SC 149.

In addition, after 1945, international human rights norms acquired vital structural importance in established democratic polities. One most significant example of this is the USA.<sup>4</sup> In the USA, the ability of federal government to exercise control of all society was greatly increased through the 1950s and early 1960s, and the formation of the USA as a fully nationalized polity, merely foreseen, not accomplished, in the Federal Constitution of 1789, approached completion in this period. This process was directly tied to the increasing willingness of the federal government to guarantee uniform civil rights to all American citizens, across the colour line, and, in order to give effect to these rights, to override state legislatures.<sup>5</sup> Moreover, this process was informed, to a significant degree, by the pervasive influence of international legal norms. International human rights instruments have only rarely been directly applied in national jurisprudence in the USA. However, in the 1950s and 1960s, legal pressures resulting from the international normative domain often led national courts in America to reinforce the standing, scope and reach of rights in domestic law, and the growing authority of international human rights was one factor that gave rise to the allocation of more uniform civil rights across the entire federal polity. On one hand, the importance of human rights was evident at this time in the fact that federal tribunals were more prepared to give relief for persons violated in their rights in the states (see Tucker 1965: 342).<sup>6</sup> On the other hand, this was visible in the rights jurisprudence of the Supreme Court, which was open and sensitive to international legal debate, and which played a vital catalytic role in broadening the impact of human rights (Casper 1972: 39). In both respects, the

<sup>4</sup> For the classic case regarding direct enforcement of international law in the USA, see *Sei Fujii v State* (1950), in which a California state appellate court relied on the UN Charter and the UDHR to strike down the state's Alien Land Law, prohibiting Japanese immigrants from owning lands. Note, though, that the state Supreme Court later denied the direct applicability of the UN Charter.

<sup>5</sup> One recent account defines the struggle for civil rights as the 'crux' of American state building and governmental expansion (Francis 2014: 8).

<sup>6</sup> See broader comment in Dudziak (1988: 94) and Eschen (2012: 179). Note – vitally – the rise in influence of international treaties and conventions as background to the legal success of the Civil Rights movement and the weakening of the power of the states, which this implied (Power 2000: 12; James 2010: 189). Famously, the National Negro Congress, the NAACP and the Civil Rights Congress (under the Genocide Convention) all protested before the UN (respectively in 1946, 1947 and 1951, each time without success) against Jim Crow laws. Prominent Civil Rights cases before *Brown v Board of Education* also referred to the power of UN treaties as a normative source of American law. On both these points, see the excellent inquiry in Layton (2000: 27, 49). For conceptual background see Primus (1999: 194–5). Tellingly, opponents of Civil Rights legislation in the 1950s also opposed the influence of UN treaties on American legislation (consider The Bricker Amendment, 1953), and they invoked states' rights to counter the rise in presidential authority caused by implementation of treaties (Anderson 2003: 227).

influence of international norms triggered a general domestic expansion of national authority, across all parts of society. Indeed, the *osmotic* impact of international law has been a constant feature of the American legal system since 1945, and international law, although rarely guaranteed direct effect, has widely been used to instil cohesion in the national legal system as a whole. In certain cases, for example, the Supreme Court has invoked international law to overrule state courts.<sup>7</sup> In numerous cases, state courts have cited international law as an interpretive guide in order both to consolidate domestic rights at state level, and, most strategically, to avoid seeing their verdicts overturned by higher courts.<sup>8</sup> In both respects, international law has commonly been used to link together different tiers of the national legal system.

The role of human rights in consolidating national political structures after 1945 became most evident, however, in the formation of new national polities, following post-authoritarian transitions. In such settings, international human rights norms, transformed into domestic law, often proved crucial to the stabilization of relatively autonomous political institutions, and, during processes of rapid political re-orientation, the domestic assimilation of human rights enabled political institutions to overcome embedded, often recurrent sources of inclusionary crisis.

Research focused on democratic transitions has usually identified *external* factors, be these particular socio-economic conjunctures, or particular, often economically determined, societal challenges to political institutions, as causes of political transition towards democracy (see Remmer 1990: 328; Gasiorowski 1995: 892; Haggard and Kaufmann 1997: 167–8; Acemoglu and Robinson 2001: 940). Naturally, this chapter, and subsequent chapters, do not deny the validity of such explanations. Nonetheless, it is argued here that constitutional transitions have typically been induced by *inner-systemic* causes, or by pathologies within national political systems, acting alongside other factors. In particular, it is argued that most democratic transitions were caused by *inclusionary*

<sup>7</sup> See *Roper v Simmons*, 543 U.S. 551 (2005), prohibiting the juvenile death penalty. See impact of this in *Ex parte Adams*, 955 So. 2d 1106 (Ala. 2005). My thanks are due to Gianluca Gentili for these points.

<sup>8</sup> In this respect, there are extreme variations from state to state. In some states, there is intense hostility to the use of international law, and courts have expressly rejected principles based in international instruments. See for the Kansas Appeal Court ruling in *State v Amaya-Ticas* (2008). In other states, courts have cited international law to establish strong precedents for domestic rights and to harden rights provisions in state law. See the Connecticut Supreme Court verdict in *Moore v Ganim* (1995). I again thank Gianluca Gentili for these references.

*crises* within national legal/political systems: that is, they were caused by the fact that national political systems had not evolved a robust inclusionary structure, and the political system had failed to perform functions of effective legal inclusion for society. In many cases, these inclusionary crises were the result, in part, of the constitutional diction in which political systems defined their legitimacy, and they resulted from the excessive inclusionary expectations which national constitutions had generated. Notably, societies often encountered inclusionary crises because their political systems, following the classical constitutional formula, had defined their legitimacy as extracted directly from the will of the sovereign nation, and they had been enduringly unsettled by inflated inclusionary pressures resulting from this. Ultimately, however, many states devised an alternative formulation of legitimacy through the course of democratic-constitutional transitions, and they developed a constitutional formula, defined in part by international human rights law, which reduced their susceptibility to inclusionary crisis. In many cases, international human rights became a medium which, once constitutionally incorporated in national states, softened the exposure of states to inherent strains caused by other strata of rights, and it helped to consolidate national political structures on that basis. Consequently, as mentioned in [Chapter 4](#), it was often only through the rise of a powerful system of international law, and especially human rights law, that national states learned to correct structural problems in their formative trajectories, to soften their exposure to inclusionary pressures that had traditionally brought them to crisis, and, as a result, to construct evenly inclusive sovereign political structures across national societies. This process is most clearly exemplified through democratic transitions; most democratic transitions usually involved, not only the establishment of national democracy, but the formation, more basically, of generally stable inclusionary structures for national societies as a whole. In most democratic transitions, the fact that hard norms could be borrowed from the international arena meant that political institutions were able to evolve relatively autonomous inclusionary structures in settings in which this had classically proved very precarious, risk-filled and inconclusive. To this degree, the rise of international human rights norms made it possible for national states to perform *compensatory structure building*. In both their internal and external dimensions, most states only acquired the ability to discharge their inclusionary functions *as sovereign states* to the extent that they were constitutionally locked into a transnational legal/political system, ordered

around rights. This usually coincided with processes of democratic consolidation.

### TRANSITION 1: GERMANY, ITALY AND JAPAN

This structure-building impact of international human rights became visible, first, in post-authoritarian or post-fascist societies, which, after 1945, were subject to military occupation by the Western allied powers, in particular by the USA: that is, in the Federal Republic of Germany (FRG), Italy and Japan. After 1945, each of these societies developed a constitutional order defined by increasing judicial power and by deep penetration of international law into domestic society. Each society developed a constitution with a transnational judicial emphasis. In each case, this clearly reinforced the basic inclusionary structure of the political system, and it heightened the general sovereign authority of the state.

To approach this phenomenon, it is necessary first of all to address a common historical misconception. To varying degrees, in the interwar era, Germany, Italy and Japan all established systems of authoritarianism designed to promote *developmentalist* policies,<sup>9</sup> and they used coercive techniques to steer the domestic economy and to elevate industrial productivity, with the goal of re-positioning national economies within the global economic system.<sup>10</sup> On this foundation, these authoritarian states regularly assumed programmatic objectives that exceeded the dimensions of classical liberal states. Typically, they intervened in private relations at work and in the family, they sought to mobilize all society through co-ordination of leisure activities and ideological indoctrination, and they ordinarily demanded high levels of obligation and obedience in different spheres of social practice. Most significantly, insofar as they assumed responsibility for the forcible management of economic growth, these states, of necessity, were required to address deep-lying societal conflicts, and to assume regulatory

<sup>9</sup> The developmentalist aspect of fascism was clearest in Italy under Mussolini. This is distilled in Panunzio's (1937: 21) characterization of fascism as a form of *state-nation*, based in the economic mobilization of society through a 'historical synthesis of syndicalism and nationalism'. But the developmentalist aspect was a feature of all fascist government. For an account of European fascism as a system generally oriented towards developmentalism, see Gregor (1979). For discussion of developmentalism in Japan, see Tabb (1995: 78).

<sup>10</sup> In Italy, Gentile (1982 [1927]: 275) argued in paradigmatic fashion that, in fascist corporatism, individual persons acquired a relation to the state 'as a specialized productive force', and the integral linkage between state and society was mediated through the construction of the person as producer.

authority for economic disputes over labour, employment and production. To perform these functions, all interwar authoritarian states developed corporatist mechanisms for the forcible regimentation of organized labour; all evolved corporatist methods for steering the economy, for managing relations between different sectors in the employment market and for linking industrial production to strategic macro-economic goals, usually related to planned development.<sup>11</sup> For this reason, the interwar states in Germany, Italy and Japan were defined by their ideological spokespeople as strong, 'total', or even 'totalitarian' regimes, and this construction was accepted by external observers.<sup>12</sup> The perception of interwar authoritarian polities as strong states was then widely replicated after World War II. As discussed, in fact, the growing promotion of international law after 1945 was partly conceived, at least rhetorically, as a means of limiting the reach of national states and of obviating the recurrence of neo-fascist authoritarianism.<sup>13</sup>

Despite the totalist rhetoric of interwar authoritarianism, however, the developmentalist regimes in Germany, Japan and Italy which dissolved before and at the end of World War II cannot reliably be classified as strong states or strong political systems. In fact, these regimes were deficient in certain quite basic hallmarks of statehood. In many respects, these regimes were afflicted by endemic structural instability, and their inner-societal capacities for legislation, even legal inclusion, and independent policy making were low: they possessed very insecurely unified political institutions, and they were only able to exercise limited control of society. The weakness of these states had similar underlying causes in each case, and, as discussed further, they reflected structural features that were common to each of these societies. In consequence, it is against a background, not of total statehood, but of endemically debilitated statehood and low inclusionary structure, that the democratic transitions in Germany, Italy and Japan after 1945 can be most adequately examined. This background, moreover, illuminates the role of international law in the constitutional dimensions of these transitions. In each case, interaction between international and domestic law played a vital role in consolidating political institutions and expanding the inclusionary structure of historically unstable national states.

<sup>11</sup> See pp. 179–80 below.

<sup>12</sup> On the theory of the 'total state' at this time see Gentile (1929: 46) and Forsthoff (1933: 24).

<sup>13</sup> See p. 103 above.

Notable in this respect, primarily, is the fact that the main authoritarian, or *fascist*, states of the interwar era – Germany, Italy and Japan – had been formed on a broadly congruent *three-stage evolutionary pattern*.<sup>14</sup> In each case, this pattern meant that the basic inclusionary structure of the state and the essential convergence of society around the state both remained low. Consequently, the eventual structure-building force of international human rights compensated for problems that were very deeply inscribed in the evolutionary history of these societies.

In the *first stage* of their formation, all these states had their origins in a societal environment that was marked by very limited social and regional unity, by deeply embedded private authority and by the persistence of pronounced residues of feudal social order.<sup>15</sup> In particular, each of these states was first created as part of a strategic process of institutional centralization, in which elite actors implanted a set of political institutions in society in order selectively to eradicate typical features of late feudalism from the political order: that is, strong conventions of patronage,<sup>16</sup> low levels of legal control, deficient fiscal capacities and generally reduced centralization and institutional density (Witt 1970: 55; Tabb 1995: 66).<sup>17</sup> As a result, initially, the political institutions of modern Germany, Italy and Japan were rapidly imposed, often by elite decree, upon national societies that were still deeply pervaded by localism and feudal customs, and in which some remnants of inherited feudal structures of authority still needed to be accommodated.

This state-building pattern was exemplified in the unification of Italy in the 1860s. In Italy, the national state was imposed by a liberal elite on territories whose localized structure was residually unresponsive to political centralization, and in which local power monopolies then persisted in many parts of the new (notionally) national society (see

<sup>14</sup> There has been much controversy regarding the question whether military Japan should be classified as a 'fascist' state. See the famous rejection of this description in Dzus and Okimoto (1979). For its qualified rehabilitation, to which I subscribe, see Gordon (1991: 335).

<sup>15</sup> On the persistence of some aspects of feudalism into the Meiji era, see Beasley (1972: 73, 348) and Johnson (1982: 36). On the survival of aspects of feudal law in nineteenth-century Germany, see Heß (1990: 16). On local opposition to centralization in Italy, see Romeo (1978: 38).

<sup>16</sup> For a description of the historical background to national state building in Japan see the brilliant exposition in Ravina (1999: 17, 25). Ravina (1999: 27) tellingly describes Tokugawa Japan as a 'compound state' and he examines the function of patrimonialism in Japan at this time (p. 34). See, further, Beasley (1972: 20) and Ramseyer and Rosenbluth (1995: 39). Yet, for excellent revision of standard views of the weakness of the Tokugawa polity, see White (1988: 6). The account proposed by White overlaps with my own in that he stresses the weakness of European states well into the nineteenth century.

<sup>17</sup> For example, Germany had no federal income tax until 1913, and direct taxes only amounted to 2 per cent of imperial revenue (Daunton 1996: 177).



Romanelli 1979: 17).<sup>18</sup> This pattern was also manifest in the unification of Germany under Bismarck. In Germany, in somewhat more authoritarian fashion than in Italy, a national political system was established that reflected a delicate balance between modern elites, who favoured national consolidation, and groups committed to the preservation of local and aristocratic privilege.<sup>19</sup> National order was eventually imposed on German society, which remained enduringly resistant to national convergence, through a mixture of military conquest, executive decree and inter-elite accommodation. This pattern was also manifest in early Meiji Japan, where a Western state model was imported as a technical instrument to supplant the feudally dispersed socio-political structure of the Tokugawa era.<sup>20</sup> In Meiji Japan, moreover, although the high aristocracy initially lost status through the state-building process, the aristocracy soon became the backbone of the political elite (see Silberman 1964: 111).

One common background to interwar right-wing authoritarianism, in consequence, was that it eventually emerged in societies in which state institutions had first been created in very artificial manner, effectively by fiat. In each case, state institutions sat uneasily alongside the surviving elements of feudal governance, and state authority was often sustained by private compromises between elites, which scarcely reflected deep-reaching patterns of social integration. In each case, states were not confronted with societies formed as nations; instead, they were surrounded by societies defined by deep regional and sectoral affiliations. Typically, in consequence, these states were, in their socio-historical foundations, very weak states, whose societal legitimacy was fragile, whose congruence with a discernibly organized nation was limited and which struggled to exercise immediate control of everyday social life across their national environments.

<sup>18</sup> It is widely reported, both in historical and eye-witness accounts, that in many areas Italian unification was partly driven by the liberal aristocracy, who abandoned their historical localism because they saw advantages in unification for their own social and political authority. On these points, see Kroll (1999: 339, 386).

<sup>19</sup> Local privilege was clearly preserved in the constituent states of the German *Reich*. This was most notable in Prussia, which, until 1918, preserved a franchise weighted towards the aristocracy. The main bastion of aristocratic privilege was the Prussian First Chamber, or *Herrenhaus*, which did much to guarantee the interests of the Prussian nobility. On the position of the *Herrenhaus* as a centre of vested aristocratic interests, see Spenkuch (1998: 227). The Prussian aristocracy is typically viewed as the 'leading political and social class' in unified Germany (Carsten 1990: 112).

<sup>20</sup> One excellent commentary argues that the Meiji Restoration was experienced as a military invasion in some Japanese provinces (Lewis 2000: 1).

In the *second stage* of state building, after their initial formation, the main authoritarian states of the interwar era all passed rapidly – sometimes within just a few years – from a hastily improvised process of post-feudal state building to a condition of limited constitutional organization. In Germany, Italy and Japan, in fact, constitution writing was promoted as one step in a longer-term state-building design, and a constitutional order was imposed on the political system because prominent elite actors viewed national constitution making as a technique for solidifying state power and for consolidating a national economy.<sup>21</sup> In each case, constitutions were established as a means to draw together diffuse elements within society to stabilize a post-feudal,<sup>22</sup> relatively centralized and fiscally efficient state above the conflictual relations of civil society.<sup>23</sup> In each case, constitutional laws were also used to create a national-economic environment conducive to industrial growth and to the promotion of national economic competitiveness. In each case, however, the mobilization of societal support for the political system in society was not a precondition, or even a formulated objective, of constitutional formation. Unsurprisingly, the first constitutions in Germany, Italy and Japan defined the conditions of constitutional rule in very technical, positivistic categories, eschewing expansive constructions of state legitimacy.

This technical pattern of state expansion through limited constitutional organization was evident in Italy under the *Statuto Albertino*, the Savoyard constitution of 1848 which became the constitution of all Italy after unification in the 1860s. Under this constitution, there developed a semi-democratic system of governance, defined as *trasformismo*, which culminated in the policies of Giolitti around 1900. *Trasformismo* was a strategy for mustering broad-based support for the

<sup>21</sup> On constitutionalism as a strategic path to national consolidation and national-economic reconstruction in Japan, see Beckmann (1957: 23), Ike (1969: 74) and Ramseyer and Rosenbluth (1995: 2). In Germany, constitution drafting was inextricably bound up with nation building. The 1848/49 constitution had been designed to create a German nation state based on broad popular support; Bismarck's constitution of 1871 promoted a less integrally unified pattern of nation making but still reflected the same objectives.

<sup>22</sup> The anti-feudal nature of Meiji state building is very often noted (see, for example, Norman 1973 [1940]: 8, 70, 72). However, Bismarckian Germany and unified Italy were also designed as states that were expected to eradicate the patchwork and privatistic remnants of feudalism in these states. All three states, to varying degrees, were intended to iron out the societal particularism of late feudal society, and to create a national state and a national economy without, however, accepting democracy as a dominant political form.

<sup>23</sup> See Maki (1947: 395). The Imperial constitutions of Germany and Japan in particular can be viewed as examples of constitutions designed to conduct a process of semi-authoritarian state and nation building. See on Japan Beckmann (1954: 260, 268) and Ravina (1999: 15). The Japanese language did not have words for 'rights' until the 1860s (Tsuzuki 2000: 77).

national government, which underpinned the consolidation of Italy as a national constitutional state. This strategy involved the gradual elaboration of a formal constitutional regime through personal, often semi-clientelistic, bargains between the governing executive and powerful societal elites, so that the new national political order was gradually extended across society through a web of ever-widening personal negotiations and accommodations (Ghisalberti 2000: 189, 203). Notably, the process of political unification in Italy coincided with the establishment of a civil code (1865), which, in parallel to political unification, slowly unified economic exchanges. This technical pattern of state expansion was also evident in Germany in the early to mid-Imperial era (1871–1900). Under the Bismarckian constitution (1871), the legal obligations of the state (easily circumnavigated by the executive) were defined in highly positivistic manner, and the elected parliament (Reichstag) played only a limited role in forming government.<sup>24</sup> In fact, the exercise of law-making initiative by the Reichstag was constitutionally restricted, and, under Art 21 of the constitution, members of parliament could not assume governmental office; parliamentary activity was mainly concerned with budgetary control. Notably, this same period also saw the creation of a German civil code (assuming effect in 1900), to impose legal unity on economic relations. This technical pattern of constitutionalism was also visible in Japan in the Meiji era. Indeed, the constitutional policies of the Meiji oligarchs were deeply influenced by the principles of limited constitutionalism pioneered in Germany (Ando 2000; Tsuzuki 2000: 108, 110), and the Meiji Constitution (1889) was specifically designed to create the basis for a strong national state, resistant to external military depredation. In Imperial Japan, the elected Diet was, until after 1900, only conceived as a secondary, essentially deliberative institution, and it did not possess complete legislative initiative or full control of the national budget (Wilson 1957: 39, 79; Beckmann 1957: 29; Akita 1967: 59, 80; Gordon 1991: 2).<sup>25</sup> As in Germany, the formation of governmental executives was not a function of the Diet (see Akita 1967: 73). In Japan, too, early constitutionalism was tied closely to the codification of economic law,

<sup>24</sup> This is exemplified in Laband's (1901: 195–6) positivistic view of the constitution as a formal legal personality.

<sup>25</sup> One commentator (Duus 1976: 113–15) states: '[T]he oligarchs had wished to assure the firm existence of a bureaucratic state structure before venturing into the uncertain waters of constitutional politics. [...] The main new element introduced by the constitution was the establishment of an elective national assembly, the Diet. The last of the new state organs to be created, the Diet was regarded as the most peripheral by the oligarchs'.

and a civil code was introduced in 1898, based largely on a German template (see Flaherty 2013: 24).

In the period of early constitutionalism, therefore, the political systems of Germany, Italy and Japan still only possessed very shallow societal foundations. In these states, most notably, public office was commonly transacted through informal procedures, and it was still partly concentrated in private hands. In each case, constitutional norms did not penetrate very deeply into society, and the scope of political rights was clearly curtailed. In many regions, further, public functions were performed by private elites, and core organs of state (i.e. judicial institutions, fiscal institutions) were only very uncertainly centralized.<sup>26</sup>

In the *third stage* of state building, after the initial process of constitutional organization, the major states which ultimately converted to authoritarianism in the 1920s and 1930s all witnessed a short period of either full or at least extensive constitutional democratization, in which political rights were more widely distributed through society. In this period, the range of social sectors that were drawn into the state expanded exponentially, and, to differing degrees, the exercise of popular sovereign power became an important source of systemic legitimacy. This period is exemplified by Italy in the period after 1912, which saw the stepwise introduction of a mass franchise and a rapid widening of the authority of parliament, prior to Mussolini's assumption of power in 1922. In Germany, this period lasted from the foundation of the Weimar Republic in 1918/19 to the onset of presidential rule in 1930. In Japan, this period can be identified in the longer timeframe 1900–1932, but it coincided, in particular, with the era, so-called, of Taishō democracy (1912–26) (Gordon 1991: 127).<sup>27</sup> In each of these interludes, the states in question experienced a dramatic rise in the volume of inclusionary expectations directed to them from different parts of society. In each setting, moreover, these states underwent a significant increase in their basic structural integrity, and they began to perform their functions at a heightened degree of centralized inclusivity. In each case, arguably, the state only became a fully national state through democratic reform, and the creation of a democratic or semi-democratic constitution intensified, not only the

<sup>26</sup> As mentioned, Imperial Germany had no fully unified taxation system. On the weakness of national institutions in Meiji Japan, see Flaherty (2013: 97).

<sup>27</sup> Japan was not actually a democracy during this period; Japan had full manhood suffrage in 1925. However, the move towards democratization in Japan was accelerated at this time. Germany had full male and female suffrage in 1919. Italy had full manhood suffrage in 1918.

structural integrity but also both the inclusionary reach and authority of state institutions.<sup>28</sup>

Notably, however, in these short interludes, the accelerated process of democratization in Italy, Germany and Japan was complicated by the fact that these states were required not only to conduct increasingly extensive processes of *political* inclusion but also to act as focal points in intensely contested and highly volatile material/economic conflicts – normally running broadly along class boundaries. In Germany and Italy, in particular, the beginning of full democratization coincided with the comprehensive mobilization of the national population in World War I, in which, as discussed, industrial production was subject to a high level of co-ordination by state departments, and governments experienced deep reliance on trade unions to regiment the labour force. After 1918, therefore, these states were expected to demonstrate their legitimacy not only through political representation but also by assimilating their populations as a source of *material sovereignty* or even *material constituent power*: by placating antagonisms between organizations at different locations in the industrial production process, and by incorporating civilian populations which were both highly militarized (and dangerous for the state) and increasingly accustomed to state intervention in economic disputes.<sup>29</sup> In consequence, these states experienced full political democratization at a point where, from an original position of low institutional integrity, they were also required rapidly to design legal/constitutional mechanisms to regulate economic production, to manage industrial relations and to arbitrate between rival organizations in labour conflicts. This conjuncture assumed different forms in each of these societies. However, in each case, the construction of a constitutional system of political-democratic inclusion coincided with the transformation of the political system into a central actor (and, in fact, often the final arbiter) in conflicts relating to conditions of labour

<sup>28</sup> Tellingly, for example, the autonomy of the German state in relation to embedded elites increased exponentially after 1918. This was reflected in a number of factors, especially in the growing extractive capacities of state, enlarged through Matthias Erzberger's fiscal reform of 1919–1920, and resultant expansion of the Imperial state against the regions and conservative elites. In Italy, after 1918, the traditional countervailing pull of local elites was diminished, governmental power, although very temporarily, was rotated between different parties, and the circulation of power through society became less reliant on private agreements. In Japan, the state's ability to legislate positively, against prominent elite and local interests, was also intensified (Garon 1987: 186).

<sup>29</sup> In Germany, in particular, World War I gave rise to the passage of legislation, notably the Auxiliary Service Law of 1916, which both forcibly co-opted the civilian population in the war effort and assigned far-reaching industrial rights to organized labour.

and production. In each case, at a decisive point in its formation, the political system was confronted with acute pressures resulting from the internalization of class conflict, and it was obliged to distil its legitimacy from the resolution of economic conflicts, lying deep in the structure of society as a whole. In Germany and Italy, in particular, this meant, at an early stage in their democratic construction, national states were obliged to sustain their inclusionary functions by generating expansive rights of socio-material inclusion for their constituencies, and by ensuring that such material rights mollified the potentially volatile political conflicts which they internalized as they assumed the form of political democracy.

This last point has particular importance for the development of authoritarian states in the interwar period. In all major states which subsequently converted to fascism or to similar patterns of authoritarianism, societal inclusion through political rights and societal inclusion through socio-material rights occurred, broadly, at the same time. As a result, in Germany, Italy and Japan, democratization led to the creation of political systems that possessed a pronounced *corporatist emphasis*, and that adapted their inclusionary structures to demands for the integration and legal reconciliation of industrial conflicts by using social and material rights to solidify their foundations through society. In some cases, these states established democratic constitutions with strong provisions for collective rights or group rights, enabling originally private collective actors (that is, trade unions, lobbies, business associations) to negotiate conditions regarding production and distribution, and to participate in public decision making.

This confluence of political democracy and economic democracy was most obvious in the early years of the Weimar Republic, which saw a wave of legislation to promote a corporatist system of economic management. Semi-corporatist arrangements between big labour and big business had in fact already been established in Germany in 1916. After armistice in late 1918, then, laws (*Tarifvertragsordnung*) were introduced to sanction collective labour contracts, and to create a quasi-corporatist Central Community of Labour, designed to create a forum for consensual negotiations between unions and industrialists regarding relations of production. The corporatist emphasis in German industrial legislation was intensified in the Weimar Constitution itself (1919), which, albeit uncertainly, contained plans for the establishment of a system of economic democracy. In particular, Art 165 of the Weimar Constitution made provision for collective regulation of

the conditions of production, and Art 157 foresaw a separate system of labour law. This corporatist tendency resulted in the introduction (tellingly, by emergency decree) of provisions in 1923, which subject some industrial disputes to mandatory state arbitration (*Zwangsschlichtung*) (Englberger 1995: 153–4; Steiger 1998: 132–5).<sup>30</sup> It also resulted in the establishment of a system of labour courts, in 1926, which was conceived as the ‘first main part’ of a comprehensive legal order to regulate industrial production and industrial labour (Bohle 1990: 85). In the Weimar Republic, the free-standing corpus of labour law projected in the constitution and attendant agreements never fully materialized. In fact, conceptions of economic democracy, conceived as a ‘supplement to political democracy’, were advocated consistently by trade unions through the 1920s (see Naphthali 1929: 14), but had only marginal impact on political reality. Nonetheless, the legal ordering of labour in the Weimar Republic marked a very advanced position in European employment legislation, and it incorporated substantial parts of labour law under public law. Significantly, moreover, in interwar Germany labour law was utilized quite expressly as a mechanism for national inclusion and nation building (see Preuß 1924: 141; 1926: 491).<sup>31</sup> Under the labour-law provisions of the Weimar Constitution (Art 7(9)), organized labour was placed in an immediate relation to the Empire, and provisions for industrial mediation were clearly designed to bind different classes together in a unified order of material citizenship.<sup>32</sup> Similar – albeit somewhat less systematic – tendencies were evident in Italy. The aftermath of World War I witnessed the rise of corporatist models of political-economic governance in Italy, and plans for a corporatist parliament were openly debated, across the political spectrum, between 1918 and 1922 (Lanciotti 1993: 301–6). In Japan, organized labour was significantly weaker than in Europe. Legal rights of Japanese unions were not fully covered by protective legislation; in 1931, notably, even a diluted bill to acknowledge union rights did not clear both houses of parliament (Large 1981: 148). Nonetheless, the era

<sup>30</sup> This was more weakly realized in more liberal societies. In the UK, for example, the Industrial Courts Act (1919) created labour courts, but they rested on a voluntary basis (Mackenzie 1921: 48).

<sup>31</sup> In the debates around the Weimar Constitution, for examples, the allocation of socio-material rights was expressly conceived as a technique for rectifying the weak correlation between state and nation in the Imperial period. This was declared programmatically by Friedrich Naumann, who wrote the catalogue of rights in the constitution, in the Constituent Assembly of 1919.

<sup>32</sup> See the conception of material citizenship in the works of Preuß (1889: 7), who was the main drafter of the constitution.

of semi-democratic experiment in Japan saw a rapid expansion of union activity and membership, notably in the years after 1918 and then again after 1930 (Gordon 1985: 107, 240). Many firms also established semi-corporatist mechanisms for interest articulation at this time, especially through the promotion of factory councils (Gordon 1991: 130). To some degree, moreover, the Japanese government sanctioned the principle that the state obtained legitimacy through the internalization of labour conflicts. This was clearly expressed in the (rarely used) Labour Disputes Conciliation Act (1926), which provided mechanisms for the politically controlled pacification of industrial conflict (Garon 1987: 112). Related legislation was also introduced in the agricultural sector.

Overall, at an early point in their public formation, all the main authoritarian states of the interwar period were required to balance deep contradictions between rival economic prerogatives and rival models of democracy. In Germany, in particular, the democratic state was soon obligated, under a system of collective social and material rights, to tie its legitimacy to the effective incorporation of, and mediation between, powerful social organizations, which were backed by increasingly unified and politicized social classes. Arguably, in fact, post-1918 governments in both Germany and Italy were required to promote a corporatist, half-privatistic societalization of the governmental order (based in socio-material rights) before their political institutions had been fully consolidated and before they had been able to stabilize their constitutions as a formal system of public law (based in political rights). This corporatist dimension was less pronounced in Japan, but Japanese governments also confronted class conflicts before the state had obtained even public control of society.

The states of interwar Germany, Japan and Italy, manifestly, were soon deeply unsettled by antagonisms between the rival social groups whose interests they were called upon to equilibrate. None of these states proved capable of reliably containing conflicts between class-determined interests within the rule-based structure of a democratic constitution. In important respects, in fact, these states retained an inner core of privatistic pluralism. They often relied, in their policy-making processes, on lateral links to powerful economic organizations and business elites, whose own commitment to democracy was weak. Moreover, they were vulnerable to private influence as they sought to respond to and accommodate dictates of different social groups, and they were highly sensitive to sporadic fluctuations in the relative



power of different economic classes.<sup>33</sup> In each society, consequently, the period of democratic-constitutional class balancing was short-lived. In each of these societies, state institutions quickly became deadlocked through inter-class adversity, coalitions between parties with rival economic constituencies became difficult to engineer, and powerful economic actors, installed in the peripheries of government, actively promoted the abandonment of the democratic order.<sup>34</sup> As a result, these societies proved a fertile breeding ground for highly authoritarian political parties and factions, which soon overthrew the democratic political order. In each case, moreover, the ultimate suspension of democratic rule led to the creation not only of an authoritarian legal/political order, but to a more authoritarian system for the administration of industrial relations and economic conflict, which abandoned the more consensual dimensions of earlier corporatist constitutional laws. In each major fascist state, a system of authoritarian or *exclusionary* corporatism was devised, in which original inter-class corporatist arrangements were selectively re-designed to favour dominant economic groups, and in which the particular prerogatives of economic elites acquired direct coercive force.

Italy led the way in this regard. Beginning in 1926, Mussolini gradually established a system of corporatism, whose centrepiece was the National Council of Corporations (instituted in 1930), which was intended to organize the economy in specialized unitary corporate organizations. In 1926, Mussolini introduced the *Legge Rocco*, designed to discipline trade unions, which created a judicial apparatus for regulating collective bargaining (the *Magistratura del lavoro*, which in fact only heard a small number of cases). The primary foundation for this system, however, was created in 1927, when Mussolini introduced a general blueprint for fascist economic administration, the *Carta del lavoro*. This document, at least in its declared intentions, established a

<sup>33</sup> For literature on business-executive interlinkage in interwar Germany, see Grübler (1982: 189, 199) and Zimmermann and Saalfeld (1988: 328). On the 'close governmental ties to the zaibatsu' in interwar Japan, see Johnson (1982: 23). Johnson (1982: 98) also gives evidence of direct *zaibatsu* involvement in economic legislation.

<sup>34</sup> In Italy, the democratic system had failed by 1922, and leading industrialists were keen to transfer power to the fascist party. On links between Mussolini and big business, see Adler (1995: 155). In Germany, the democratic system had ground to a halt by 1930, primarily due to disputes between coalition parties in 1929 over adequate fiscal responses to the Wall Street Crash. The support of big-business associations for the executive-led system of government by economic decree that emerged after early 1930 is well documented. For studies on the retreat of German business from democratic corporatism, see Blaich (1979: 64), Turner (1985: 296) and Meister (1991: 248). Business support for political clampdown during the crisis of the Japanese experiment in progressive politics is also widely acknowledged (Gordon 1985: 156; 1991: 252).

consensual structure for resolving labour conflicts, giving entrepreneurs and unions equilibrated positions in industrial bargaining. In so doing, purportedly, it created legal preconditions for a corporatist system of industrial organization, labour integration and conflict settlement, designed to promote cross-class negotiations in economic legislation. In particular, the *Carta* defined collective labour contracts, mediated or coercively imposed by the state, as acts of binding legislation, which were subject to the jurisdiction of the labour courts. In this respect, the *Carta* accorded constitutional standing to collective labour law and to the collective material rights that it contained, and it imputed a distinct public-legal personality to organized professional corporations: the act of forming a collective bargain became an 'act of public law' (Guidotti 1935: 86).<sup>35</sup> Some of the most eminent theorists of Italian fascism even viewed the corporatist ordering of economic law under the *Carta* as a solution for fateful separation of state (public law) and civil society (private law) caused by the French revolution and its anti-corporate laws (Costamagna 1927: 3, 16; Sforza 1942: 255). However, the consensual-corporatist projections of the *Carta* remained illusory. Tellingly, the *Carta* was introduced after the prohibition of free trade unions in 1926. Moreover, it tied industrial settlements to quasi-developmental macro-economic policies, and it expressly stated that, in wage disputes, labour tribunals should give precedence to directives of entrepreneurs over the demands of organized labour. In consequence, the *Carta* acted mainly as an instrument for the 'discipline of labour', forcibly binding productive groups together in a drive to maximize industrial production.<sup>36</sup> One commentator described Mussolini's labour courts as instruments in a 'perfect interpenetration' of juridical and political-economic prerogatives (Costamagna 1927: 239). In these respects, Mussolini's labour laws provided a legal substructure for a system of authoritarian corporatist capitalism, through which the state gave coercive backing to business, and which, in its foundations, was deeply hostile to the interests of labour (Mayer-Tasch 1971: 34, 138). Despite the cross-class corporatist rhetoric of Mussolini's regime, its leading theorists openly claimed that, far from negating class division, fascism was committed to preserving 'the differences between classes in all senses' (Panunzio 1937: 291).

<sup>35</sup> This point was central to fascist legal theory. See, for examples, Guidi (1930: 97) and Panunzio (1933: 368).

<sup>36</sup> This is spelled out in Fanno (1935: 110). See also Areva (1929: 18).

After his assumption of power in Germany in 1933, similarly, Hitler emulated some aspects of Mussolini's corporate legislation, notably in founding the corporatist labour federation (*Deutsche Arbeitsfront*, DAF) and in passing the *Arbeitsordnungsgesetz* (Law for the Organization of Labour, 1934). This legislation provided for the state-led settlement of industrial conflicts, and it placed supervision of industrial conflicts in the hands of labour trustees, appointed by the National Socialist Party (NSDAP). This legislation clearly favoured the entrepreneurial side in the industrial process, and, as in Italy, it was instituted after the abolition of free unions, so that independent delegates of labour could not participate in industrial arbitration or negotiation. These laws were immediately followed by a law providing for compulsory cartellization in some industrial sectors, which concentrated economic authority in a small number of key units. In Japan, similar authoritarian corporatist tendencies, linked to aggressive anti-labour policies, were also in evidence. Legislation of the mid-1920s had already encouraged the formation of large cartels, and laws were introduced in 1931 both to facilitate cartelization and to ensure reporting of large enterprises to government (Johnson 1982: 98). By the mid-1930s, unions were subject to suppression and prohibition. In the late 1930s, many unions were replaced by patriotic associations, known as *sanpo*. Eventually, the *sanpo* movement was transformed into a corporatist labour front, modelled on the DAF in Germany, which those few free unions that still existed were encouraged to join, and it subordinated factory councils to state control, ensuring that business interests were protected and preserved in industrial settlements.<sup>37</sup> In 1940, all unions were forcibly incorporated in the *Sanpo* Association. In Japan, as in Germany, cartels were expressly promoted through this legislation, and they were utilized as organs for the co-ordination of the national economy. This greatly intensified the authority of large-scale capitalist enterprises (*zaibatsu*), which controlled almost one quarter of total capital in Japan (Shoda 1996: 245).

National statehood in Germany, Italy and Japan, in sum, was, with significant variations, shaped by an evolutionary trajectory in which state institutions did not originally possess deep inclusionary foundations. These states were originally formed as political systems which, in the first instance, possessed low institutional integrity and limited

<sup>37</sup> On the reception of European fascist ideas regarding union organization in Japan, see Garon (1987: 213) and Gordon (1991: 322). On the functions of *Sanpo*, see Large (1981: 211) and Gordon (1985: 263).

inclusionary autonomy, and they lacked a comprehensive monopoly of power in society. Then, at an early stage in their formation, these states were expected to secure their legitimacy via the simultaneous political mobilization and material pacification of rival parties in the process of industrial production. However, these states did not possess sufficient inclusionary force to conduct such highly politicized processes of inter-class mediation, and they were unable to translate rival economic interests into an obviously integrated, public/political will. After the failure of the more inclusionary/democratic experiments in the 1920s, the underlying privatism of political institutions in Germany, Italy and Japan meant that they adopted a systemic design shaped by dominant private prerogatives and organizations, which shifted rapidly towards policies focused on the authoritarian suppression of one class (labour) by the another class (business). Indeed, the main fascist or quasi-fascist states that developed in the later 1920s and 1930s re-deployed the mechanisms originally used consensually to integrate organized labour as instruments for the forcible subordination of the labour movement to dominant private, monetary interests, which were then directly mediated and enforced through the coercive apparatus of the state. The authoritarian states of the interwar era were products of a societal conjuncture afflicted by a recurrent *crisis of inclusionary structure*, and this was reflected in unsuccessful inter-class co-operation, low state autonomy, privatistic porosity of institutions and general structural depletion.

The authoritarian states that evolved in the 1920s and 1930s in Italy, Germany and Japan did not put an end to these structural problems. On the contrary, once established, interwar authoritarian states retained many of their historical weaknesses, and problems of depleted structure were in some respects exacerbated in all the main states possessing fascist characteristics. This was visible, first, in the *internal* organization of these states. Interwar authoritarian regimes were typically marked by low inner organic consistency and weak differentiation of public functions. In Italy, for example, the structure of the state under Mussolini was defined by an uncertain partition of authority between members of the fascist party and offices attached to the pre-existing state apparatus. One endemic feature of fascist Italy was the existence of a parallel administration, in which public offices were discharged by para-state agencies with partly private character, created by the fascist party, which often challenged or duplicated more formally established offices of state (Melis 1988: 262–3; Bonini 2004: 98). Such agencies had originally been instituted to generalize state power across society, and

to increase the presence of the state in remote localities. But the proliferation of such offices meant that Mussolini's state lacked cohesion, offices were divided, in a blurred institutional pluralism, between private and public actors, and political institutions were weakly defined and regulated. In Germany, problems of inner state cohesion were still more acute. Even NSDAP insiders repeatedly observed that the apparatus of Hitler's regime was marked by extreme centrifugalism, so that, behind the veneer of totalitarian social control, many offices were transacted as private goods, regional actors established local domains of semi-autonomy, and rival administrative sectors and office holders divided responsibility for similar functions, thus creating a highly pluralistic and internally dispersed administrative order.<sup>38</sup> Even the utility of the term 'state' to describe Hitler's regime remains a matter of dispute. Hitler's regime could be equally well defined as a fluid conglomerate of coercive functions, held together through a mixture of private interests, personal associations and systemic violence.<sup>39</sup> In military Japan of the 1930s, in partial analogy, the administrative system was horizontally divided into distinct, weakly co-ordinated, often rival units (Berger 1977: 80; Gao 1997: 111–12). Indeed, in Japan, the models of authoritarian statehood promulgated from the late 1930s onward were based in the idea that a new governmental structure should be created, standing in parallel to constituted state institutions, and integrating society through mechanisms not attached to formal organs of state.<sup>40</sup> During the war, then, the Japanese state was forced to rely on support from cartels and private organizations, and state functions were routinely beset by 'chronic weakness' (Haley 1991: 145).

In their *external* engagement with other parts of society, the structural debility of interwar authoritarian states was still more palpable. In Italy, the central organs of the regime were barely in a position to exercise control over different regions and different functional sectors in society, and the societal implementation of legislation, if successful at all, usually relied on incentivized co-opting of powerful local actors.

<sup>38</sup> The lack of statehood under Hitler was admitted by Alfred Rosenberg, a leading ideologue of the NSDAP, who stated: 'The National Socialist state developed into a *legal centralism* and into a *practical particularism*' (quoted in Ruck 1996: 99). Similarly, Hans Frank, the chief jurist of the Hitler regime, claimed that National Socialism was based in a 'clear attack on the state' (Rebentisch 1989: 2). See related analysis in Diehl-Thiele (1969: 21), Schulz (1974: 294) and Costa Pinto (2011: 206–7). See the classical version of this argument in Neumann (1944: 467).

<sup>39</sup> Note the telling comment on the 'essential difference between state and totalitarian rule' in Buchheim (1962: 117).

<sup>40</sup> I refer here to the Association for Promoting a New Order. For an account, see Berger (1977: 278–80).

In many ways, the corporatist state under Mussolini, like the liberal state under Giolitti, was designed to support a process of uniform nation building. The basic ordering of the economy in unitary corporations was in fact intended to separate economic agents from their regional locations and integrate them directly in the national political system (Palopoli 1931: 55, 117). Moreover, interactions between public offices, corporations and private elites were promoted in order to cement a deep-reaching societal substructure for the political system. However, the penetration of the political system into society was always partial and regionally limited. In particular, the partial privatization of public offices promoted by the party encouraged the local/personal arrogation of public authority, and local resistance to the political centre, often based around pre-existing patronage networks, was normally extensive: under Mussolini, the idea of the unified political nation remained illusory (see Salvati 2006: 233). Similarly, Germany under the NSDAP remained a political regime, in which private actors assumed far-reaching public authority in different social sectors and different geographical locations, and the reach of the political system across society, even when it was sustained by extreme levels of violence, remained dependent on personal co-option, it was regionally variable, and it was confused by erratic duplication of public offices (Hachtmann 2007: 60). The creation of a 'unitary state' revolving around 'strongly centralized power' may have been a declared objective of the Nazi leadership (Rebentisch 1989: 97). This, however, never became a reality. Analogies to this can be discerned in Japan. In the Japanese military regime, parochial authority and patronage remained very strong, and the penetration of the central state both into rural localities and into some economic sectors was very curtailed (Berger 1977: 233–4). In particular, in authoritarian Japan, powerful corporate actors (firms, cartels, monopolies) were only uncertainly subject to state jurisdiction, and their autonomous authority was expressly protected under state law.<sup>41</sup> Corporate bodies and large enterprises were typically at liberty to pursue interests outside the state, thus clearly limiting the efficacy of official policy making (Duus and Okimoto 1979: 72).

Both internally and externally, therefore, the main authoritarian states of the 1930s projected a definition of themselves as alternatives to classical liberal states. Accordingly, their policies and ideologies were focused on imposing strong statehood and deep national

<sup>41</sup> Note the functions in this respect of the Important Industries Control Law (1931), which allowed autonomy for firms in the formation of cartels (Johnson 1982: 109).

uniformity on societies that had only recently been constructed as nations, and which, historically, had often proved unresponsive to consolidated state institutions. However, these states fell far short of their rhetorical self-construction as *total states*, and these societies bore little resemblance to the descriptions of cohesively integrated nations which their governments used to characterize them. By any reasonable measure, Germany under Hitler and Italy under Mussolini had weaker levels of institutional hardness or *stateness* than their ill-fated democratic precursors in the periods 1919–1930/33 and 1912–1922 respectively. Each of the main interwar authoritarian regimes, most notably, was marked by regressive, quasi-feudalistic tendencies towards inner and outer particularism.<sup>42</sup> The main cause of the structural debility of these regimes was the fact that, during previous democratic interludes, these states had been confronted with acutely polarized class conflicts, for the consensual internal resolution of which, typically pursued through the distribution of collective or socio-material rights, they had lacked adequate institutional capacities. In consequence, democratic constitutions had been replaced by authoritarian corporatist systems, in which the attempt at constructing a cross-class balance was abandoned, economic interaction was coercively stabilized, and industrial production and conflict were subject to highly prerogative, often violent, regimentation. Overall, the incorporation of class-based economic conflicts overtaxed the inclusionary structure of these political systems, and the fact that the state could not withstand class conflicts led to a privatistic, semi-patrimonial dismemberment of state institutions, in which state organs were aligned to dominant private interests, both in different economic sectors and in different localities. Throughout the authoritarian period in Germany, Italy and Japan, state weakness remained the defining problem, and the inability of the state to support its power with a deep-lying inclusionary structure lay at the centre of the authoritarian pathology.

This historical analysis provides a distinctive sociological perspective for observing the rise of transnational judicial constitutionalism after 1945. As mentioned, after 1945, the states that replaced fascist Italy, National Socialist Germany and military Japan all obtained a public-legal order marked by express obligation to international human rights law, in which international law was used to dictate firm normative constraints for the exercise of state power. The rights-based

<sup>42</sup> On the regime of the NSDAP as an example of neo-feudalism see Rebenisch (1989: 535). On Japan, see notes 43 and 51.

constitutional model was, in part, imposed by external actors, notably by representatives of the government of the USA (see Shoici 1998: 98–110; Hellegers 2001: 189, 500, 503; Heun 2012: 13). This has led to a broad perception that international law ultimately curtailed the power of these states, after its inflationary growth in the 1920s and 1930s. Against the background outlined above, however, not expansive public power, but *chronically reduced* state sovereignty, formed the factual context for post-1945 patterns of constitutional re-orientation, influenced by the increasing domestic recognition of international law. Observed sociologically, in fact, the consolidation of the rights-based constitutional model was determined by social forces prevalent in Germany, Italy and Japan, and it enabled these states to address sociological pressures, above all their propensity for *crisis of inclusionary structure*, that were deeply embedded in their national societies, and which had historically obstructed the formation of strong political institutions. The growth of transnational judicial constitutionalism allowed these societies to compensate for, and – to some degree, and with clear case-to-case variations – to overcome their weakness in the face of obdurate *pressures of inclusion*, which had traditionally proved destabilizing. This applies in particular to inner-societal pressures relating to the participation of class conflict and to the distribution of material rights, which, in these societies, had repeatedly disturbed the autonomy of the legal/political system. The rise of the transnational rights-based constitutional model produced a social conjuncture in which these political systems were able to control their reactions to external demands, to elevate their differentiation in relation to other social actors, and to avoid fragmentation in face of intense inclusionary pressures. On this basis, in fact, the constitutional models that were established after 1945 can be observed as a pattern of *compensatory state and structure building*. In these constitutions, international human rights norms were assimilated domestically, usually through courts, as principles that hardened the inclusionary structure of the political system against virulent inclusionary crises. International rights law began to form a new tier of rights in society, actively stabilizing the political system against the unsettling implications of the strata of rights through which its inclusionary processes had previously been conducted.

This structure-building impact of international human rights can be observed in different ways in different post-fascist polities. However, one general reason why states obtained more sustainable legal structures after 1945 was that they gave primacy to singular civil and



political rights over collective rights, and states defined their legitimacy by applying rights, not to incorporate persons (and the associations to which they belonged) within their own structure, but to recognize and reinforce the single liberties of persons, positioned outside the state. Accordingly, the post-1945 constitutions of the Federal Republic of Germany (FRG), Italy and Japan all reflected reservations about collective/corporate material rights, they showed increased sympathy for singular rights as the primary grounds for the authority of law, and, in consequence, they weakened the link between political legitimacy and corporatist integration.

To be sure, there were variations in the degree to which these constitutions entrenched rights, and in the emphasis that they placed on different categories of rights. For example, the Italian Constitution (1948) gave greater importance to labour rights and social rights than other post-1945 constitutions, even according 'centrality' to such rights (Stolzi 2014: 168). Art 1 of the Italian Constitution defined Italy as a 'Republic founded on labour' and, although sanctioning the freedom of property, it stipulated that the pursuit of property needed to be constrained by principles of human dignity (Art 41), and (in Arts 42–43) it provided for expropriation of property if required for the common good. By contrast, other post-authoritarian constitutions engaged in relatively cursory fashion with second-generation rights. The Japanese Constitution (1947) enshrined rights to minimal welfare and living conditions (Art 25), and it guaranteed the right to work. However, these rights were not enacted through corporatist arrangements, and formal collective rights were not included in the constitution. The *Grundgesetz* of the FRG (1949) merely declared (Art 28) that constitutional order was required to comply with the principles of a social-legal state, thus making only minimal commitment to state incorporation of labour. Alongside this, however, all these constitutions gave obligatory force both to common civil and political rights and to classical personal-subjective rights of ownership, contract, movement and labour. In this respect, these constitutions reflected a construction of single persons as rights holders increasingly promoted under international law. Of course, post-1945 international human rights declarations and instruments proclaimed certain social rights; this was most emphatic in Arts 22–26 of the UDHR. In the early application of international human rights law, however, social rights did not assume substantial purchase. In most national constitutions created after 1945, similarly, emphasis was placed firmly on the attribution of single rights

to single persons. Social rights were not absent in these documents, but they were clearly subordinate to primary subjective rights, and, where they did recognize social rights, these constitutions did not tie the state into deep programmatic obligations regarding fulfilment of these rights.

The use of singular rights to define the legitimacy of the state impacted on Italy, Japan and the FRG in very different ways. In each case, however, the domestic assimilation of international rights tended to raise the stability and inclusionary power of the political system, and, above all, these rights reduced the traditional propensity of these states for fragmentation in the face of deep social conflicts.

On one hand, for example, the standing which these constitutions gave to singular rights meant that the state institutions of post-1945 Japan, Italy and the FRG were less susceptible to influence by powerful industrial enterprises. Reflecting the impact of US-American anti-trust law, these constitutions promoted classical rights of economic liberty, freedom of contract etc., in order to enforce stricter lines of differentiation between political institutions and organizations exercising economic power. In fact, in some cases, the process of post-1945 constitution writing was flanked by additional legislation, applying anti-monopoly laws to curb the influence of large-scale industrial units, to reduce the traditionally extensive power of cartels, and to limit the intersection between private economic actors and the state. In the FRG, for example, de-concentration measures were imposed by the Western allies, and the debate about anti-cartel legislation remained a matter of pressing concern throughout the post-war era, culminating in Ludwig Erhard's anti-cartel law of 1957/58 (see Robert 1976 245, 344). Anti-monopoly legislation was also introduced in Japan; a Law for the Dissolution of Excessive Concentration of Economic Power was implemented in 1947 (Shoda 1996: 248). In each case, the growth of singular rights straightened the lines of demarcation between the political system and powerful economic bodies.

On the other hand, the fact that these constitutions gave priority to singular rights meant that the previously tight (often coercive) knot between the state and trade unions was loosened. Responding to the consequences of the diverse corporatist experiments in the 1920s and 1930s, the main constitutions created in the post-1945 transitions gave emphatic recognition to the rights of independent trade unions. In doing this, they clearly rejected corporatist models of union integration; instead, they constructed a legal order, in which unions were defined as organs for autonomous collective bargaining, thus locating

organized labour and industrial conflicts outside the vertical structure of the state administration. As a result, a system of industrial relations emerged in which unions were legally protected, but disputes were not subject to mandatory arbitration and were not fully internalized within the state. Before the founding of the FRG, for example, trade unions attempted to revitalize plans for a system of economic democracy promoted in the Weimar Republic (Schmidt 1975: 69–71), and early post-1945 industrial legislation looked back to legal provisions at the beginning of the Weimar era. However, although the *Grundgesetz* (Art 9) protected union rights, compulsory state arbitration was not established; legislation on collective bargaining in 1949 (*Tarifvertragsgesetz*) insisted on trade-union autonomy, and it placed labour conflicts outside the realm of compulsory state jurisdiction (Reuß 1958: 324; Rütten 1996: 160–62). In Italy, union rights were strongly protected in the 1948 constitution. However, corporatist models of statehood found few influential advocates, and, in Art 39 of the constitution, compulsory arbitration of industrial disputes was abandoned in favour of free collective bargaining. By 1954, it was decided at the National Congress for Labour Law that the social and labour laws contained in the constitution should be interpreted, in essence, as legal principles pertaining not to public law, but to private law. This decision in some ways changed the basic emphasis of the Italian constitution, and it diminished the extent to which state institutions were directly implicated in the enforcement of social legislation (Cazzetta 1999: 627). In Japan, the presumption in favour of singular constitutional rights was weaker than in post-fascist Europe (Beer 1981: 442, 453; Upham 1987: 10). Moreover, labour legislation after 1945 reflected a more paternalistic approach to unionization. In the immediate aftermath of the war, independent rights of unions were increased – notably, in the Labour Union Law (1945) and in the constitution itself (Art 28). However, owing to a wave of protracted and unsettling industrial agitation, trade-union liberties were restrictively revised (Gordon 1985: 331). As a result, Japanese political economy retained a partial corporatist structure, and through the Labour Relations Adjustment Law of 1946 union negotiations again became partly susceptible to state intervention as arbitration commissions were introduced (Gordon 1998: 56). Notably, post-war Japan remained, almost paradigmatically, a *developmentalist* state, in which state agencies assumed maximum responsibility for effective growth management (Johnson 1982: 17–19; Tabb 1995: 100; Gao 1997: 16). However, the position of trade unions as parties to free

collective negotiations was preserved (Hanami 1996: 183), and the coercive system of interwar state corporatism was dissolved.

In the first instance, therefore, patterns of post-1945 constitution making in post-authoritarian societies established a stricter differentiation between political functions and economic functions, and they promoted singular personal rights norms as institutions to *depoliticize* class relations. The corporate rights enshrined in much public law of the interwar era had intensified already incubated class hostility by locating industrial disputes at the centre of the political system. Post-1945 constitutions generally did the opposite. These constitutions applied singular rights to disperse the political intensity of class conflict, and they reduced the extent to which parties in class conflict could directly transmit industrial antagonisms through the political system. Indeed, post-1945 constitutions dictated a grammar of legitimacy, in which single rights acquired greater importance than the mediation of class conflict as the ultimate source of legitimacy for the political system and its acts of legislation. Singular rights constructed a vocabulary in which states could produce basic legitimacy, both of a fundamental character and for single laws, without reference either to class conflicts or to the constituent inclusion of corporate (class-based) social organizations. Central to this process was the fact that rights allowed states to presume legitimacy for legislation as a resource constructed in *systemically internal* fashion: through their centration on relatively static singular rights, states were able to presuppose principles of legitimacy as elements of their inner structure, which they could project, internally, to accompany and authorize single acts of legislation. This reduced the degree to which states were required to negotiate with external bargaining groups, and to manufacture legitimacy through absorptive and precariously balanced processes of inclusion and mediation. In this regard, notably, rights separated single *acts of legislation* from the *production of legitimacy*: legislation and legitimation became quite separate and distinct functions. The application of singular rights as legitimating norms meant that states could utilize reserves of legitimacy that were to some degree independent of the objects and the process of law making, and, to some degree, they were able to make laws on the basis of already existing, internally stabilized, legitimational premises. In each respect, the rights inscribed in post-1945 constitutions began to heighten both the inclusionary force and the basic differentiated autonomy of the national political system. These rights enabled states plagued by histories of weak inclusionary abstraction both to position their functions in relative

distinction *vis-à-vis* other organizations, and they extracted an internal normative order for state functions which was relatively independent of highly charged interests articulated through society at large. The constitutional prioritization of basic rights – notably rights of independent economic interaction, free political and economic association and contractual autonomy – served in part to liberate the state structure from its dense interpenetration with traditionally potent private bodies, and it helped to clarify the legal framework in which social conflicts were to be absorbed by the state.<sup>43</sup> In each respect, singular rights began to distil an inclusionary structure for the political system, which softened the conflicts which the state had encountered through earlier processes of rights-mediated inclusion, and, in so doing, rights also hardened the inclusionary structure and supported the basic functional differentiation of the state.

A more obvious reason for the structure-building impact of rights in some societies after 1945, second, was that post-authoritarian constitutions, albeit more tentatively in the Japanese case, provided for the direct implementation of international law. Moreover, these constitutions created superior courts, which, with variations, they construed as *transformers* of international law, and especially of international human rights law, and which acquired responsibility for transplanting international law into national political systems (see Mosler 1957: 25; Partsch 1964: 53, 80, 115). These features generally proved vital for promoting systemic autonomy and inclusionary structure building in post-authoritarian societies.

In Italy, the FRG and Japan, international law acquired near-constitutional standing in the post-war constitutions, and national legislation was constitutionally bound to reflect principles of international law. For example, the Japanese constitutional apparatus assigned high standing to international law,<sup>44</sup> and, by the 1960s, the UDHR was

<sup>43</sup> In Japan corporatism was not diminished but solidified after 1945. Yet, post-1945 Japanese corporatism was corporatism with a difference. Under the post-1945 corporatist order, the state was not merely a mediator in industrial conflicts but a developmentalist agent of growth (see Johnson 1982: 197). Crucially, constitutional reform in Japan was flanked by extensive land reform (1947–1949), implemented by the American occupying government, which abolished sharecropping and generally both reduced the potency of status-based social structures and reduced the obstructive force of local institutions (Dore 1959: 317, 378–9). This reform was conceived by General MacArthur as a final remedy for ‘centuries of feudal oppression’ (Dore 1959: 23).

<sup>44</sup> In Japan treaties and human rights covenants have self-executing force. The 1947 Constitution incorporated international law in the catalogue of rights, although it did not give express constitutional standing to international law (Port 1991: 141, 152).

recognized as a guide for domestic legal interpretation (Iwasawa 1988: 85). The *Grundgesetz* gave recognition, in Articles 24, 25, 26 and 100(2), to the precedence of international law over national acts of legislation. Over a longer period, the authority of international law was occasionally qualified by the high courts, but it remained an important normative principle. This was also stipulated in Article 10 of the Italian Constitution of 1948, and, although Italy retained a dualist construction of international law, the courts were required to ensure that customary international law was applied as the foundation for domestic law (La Pergola and Del Duca 1985: 603–4). Under the influence of the US-American constitutional model, further, the main post-1945 constitutions made strong provisions for judicial review of primary laws, and they conferred on superior courts the authority to oversee statutory legislation and to adjudicate contested laws and cases through reference both to domestic rights norms and to rights defined under international law. Art 81 of the Japanese Constitution gave authority to the Supreme Court to exercise control of statutes. To be sure, this authority was rarely exercised in the early decades of democratic rule. After the end of US occupation in 1952, the Japanese Supreme Court decided that it could only exercise judicial review in accordance with the diffuse American model, if cases were referred to the Supreme Court from the regular courts.<sup>45</sup> Under Arts 92–3 of the *Grundgesetz*, the FRG obtained a very powerful Constitutional Court, operative from 1951, which was authorized to conduct abstract and concrete review of statutes. By the late 1950s, the court had assumed responsibility for enforcing basic rights both as vertical and horizontal principles of organization for the whole of society, and it declared fundamental rights, derived originally from international law, as normative parameters for all social interaction.<sup>46</sup> In Art 134, the Italian constitution also instituted a Constitutional Court, which began work in 1956. This court had weaker powers of abstract constitutional review than

<sup>45</sup> See the Supreme Court ruling in *Suzuki v Japan* (1952), stating: ‘what is conferred on our courts under the system now in force is the right to exercise the judicial power, and for this power to be invoked a concrete legal dispute is necessary’ (Maki 1964: 363–4).

<sup>46</sup> See the Constitutional Court ruling in *Lüth* (1 BvR 400/51 (1958)), which imprinted a comprehensive rights-based order on West German society as a whole. In this case, rights were not expressly extracted from international law, but the openness of the *Grundgesetz* to international norms was an important influence on the ruling. *Lüth* eventually played an important role in defying the distinctiveness of West German law. However, it was constructed against an international background. Although *Lüth* did not cite any international human rights treaties, it did cite the Declaration of the Rights of Man and Citizen of 1789 and an opinion of Benjamin Cardozo on the freedom of expression.

the West German court, and human rights norms were less integral to its jurisprudence than in the FRG. Notably, in early rulings, the court pursued a restrictive approach to the domestic application of international law. It limited both the matters protected under international law and the range of persons with rights defined under international law.<sup>47</sup> Significantly, however, it applied constitutional rights directly to eliminate remnants of criminal law surviving from the fascist period, and, in so doing, it used human rights as the basis for quasi-legislative functions.<sup>48</sup>

In these respects, the post-1945 constitutions of Japan, Italy and the FRG impacted in highly beneficial fashion on the structure of the political system. Discernibly, the institutions of these states acquired increased cohesion, and the tendencies towards patrimonial centrifugalism which had historically undermined their autonomy lost corrosive effect. Above all, the constitutions created after 1945 tightened the distinction between the political system and other parts of society, and they allowed state institutions to include society more evenly and cohesively in positive acts of legislation. In each respect, the judicial assimilation of international rights norms formed a relatively autonomous legal structure for the state, and, as such, it reduced the state's sensitivity to inclusionary crisis.

This reinforcement of national political systems through international rights law and increasing judicial power became evident – first – in the *internal/organic structure* of the states created by the post-war transitions. Most evidently, of course, the fact that the democratic states of Italy, the FRG and Japan were constitutionally committed to the recognition of international law and international rights norms meant that national high courts, enforcing rights partly constructed under international law, assumed a prominent position in the institutional order of state. From this position, generally, courts instilled a routine procedural order on government, and they dictated clear norms to support legislation and jurisprudence. Notably, new Constitutional Courts were not bound by precedent, and they were able to dictate a new set of norms, at least influenced by international legal presumptions, as a comprehensive foundation for the political system as a whole (see Hönnige 2011: 250). As a result of this, post-1945 states obtained rapidly heightened judicial cohesion, and the assumption that basic rights, applied

<sup>47</sup> Italian Constitutional Court 32/1960.

<sup>48</sup> See Italian Constitutional Court 29/1960, declaring limitations on the right to strike unconstitutional.

by courts, formed simple and non-derogable sources of legitimacy for law and judicial practice did much to raise the uniformity of their legal orders.<sup>49</sup> In particular, judicial control of the legislative process helped to ensure that statutes obtaining force of law had been authorized by open, public procedures, and generally to cement the state as a public order against private actors, which had traditionally enjoyed easy access to powers of public coercion. In each respect, the penetration of international human rights norms into national law heightened the basic differentiation and structural integrity of the political systems of the FRG, Italy and Japan, and it obstructed their historical tendencies towards internal privatism, re-societalization and institutionalization of parallel agencies. Central to this was the fact that, by defining their legitimacy in relation to abstracted rights norms, post-transitional states were less reliant on objective or external sources of legitimacy, and they were less frequently compelled to obtain legitimacy through the satisfaction of very specific group interests or through appeals to singular actors. As a result, these states could authorize laws through inner processes of self-scrutiny, and they were able consistently to explain the legitimacy of laws without internalizing specific groups or actors in their organic functions.

The reinforcement of national political systems through the assimilation of international human rights law and the rise in judicial power was also evident – second – in the *external/societal position* of post-authoritarian states. In the polities that evolved in the FRG, Italy and Japan after 1945, the fact that legislation was overseen by courts and subject to rights-based review established transparently generalized principles to legitimate the societal transmission of law, and it imprinted a more uniform grammar on legislation, as it was applied across all parts of society. Further, this meant that all members of society could, at least in principle, insist on equal inclusion in acts of legislation, so that regional, professional and structural variations played a less vital role in shaping the production and enforcement of law. Moreover, it meant that law could more easily cut through traditional distinctions of status, and it could bring areas of social exchange (family, religious orders, workplace), which had traditionally been

<sup>49</sup> The *Lüth* verdict meant that in the FRG ‘all spheres of the law’ were aligned to a basic value order, founded in fundamental rights. Basic rights became the highest unifying criteria to define the operations of legislature, executive and judiciary. See the brilliant analysis of this in Stolleis (2012: 225–7). On this process in Italy, see Azzariti (1959: 16–17).



partly immune to state jurisdiction, under consistent legal control.<sup>50</sup> The legal consistency derived from rights enabled state institutions to legislate more uniformly across their social environments (nations), and it meant that intermediary local or regional institutions, positioned between the state and individual members of society, lost importance.

This may in itself appear paradoxical. Notably, the constitutions of the three main post-authoritarian states contained clauses reinforcing the autonomy of local government, and, to some degree, they broke with the attempted policies of coerced corporatistic unitarism promoted during the authoritarian era. This is evident in Art 92 of the Japanese Constitution, in Art 115 of the Italian Constitution, and in Art 70(1) of the Constitution of the FRG. However, the fact that each of these constitutions made provision for relatively uniform rights ensured that local power, even where constitutionally protected, was exercised in terms defined by the central state (Rodotà 1999: 57). As a result of this, although promoting some administrative decentralization, these constitutions obviated the uncontrolled particularism that had prevailed behind the mask of political totalism in the fascist period.<sup>51</sup> This was especially pronounced in Art 28(3) of the Constitution of the FRG, which made the federal government responsible for ensuring that state constitutions complied with basic rights norms. Yet it was also apparent in Art 127 of the Italian constitution, which dictated that regional power could only be exercised, not as detached from the central state, but as part of the wider exercise of national power and as subject to international law (Pubusa 1983: 71),<sup>52</sup> thus reinforcing the position of central organs of state within the national legal system (Donnarumma 1983: 46). In establishing an evenly inclusive legal

<sup>50</sup> For example, Art 24 of the Japanese Constitution was designed to cut away the old quasi-feudal system of family law and to undermine the patriarchal 'house system', which still survived in rural areas (see Oppler 1976: 115–17).

<sup>51</sup> In Italy, notably, the Constitutional Court played a most important role in formalizing the legal and political position of the regions. Accepting decentralization in some functions, it also ensured a strictly ordered balance of competence between national and regional government. One commentator argues tellingly that the constitutional formalization of regional power replaced local communes and provinces which had assumed public functions by 'ancient tradition', but it also imposed 'constitutional discipline' on the regions and imposed stricter regulation on regional autonomy (Astuti 2006: 914). See further Sciascia (1957: 17–18), Bartole and Vandelli (1980: 180) and Rodotà (1999: 57). In Japan, the prefectural system provided a link between the state and the municipalities (Michio 1988: 56). Moreover, constitutional emphasis on single rights also led to agrarian reforms, which eroded the powers of late-feudal elites in the provinces (Dore 1959: 317, 378).

<sup>52</sup> For an early decision insisting that all regional laws are subject to international law, see Italian Constitutional Court 32/1960. It was clearly decided in this case that international law 'constitutes a limit to the legislative power of the regions'.

system, therefore, national courts, partly applying norms of international extraction, performed clear nation-building functions. As discussed, in societies marked by extreme authoritarianism before World War II, nation-building functions had often been assigned to corporatist labour law. After 1945, the nation-building functions of labour law migrated into formal human rights norms, applied through domestic courts, which placed a stratum of single rights, partly of international provenance, across national society, forming a structure of inclusion to supplement the strata of rights elaborated through solely national processes of legal formation. Paradoxically, in the main post-authoritarian transitions of the post-1945 era, the penetration of international law into national states was often the precondition, not only for the successful consolidation of the political system and its basic inclusionary structure but also for the successful construction of societies as *nations*.

In sum, the rise of rights-based constitutionalism after 1945 helped to create national political systems whose laws were enforceable in more generalized fashion across society, and which, accordingly, were able to act at an increased level of societal abstraction and autonomy. On one hand, international human rights law, transformatively assimilated into domestic constitutional practice, projected a construction of legal validity that allowed post-authoritarian states partly to re-locate the source of their legitimacy from a *position outside* to a *position inside* the political system. Conversely, however, rights allowed these states to re-locate class conflict from a position inside to a position outside the political system. This greatly augmented the structural autonomy of these states, and it meant that the political system acquired a relatively free-standing inclusionary structure, which was not endlessly challenged by over-politicized inter-organizational conflicts and sectoral demands. On the other hand, as courts applying rights increasingly controlled access to law-making authority, the tendency in authoritarian societies for powerful local and regional actors to arrogate legislative force in particular areas or social domains, and so to disrupt the underlying foundations of the legal system was in part abated. On both counts, the domestic filtration of international law led to a concentration of society's inclusionary powers within the political system itself, it established a relatively robust structure of political inclusion, and it helped to place national society as a whole in a more even relation to state institutions. As mentioned, nation-building strategies attached to corporatist class mediation had usually proved corrosive and unsuccessful. By contrast,

the transmission of international law through national societies normally had a distinctive nation-building effect.

These claims should under no circumstances be taken to imply that the interaction between national and international constitutional norms after 1945 removed all traditional structural features in post-authoritarian societies, or that it created fully autonomous state institutions. After 1945, Italy and Japan both retained a tradition of relatively weak statehood, marked by high convergence between private and local influence and public authority (Haley 2004: 67). Similar claims, albeit rather less plausibly, were often made about the FRG, at least in its early decades.<sup>53</sup> Moreover, this argument should not be taken to mean that the new constitutions in these societies simply eradicated the traditional corporatist structure of society. This was evidently not the case. In Japan, for instance, the anti-monopoly laws introduced after 1945 were never fully applied (Johnson 1982: 226); the anti-monopoly legislation of 1947 was revised in 1953, and the amended law exempted some cartels from proscription and facilitated partial reorganization of the *zaibatsu* (Shoda 1996: 251; Gao 1997: 183). The Japanese polity remained marked by a combination of incomplete de-concentration of industrial monopolies and persistent weak legal structure (i.e. low levels of litigation, distrust of formal legal procedure, reluctance to activate procedures for rights redress) (Johnson 1982: 319; Haley 1987: 347). After 1945, notably, direct state incorporation of trade unions was replaced by firm-based, enterprise unionism (Kawanishi 1992: 127). However, state regulation and promotion of economic activity remained high, and the early post-war years saw a rise in corporatist economic administration (Johnson 1982: 41; Kume 1998: 53, 55). In the FRG and Italy, likewise, industrial production retained a discernible *corporate bias*, and the political system was persistently shaped by complex, often relatively informal, interactions between holders of formal office within the state and organizations representing trade unions and industrial management (Sülow 1982: 25; Abelshauser 1987: 148; Salvati 2006: 243).

Nonetheless, the promotion of human rights jurisprudence in post-1945 constitutions generally meant that, in societies emerging from fascism or similar experiences of authoritarianism, the political system had access to principles of legitimacy that were not derived from acts of

<sup>53</sup> The 1950s and 1960s saw the growth of a voluminous literature on the power of private associations in the FRG. See, for example, Eschenburg (1955: 84) and Forsthooff (1971: 119).

concrete material pacification, and the position of corporatist bodies within the political system was structurally modified. After 1945, in fact, a new system of quasi-corporatist economic management was widely instituted in different post-fascist societies. This system still relied on corporatist consensualism, yet it reduced the importance of corporatist organizations as primary pillars of state legitimacy. In the FRG, notably, the corporatist economic constitution of the Weimar era was replaced by an enforced liberal constitution, in which, despite renewed corporatist tendencies in the 1950s, strict laws of competition ensured that leading industrial bodies were located outside the state (see Böhm 1971 [1949]: 107). In Italy, as mentioned, some corporate agencies from the 1920s persisted into the post-war period, but organizational structures surviving from classical corporatism were adapted to a market economy (Stolzi 2014: 171). In Japan, similarly, enterprise unionism gave rise to a more obviously societalized model of corporatism (Kume 1998: 58). In each society, the ability of the state to manage inter-organizational conflict management, relating to industrial production, was no longer declared the primary source of legitimacy for legislation. Instead, industrial conflict management was simply construed as one function of a state that was already legitimated by an overarching normative system. As Kjaer (2014: 120) has recently explained, this period quite generally saw a break with pure state-led or *politically integrative* corporatism, and it witnessed a transition towards *neo-corporatism*, in which corporatist interactions remained vital for the production of everyday consensus and practical legislation, but these interactions were usually conducted at a societal, sub-executive level.

In some ways, the assimilation of international human rights norms as principles of legitimacy for domestic law was a decisive factor in this transition to neo-corporatism in the FRG, Japan and Italy. As discussed, in the decades after 1945, these states explained their legitimacy, to some degree, by circulating private, civil and political rights through society, which were partly extracted from the international domain, and whose authority was formally secured under international law. One consequence of this was that rights could be applied by states as simple, statically iterated principles of legitimacy, and they did not necessarily generate further layers of rights or engage states in deep cycles of social politicization or class-determined inclusion. After 1945, in fact, these states were able to distribute rights, through courts, to legitimate legislation while in fact, in the act of rights distribution, also separating themselves from the organizations whose conflicts they were required

to regulate and which had traditionally mobilized around rights. This meant that the deep traumatic logic of national strata of rights, which drew the state inexorably into society and its conflictual exchanges, was broken. Tellingly, in fact, some of the most important early rulings of the Italian and West German Constitutional Courts were focused on the social conflicts which had historically proved most disruptive for the state – that is, questions of labour law, especially concerning freedom of labour and the standing of collective contracts. In such cases, the rulings of these courts served both to protect certain formal rights of organized labour, yet also to ensure that, to a large degree, these rights were exercised outside the jurisdictional functions of the state. In 1954, for example, the West German Constitutional Court declared that collective bargaining was defended by the basic rights in the *Grundgesetz*; in so doing, however, it also insisted on the legal position of unions as freely constituted organizations, operating in a relatively autonomous legal sphere.<sup>54</sup> In early cases in Italy, the Constitutional Court strongly protected the right to strike and it defended collective bargains. But it also stated that collective wage agreements should be essentially defined by rules of private law.<sup>55</sup> In these cases, the courts clearly protected the position of trade unions as organizations intended to secure socio-material rights for their members. However, they imposed a restrictive formal grammar on industrial disputes, limiting the politicization of the questions at issue, and stabilizing labour relations under a system of formal rights standing outside the state. Because of this, the courts were able to resolve labour conflicts in relatively neutral fashion. Owing to such judicial depoliticization of labour conflicts, in fact, national states eventually acquired the ability to negotiate more independently with economic organizations, and to reach agreements over production conditions without risking coalescence with external private interests. In most post-authoritarian societies this ultimately made it possible for states to establish a solid corpus of social rights, even rights entitling trade unions, within constraints, to participate in economic decision making.<sup>56</sup> In these societies, in fact, the fact that some elements of its legitimacy were extricated from social controversy ultimately allowed the state to construct a quasi-corporatist system of material distribution, in which substantial material guarantees were allocated to trade-union

<sup>54</sup> West German Constitutional Court, 1 BvR 629/52(1954).

<sup>55</sup> See Italian Constitutional Court 10/1957; 106/1963.

<sup>56</sup> In the FRG, for example, laws were passed in 1951, 1952 and 1976 to sanction union participation in workplace decision making.

constituencies, yet in which economic negotiations were conducted by sub-executive departments, at a reduced degree of social contestation. The rise of a neo-corporatist system of economic administration was partly determined by the fact that states learned to perform basic processes of national inclusion, especially inclusion through political and material rights, without acute politicization of social conflicts. This in turn was determined by the constitutional order of singular rights established after 1945. The emergence of a fourth tier of judicially constructed international human rights norms in Germany, Japan and Italy, in short, did much to facilitate the inclusionary circulation of rights, and in fact to stabilize the older tiers of rights which political systems had struggled to secure on the basis of a purely national inclusionary structure.

In all the main states that developed a fascist structure in the interwar era, the propensity towards authoritarianism had originally been caused, or at least intensified, by the depleted inclusionary autonomy of the state. Arguably, the main states that converted to fascism in the interwar era had been persistently undermined by the structural residues of feudalism, and they had not been conclusively constructed as modern states, able to perform relatively uniform processes of inclusion or even positively to sustain their functions in the face of pervasive private interests. To some degree, in fact, the societies in which these political systems were located were not yet fully formed as nations, and they retained a highly patchwork legal/political structure, which was induced by, and then in turn contributed to, the private and local usurpation of political power. Consequently, as these states had attempted to construct legitimacy around the formula of the sovereign people in the early twentieth century, they had failed, quite catastrophically, to condense this people into a sustainable political will. For these reasons, these political systems had struggled to abstract a stable and autonomous body of public law to organize and legitimate their inclusionary functions, and they had lacked a fully extracted system of higher-order public norms to determine their functions. Vitally, however, the fact that these states were partly incorporated in an international constitutional system after 1945 meant that they could harden the autonomy of their legal structures, and that the processes of state and nation building initiated in the nineteenth century could be more effectively continued. In the first new democracies after 1945, the rise of consolidated national political systems depended on the paradigmatic shift from national or popular sovereignty to

international human rights as the ultimate premise or *formula* of political legitimacy.<sup>57</sup> As the basic source of legal authority migrated from national sovereignty to human rights, national laws could be underpinned by norms derived, in part, from a pre-constituted international legal system, and national legislatures could use these norms to authorize legislation, both at its inception and throughout the course of its application. As a result of this re-orientation, national states were to diminish their factual inclusion of organizations expressing societal interests, and they were able to legislate, under some conditions, without express approval from actors situated outside the political system. In particular, they could presuppose an autonomous normative foundation to justify legislation, even in circumstances, typical of protracted institutional transitions, in which laws were exposed to radical contestation, policies did not meet with manifest endorsement, and institutions lacked hard foundations in society. Eventually, this made it easier for national political systems to disentangle themselves from the social environments in which they operated, to propose their legitimacy as relatively differentiated from specific social prerogatives or exchanges, and, as a result, to maximize the volume of positive law which they were able to generate and apply across a national society. Only through the medium of international human rights law, in sum, did these national states manifestly acquire the capacity to integrate their populations, *as nations*. Ultimately, states learned to apply internationally defined rights, as a fourth tier in their inclusionary structure, across their societies. This fourth tier of rights proved a more enduring source of inclusionary structure than previously instituted strata of rights. By reducing the intense conflicts attracted by political and material rights, it allowed states to perform inclusionary functions for their constituencies, including the distribution of material rights, without exposure to extreme risk of fragmentation, and it often formed a foundation on which other rights could be successfully allocated.

From a literal national perspective, the body of international human rights norms consolidated after 1945 appeared as external constraints on domestic political systems. This perspective is still widely replicated in literature addressing these phenomena.<sup>58</sup> From a wider sociological perspective, however, the institutionalization of international human rights at this time often enabled transitional national states to expand

<sup>57</sup> Close to my claims on this point see Ahlhaus and Patberg (2012: 25).

<sup>58</sup> See p. 70 above.

their inclusionary structure, and to stabilize a basic legal apparatus. The assimilation of international law meant that historically weak political systems were able to legislate at a heightened level of autonomy, and, effectively, to assume a position of inner-societal sovereignty.

## TRANSITION 2: PORTUGAL AND SPAIN

The democratic-constitutional transitions of the 1970s, and especially those on the Iberian Peninsula, which followed the collapse of the authoritarian regimes created in the 1930s by Salazar and Franco, had some sociological characteristics which resembled those of the post-1945 transitions. These transitions also reflected a pattern of compensatory structure building through international human rights law.

First, for example, the constitutions created in the wake of the democratic transitions in Portugal (beginning 1974) and Spain (beginning 1975) mirrored earlier transitional constitutions in that they imputed very great significance to international law, and they made extensive provision for the domestic application of international human rights norms. In Spain, notably, in the course of the transition, international law and human rights law based in international treaties were accorded singularly high standing, and the transitional Spanish state was designed around a monistic reception of international legal norms (Peces-Barba Martínez 1988: 36; Lara and Pérez Gil 2009: 7; Rafols 2005: 90). Under Art 96(1) of the Spanish Constitution of 1978, notably, international treaties were defined as part of the domestic legal order. Second, the post-transitional constitutions in Portugal and Spain mirrored post-1945 constitutions in that they established strong Constitutional Courts, which were authorized to ensure that international law, especially international human rights norms, prevailed over domestic law in cases of conflict (Marín López 1999: 42, 65). This was rather less pronounced in the 1976 Constitution of Portugal. In Portugal, the radical military units, which had led to the overthrow of Caetano in 1974, retained a position of influence in legislative and judicial procedures after the first stage of transition. Indeed, in transitional Portugal, the ordinary judiciary was often suspected of harbouring sympathy for Salazarism (Magalhães 2003: 93–6), and a court able to conduct independent review of statutes did not exist until constitutional amendments were passed in 1982. However, the new constitutions in Portugal and Spain both established strong Constitutional Courts, which had



power to conduct abstract and concrete review of statutes. In both cases, international human rights agreements provided a normative framework for control of domestic statutes and administrative acts.<sup>59</sup>

As in earlier transitions, further, the rise of judicial power in Spain and Portugal occurred as part of an adaptive social process, and the implementation of international human rights norms occurred in historical contexts deeply marked by a history of weak state structure. Once again, this claim may appear rather counter-intuitive. Prior to the onset of the transitional reforms, the authoritarian regimes in Portugal and Spain were defined ideologically as strong, socially expansionist states. Like earlier authoritarian states, they used far-reaching regulatory mechanisms to control economic production, to integrate and regiment organized labour and to police social activities typically situated in the private domain. Like interwar Italy, in particular, authoritarian Portugal and Spain had developed a densely meshed syndicalist system for managing labour-market relations, and they used expansive judicial institutions in order to control and suppress conflicts in this sphere. Moreover, authoritarian Portugal and Spain were defined by one structural feature that very clearly separated them from other states in which reactionary authoritarianism took hold in the interwar period. Notably, Portugal and Spain had very long histories as national states, and they were not obviously affected by problems of disembeddedness or elite/society mismatch caused by accelerated processes of national unification and central state building. Nonetheless, in many respects, authoritarian Portugal and Spain were products of an evolutionary process similar to that observable in Germany, Italy and Japan. Like the fascist regimes of the interwar era, these regimes were beset by chronic structural problems, chronic depletion of autonomy and deep inclusionary crises. In particular, these states had evolved in societies defined, quite fundamentally, by the partial persistence of feudal order. Well into the twentieth century, both states remained afflicted by weak centralization and low density, by persistent inner pluralism, and, above all, by very deep reliance on local or private supports for the circulation of power. Even during periods of democratic experimentation, powerful local groups retained highly privileged positions in the political system, and often controlled access to public office (López Martínez and Gil Bracero 1997: 129–37). As a result, these states lacked deeply

<sup>59</sup> On the impact of international law in the review functions of the Constitutional Court in Portugal see Cortês and Violante (2011: 764).

founded inclusionary structures, and they were marked by low systemic abstraction and differentiation in relation to prominent social organizations. The authoritarian regimes created in the 1930s that survived beyond 1945 collapsed mainly for internal/systemic reasons: primarily because of low legal and institutional autonomy and weak inclusionary structure. Accordingly, the constitutional form that ultimately emerged in these societies, following the democratic transitions, can be explained, sociologically, against this background.

As in the authoritarian states addressed earlier, above all, the debility of the political systems created by Salazar and Franco was evident in their techniques for managing economic conflicts and class antagonism, and they were deeply unsettled by historical pressures resulting from their internalization of economic conflicts. In fact, the basic authoritarian design of these regimes was, in part at least, the product of a deep-lying systemic failure of labour integration, and each regime displayed structural deficiencies caused by this failure. For example, authoritarian Portugal was originally constituted by Salazar as a political system designed to absorb social pressures caused by unresolved class tensions, which had obtained expression in the Portuguese First Republic. Salazar's constitution of 1933 was programmatically committed to the balancing of corporate interests in society, and in Arts 31, 34 and 35 it provided a notional legal base for moderated capitalism and national corporatism based in consensual economic policies. Under Salazar's constitution, however, corporatist ideals were hardly more than fictions. In fact, economic policy making was ordered in guilds (*grémios*), which served the retrenchment of elite economic prerogatives against free organized labour, and governmental power was closely linked to prerogatives consolidated in social milieux outside the state (Makler 1976: 499). Salazar thus established a system of exclusionary corporatist capitalism, designed coercively to control economic dissent. The political system of authoritarian Spain had similar characteristics, and it was also defined by a background of intense socio-political fragmentation. Notably, the system of democracy established in the Spanish Second Republic (1931–1939) had been defined constitutionally by the attempt to derive legitimacy for the state from the corporatist integration of labour conflicts, from governmental arbitration in labour disputes and from the effective mediation of class antagonisms.<sup>60</sup> The establishment of democracy in Spain in the 1930s, however,

<sup>60</sup> On the corporatist structure of the Second Republic see Novak (2004: 250).

had given rise, first, to an intensification and polarization of labour conflicts, and, second, to a catastrophic politicization of the state structure. As in states discussed earlier, consequently, in Republican Spain the attempt at corporatist democracy was soon abandoned in favour of a selectively repressive brand of corporatism; the constitutional documents imposed in Spain under Franco resulted in a switch from labour-inclusive to labour-exclusive corporatist politics. Under Franco, ultimately, the basic principles of corporatist political-economic organization were set out in the Fundamental Labour Law (*Fuero del Trabajo*) of 1938, which stipulated that syndicates, acting as corporations under public law (XIII/3), were to represent and co-ordinate different productive sectors. These laws also provided for mandatory state arbitration in unresolved industrial conflicts (Gay de Montella 1939: 136). The organic laws of the state then stated clearly that economic interests were subject to state organization, and that, within constraints set by the state, different socio-economic groups (unions, professions, municipalities, etc.) could claim certain collective rights to economic security. However, as in Germany and Italy, these laws strictly subordinated workers' associations to the prerogatives of powerful private enterprises (Madureira 2007: 90), to which they accorded a key role in the developmentalist programmes underlying the regime, and they clearly recognized private initiative as 'the fundamental economic activity' in national society (Gay de Montella 1939: 36). Authoritarian Portugal and authoritarian Spain, therefore, were both originally created by a crisis of labour integration, and this left a deep imprint on their basic structure.

The authoritarian corporatist strategies underpinning political authoritarianism in Portugal and Spain were never comprehensively enacted. In Spain, in fact, the corporatist system was partly dissolved in the 1950s, and limited autonomy in collective bargaining was re-established in 1958. Nonetheless, owing to their corporatist orientation, both states were weakened through interaction with external economic bodies. Both states were internally fragmented through their complex channels of interaction with labour and business, and many powerful (originally private) interests and organizations were able to assume a stable and protected legal form in the margins of the state (Gunther 1980: 250). One result of these factors was that, in both societies, the state's capacities for autonomous policy making were reduced, and the governmental executive relied on complex, half-private bargains with private groups in order to produce policy, to authorize law

and to secure compliance.<sup>61</sup> One further consequence of this was that the positions of private actors were structurally consolidated in society, and the state obtained and demonstrated its legitimacy – in part – by placating and satisfying established external prerogatives. In fact, economic organizations and, in some cases, even particular families were able to establish positions in the margins of the political system, from which they could utilize political influence for the protection of personal and economic prerogatives, which were not necessarily consonant with the official direction of state policy (Makler 1976: 523). Often, this governmental privatism converged with older traditions of patronage, clientelism and private monopoly of public power, which were historically embedded in these societies, and it meant that the originally highly localized, quasi-feudal structure of society was intensified, even under the auspices of a coercive unitary state. Notably, Spanish and Portuguese society was traditionally marked, at a political level, by a persistent culture of *Caciquismo*: that is, by privatistic brokering of public office, especially in local office holding, by endemic clientelism in political constituencies, and by extreme personalization of political leadership roles.<sup>62</sup> These older traditions of patronage often shaded into the authoritarian personalism that became prominent in the 1930s, and traditional elites soon reappeared after the establishment of the new regimes (see Barreira and Sánchez 2008: 495). As their economies underwent partial liberalization in the late 1950s, further, these states were confronted with increasingly intense labour disputes, and enforcement of elite prerogatives placed the government under great duress. Notably, these states lacked sufficiently refined instruments to meet obligations regarding regulation of labour markets, control of industrial conflict and forcible pacification of dissent (Román and Delgado 1994: 198). Tellingly, these states also lacked full control of basic judicial functions, and they were often required, at different times for different reasons, to devolve judicial obligations to military courts and labour courts in order to meet the rising requirement either for rapid justice, rapid coercion or rapid judicial settlement, thus

<sup>61</sup> For the deep overlap between public and private power under Salazar see Makler (1976: 501, 513).

<sup>62</sup> This term is usually used to characterize the endemic clientelism in Spanish politics in the Restoration era (after 1875), in which local bosses exercised political control of different areas through patronage (Ortega 1977: 354). But, in my view, this term can also describe the social horizon of much of Spanish politics, and to a lesser degree, Portuguese politics under the authoritarian system up to the 1970s. To support my view see Mayer-Tasch (1971: 193) and Cazorla-Sánchez (1998: 128; 1999: 883). On *caciquismo* in Salazar's Portugal see Silva (1994: 31).

promoting a bewildering and uncontrollable proliferation of judicial office.<sup>63</sup> On both counts, disputes over labour relations drained the state's resources for legitimization and caused the basic inclusionary integrity of the state to fracture.

For these reasons, the political systems of pre-transitional Portugal and Spain possessed a very depleted inclusionary structure. Although proclaimed as authoritarian regimes, these systems relied on the support of external private actors for legitimacy, and they were required endlessly to broker acquiescence or compliance among different social groups. The foundations of the political system were pluralistically situated at different points through society, and the state was forced to construct the sources of its legitimacy at social locations lying outside the political system itself. Consequently, the legitimacy of the state was very susceptible to destabilization through changes in economic conjuncture, normative orientation of powerful organizations and dimensions of industrial conflict. To a large degree, in fact, the pre-democratic regimes in Portugal and Spain, like the main authoritarian states before 1945, were not conclusively formed as states, and they were only able to perform rather limited functions of societal control and inclusion. Moreover, these states operated in societal environments that were not fully formed as national societies, and in which even processes of legal/political inclusion were not solidified.

On this basis, the constitutional developments during and after the democratic transitions in Portugal and Spain in the 1970s can be seen in a distinctive sociological perspective. These transitions can be observed as parts of an adaptive process, in which traditionally weak political systems availed themselves of normative instruments to correct the problems of structural consolidation and inclusion, which had historically afflicted them. To be sure, the structure-building impact of these transitions cannot be ascribed solely to the impact of legal norms. Clearly, the expansion of parliamentary-democratic representation in the course of the transitions did much to erase the localistic fabric of society. Clearly, further, the integration of Portugal and Spain in a broader political-economic conjuncture reduced some pressures on national institutions.<sup>64</sup> Yet, in certain respects, the fact that the new

<sup>63</sup> For analysis of the 'spectacular expansion of special jurisdictions' under Franco, see Táboas (1996: 318). See also Bastida (1986: 185).

<sup>64</sup> It is widely noted for example that political and economic pressures from the European Community formed a powerful 'external factor determining political change' in pre-1975 Spain (MacLennan 2000: 5).

constitutions in Portugal and Spain placed national law making in a close relation to international legal norms acquired particular structure-building importance, and it assumed a vital role in obviating conventional pathologies of statehood in these societies.

In transitional Spain and Portugal, the assimilation of international law played an important role in reinforcing the *internal* organic structure of the state. For example, the salience of international norms brought the initial benefit that, even in highly contested settings of the early transition, the inclusionary structure of the political system could be consolidated in insulated form, and the terms of the transition could be negotiated in reasonably consensual fashion. This was especially pronounced in Spain. Even during the transition in Spain, the high-level commitment to international rights norms formed a point of common orientation for different political actors. This meant that the transitional process as a whole could be conducted within a pre-agreed framework, partly elevated above specific social conflicts, and that historically volatile controversies, especially over labour, could be held outside the transitional process (Hamann 1997: 124). As a result, prominent participants in the transition were able to utilize already existing channels of communication within the state to establish inter-elite consensus, and they mapped out a relatively smooth path for the transition to democracy (Linz and Stepan 1996: 91–2). Over a longer period, then, the fact that the constitutions of Portugal and Spain gave authority to courts to oversee legislative procedures and, where necessary, to declare statutes and administrative acts unconstitutional, meant that public powers were more strictly located in the state, and that private or local actors could less easily gain access to and deploy state power in order to pursue singular prerogatives.<sup>65</sup>

Most vital in this respect, however, was the fact that the new constitutions of Spain and Portugal sanctioned basic subjective rights in respect of labour disputes, professional representation and collective bargaining. This was originally less pronounced in Portugal, where, as late as 1987, the Constitutional Court ruled against liberal market reforms. In Spain, however, liberalization of union organization was introduced by a decree in 1977. This was consolidated in Arts 7, 28 and 37 of the democratic constitution of 1978. Importantly, early judgments of the Spanish Constitutional Court addressed industrial

<sup>65</sup> In post-1978 Spain, for example, one important duty of the Constitutional Court was (Art 141) to control the legality of public organs in autonomous regions (see Gil 1982: 561).

conflicts, and the court expressly applied international law to stabilize the autonomy of union activity, outside the organic order of the state.<sup>66</sup> One immediate result of this re-orientation in labour law was that, during the transition, the political system was not ceaselessly compelled to regulate labour markets, and it was able to release many aspects of economic regulation from state jurisdiction (see Foweraker 1987: 67; Román and Delgado 1994: 190, 210; Hamann 1997: 126). The sphere of labour law, consequently, lost some importance as a source of legitimacy, and both the historically generalized politicization of industrial conflicts and the endemic inner fragmentation of the legal and political order under corporatist authoritarianism could, in part, be avoided. Both Portugal and Spain clearly retained a very pronounced corporatist bias in and after the transitional period. Indeed, in both societies, this model was at times crucial for the survival of the democratic system as a whole. Yet, as in other post-authoritarian societies, both states developed a less concentrated, or pluralist, model of corporatist organization, based in a displacement of economic conflict from parliament to sub-executive fora (Perez-Diaz 1986: 9; Yruela and Giner 1988: 144; Royo 2002: 84). One further result of this re-orientation in labour law was that it gradually led to a reinforcement of social rights through society as a whole.<sup>67</sup> As in post-1945 transitions, in fact, international human rights law came to overlie, and stabilize, other strata of rights in society. The fact that states were able to extract one defining tier of rights from the international arena meant that they could distribute political and socio-material rights without engaging in deeply, intensely consuming conflicts, they could derive legitimacy from multiple sources, and they could promote political inclusion in relatively neutralized procedures. As in cases discussed earlier, the rise in the impact of international rights as sources of legitimacy meant that conflicts which had traditionally been held at a very unsettling level of intensity in the state could be re-located to positions outside the state. In most cases, labour policies were negotiated at sectoral level, and

<sup>66</sup> See Spanish Constitutional Court 11/1981. As in other transitional settings, in post-1978 Spain, collective bargaining was defined as a basic right, protected by international law, but not as a part of public law or as 'one of the fundamental rights and public liberties' given special protection by the constitution. See Spanish Constitutional Court 98/1985. A strict separation between rights of collective bargaining and fundamental individual rights was also made in Spanish Constitutional Court 58/1985.

<sup>67</sup> See the early defence of universal labour rights, ruling restrictions on labour rights unconstitutional, based on citation of UDHR, and using proportionality arguments, in Spanish Constitutional Court 22/1981.

inclusionary conflicts concerning labour and production did not converge fully around the central organs of the state. Often, in fact, judicial actors, operating within pre-defined normative constraints, could intercept such problems before they entered the political system.<sup>68</sup> Overall, therefore, the rising use of internationally defined rights as a source of legitimacy meant that states could generate some socio-material rights without risking extreme destabilization. The emergence of a stratum of international rights, placed on top of earlier strata of rights, incrementally augmented the inclusionary structure on which the state relied, and it substantially increased the overall autonomy of the political system.

The assimilation of international law also impacted on the *external* organization of the state in post-authoritarian Spain and Portugal. Most distinctively, the increasing use of rights norms to authorize legislation in these polities meant that different social actors were brought into a more even relation to state power, so that the facility with which powerful local and private bodies had gained exemption from, or privileged access to, state authority was diminished (see Almeida 2013: 135). Generally, this reduced the traditionally localized, pluralistic character of national society, and it raised the inclusionary reach of the legal/political system as a whole. On one hand, the new constitutions placed a more uniform structure on the national environments of the political system. Naturally, both Spain and Portugal retained many features from their pre-transitional structure. In both states, organized interests retained entrenched influence (Royo 2002: 79). Moreover, Spain in particular remained highly regionalized; clearly, regional separatism has remained a volatile factor in recent Spanish history. Nonetheless, the historical link between local power and private government was partly severed, and local authority was increasingly exercised within hard constitutional constraints. In Spain, in fact, the jurisprudence of human rights promoted by the Constitutional Court was often strongly weighted against regional autonomy, and it was developed to impose a unified legal order over all parts of society.<sup>69</sup> Overall, the ability of the state to legislate, from within its own resources and without co-option of private bodies, was

<sup>68</sup> See the cases in note 67.

<sup>69</sup> Notably, Art 149.1 of the Constitution made the state responsible for enabling all citizens to exercise their constitutional rights. This provided scope for expansion of central power. Early Constitutional Court rulings also restricted the power of autonomous regions. See in particular Spanish Constitutional Court 1/1982.



intensified, and the state developed more expansive capacities for applying law throughout society as a whole. Indicatively, the increasing inclusivity of the legal/political system was reflected in growing social confidence in law, so that citizens showed increasing willingness to access the courts, to pursue litigation and to utilize the law as a medium of conflict resolution.<sup>70</sup> Rising access to law naturally brought society into a more even relation to the legal system, and it further elevated the standing of the legal system as the focus of a broad inclusionary order.

As in earlier cases, therefore, in the Iberian transitions the domestic filtration of international law, and especially of international human rights law, played a key structure-building role, allowing political systems to compensate for traditionally acute problems of depleted inclusivity. Above all, the fact that states were able to utilize abstracted rights norms to sustain their legitimacy meant that they could diminish their reliance on external support, and they could police their absorption of societal conflicts and actors, often depoliticizing traditionally volatile contradictions (especially those resulting from industrial conflict) across society at large. This meant that state institutions could occlude themselves against unsettling external forces, and they could perform their functions of mandated legislation and inclusion, both political and material, in increasingly autonomous fashion. In some respects, the fact that national political institutions and actors were integrated into an international normative order provided the basis for the extracted construction of a clear and autonomous corpus of national public law, and thus also for the reliable consolidation of a national political system. It was only as these states were locked into a transnational political system, constituted through human rights norms, that their formation as inclusionary national-political entities could be brought toward completion.

## CONSTITUTIONALISM AND STRUCTURE BUILDING IN EASTERN EUROPE

Broadly similar patterns of structural formation can be identified as features of the next major wave of constitutional transition, or *systemic transformation*, in Eastern Europe in the 1980s and early 1990s.<sup>71</sup>

<sup>70</sup> It is calculated that in Spain the number of contested civil cases increased by nearly 100 per cent in the five years after transition (Giles and Lancaster 1989: 825).

<sup>71</sup> In much of Eastern Europe and the former Soviet Union, *systemic transformation* seems a more accurate term than *transition* to capture the process of institutional and economic restructuring. For related claims see Carothers (2002: 13).

These upheavals were comparable to previous periods of constitutional rupture and re-direction in their legal-institutional consequences, as most Eastern European polities undergoing systemic transformation after 1989 developed constitutions that accorded high status to international law, especially international human rights law. Moreover, either immediately or gradually, most states in Eastern Europe developed powerful Constitutional Courts, which, with obvious variations, assumed responsibility for assessing the conformity of statutes with international human rights instruments. In many national states during the Eastern European regime changes, judicial actors in fact acquired unprecedented levels of influence and autonomy, and their role in stabilizing the political system was intermittently very substantial. In some instances, judicial bodies actually led the reform process, acquiring competences, partly founded in international law, that extended far beyond functions ascribed to courts in polities marked by typical separation-of-powers arrangements.

In addition, the transformations in Eastern Europe were similar to earlier transitions in their social backgrounds, and different national reform processes occurred in societal settings in which national political institutions were marked by weak statehood, depleted inclusionary structure, and protracted inclusionary crisis. Of course, crises of inclusion in Eastern European polities did not find the same expression as in other authoritarian polities. It was fundamental to these polities that, prior to 1989, they defined their legitimacy by claiming that they had eradicated class conflict, so that problems caused by the inclusion of obdurate economic antagonisms did not have the same ideological valence as in other societies. Nonetheless, the regimes in Eastern Europe had striking constitutional similarities to earlier reactionary dictatorships. On one hand, these regimes were designed – purportedly – to exercise far-reaching social control, and they were typically based in constitutions enshrining declaratory group rights, which incorporated substantial areas of social practice, especially relating to economic production and development, immediately within the political system.<sup>72</sup> Moreover, the constitutions of Communist states were premised in unitary, neo-Jacobin conceptions of national sovereignty, and they proclaimed legitimacy through the objective identity of the political system and society, purporting to allow the untrammelled *material will* of the national proletariat to run immediately through all

<sup>72</sup> For general comment see Markovits (1998: 615–17).

organs of the state.<sup>73</sup> The enactment of popular sovereignty through the neutralization of material disparities in society was thus the primary basis of legitimacy in these regimes, and they pursued this objective partly through repression, and partly through the reduction of material distinctions between social groups. In this process, Eastern European regimes usually gave restricted standing to political rights, which were selectively applied through controlled party procedures, so that political inclusion was largely forcible and regimented. As a result, classical political rights did not impact expansively on the political system. The diminution of political rights, however, provided a foundation for the allocation of some socio-material rights, and, in most cases, the political system secured its hold on society through a mixture of coercion and material rights allocation.

Social inclusion through socio-material rights, impacted deeply on the basic structure of the political system in pre-1989 Eastern European societies. Owing to their dense fusion of political direction and economic/distributional management, notably, these political systems were exposed to powerful pressures of inclusion, and they encountered difficulties in sustaining functional autonomy in face of the societal conflicts and resultant obligations which they internalized. As they lacked formal/legal or political-representative mechanisms for resolving social conflicts and legitimating legislation, they tended to use their bureaucracies as frameworks either for the resolution or for the coercive regulation of social antagonisms and disputes. They were only able to discharge their regulatory obligations by expanding their peripheries to include local and private agents and organizations for purposes of societal control. As a result, the regimes in Eastern Europe were typically defined by very high reliance on persons and bodies whose position in relation to the political system was uncertain, and their peripheries were marked by at times deeply debilitating levels of porosity to interests and actors with nebulously defined public/private status (Willerton 1992: 9; McFaul 1995: 221; Easter 1995: 576). Typically, these systems possessed the following hallmarks: high personalization of office, deep and obdurate interpenetration between public organs and private agents, the use of informal power by entrenched personal elites, and, because of this, a

<sup>73</sup> See provisions in the 1952 Constitution of Poland (Art 4), the 1949 Constitution of Hungary (Art 2), the 1977 Constitution of the Soviet Union (Art 1). Owing to their commitment to full sovereignty of the proletariat, these constitutions also promoted the politicization of the judiciary, defining judges as organs of the political will of working people. See, for example, Art 41 of the Hungarian Constitution.

shortage of policy options and low flexibility in legislation. In addition, partly by consequence, most Eastern European regimes suffered high levels of localized power and corruption, and society as a whole was shaped by at times extreme centrifugality. Overall, the basic presence of a uniform inclusionary structure for the political system was often questionable.

Such fragmentational tendencies were particularly acute in larger societies in Eastern Europe, such as the Soviet Union. Here, the political system had its functional basis in the fusion of official party directives and informal local prerogatives, and local elites often operated as hinges, connecting the centralized elements of the political system to the diffuse regions (Willerton 1992: 227; Anderson and Boettke 1997: 38; Garcelon 2005: 51). Although widely construed as a totalitarian state, the political system of the Soviet Union was in fact marked by evident characteristics of quasi-feudal disaggregation. Its underlying structure had weak inclusionary force, and its socio-structural bedrock was located in 'personal network ties' at different local junctures, so that the 'infrastructural powers of the state' were sustained, if at all, by rather crude patterns of patrimony, corruption and locally embedded venality (Easter 2000: 69, 165). This meant that the general autonomy of the political system was low, and elite actors with powerful vested interests were able to assume positions inside the political system in order to consolidate their separate interests. As in earlier one-party systems, the lack of clear formal/constitutional mechanisms for the rotation of office and the removal of elites from inside the political system meant that the political system was reliant on very particular sources of external support, which sapped the legislative autonomy and the basic functional differentiation of the state.

The processes of systemic transformation in Eastern Europe were driven, manifestly, by factors outside the political system. For example, they were stimulated by international pressures, by changes in international economic conjuncture, and, in some cases, by anti-systemic action in national civil society. Like earlier cases, however, these transformations were also propelled by forces internal to the inclusionary structure of the political system of the societies in which they occurred. In different ways in different settings, regime changes in Eastern Europe occurred as part of a process of national structural formation, and the rise of a constitutional order linking national processes of norm formation to an international system of human rights norms helped to remedy historical problems of weak abstraction in the political system. As

in other cases, in fact, it was only as these societies were incorporated as integrated units within a transnational constitutional system that sociologically embedded processes of state building, and national formation more widely, could approach completion.

To illustrate these points, first, the early phase of constitutional re-orientation in Eastern Europe was stimulated by principles enunciated under international law. In particular, the Helsinki Accords of 1975, although not established as a binding treaty, created a powerful momentum for the expression of human rights norms in national polities. The principles declared in these Accords impacted deeply on the normative structure of different societies, and they gradually elevated the autonomy and distinction of national political systems across Eastern Europe (see Kurczewski 1993: 12; Thomas 2001: 255). The structure-building impact of international human rights law in Eastern Europe became evident, initially, before the transitional reforms had fully commenced. In some societies, strikingly, the growing resonance of international law led to a reform of the judicial apparatus, which in turn led to a wider transformation of the state. For example, in Poland, a Supreme Administrative Court was created in 1980 and a Constitutional Court, with weak powers of review, in 1985–86. In 1983, a Constitutional Law Council was established in Hungary. (Dupré 2003: 5; Kuss 1986: 343). In Poland, moreover, norms spelled out in the Helsinki Accords provided support for independent trade-union activity, and the growing presumption in favour of human rights as independent constitutional norms proved a strong impulse both for judicial and for wider political-systemic reform. Tellingly, Jacek Kurczewski has noted (1993: 95) that the Polish Martial Law Decree of 1981, suppressing trade-union activity, was initially contested on grounds of (un)constitutionality, defined through reference to internationally proclaimed norms. However, in the executive-led system of the Communist regime, no provisions for judicial review existed to give expression to such challenges. The thwarting of expectations of constitutionality, review and normative redress, consequently, intensified resistance to martial law, and it eventually triggered a longer process of incremental constitutional reform. However, the assumption that rights had an independent normative reality acquired the greatest importance in the most important process of constitutional re-direction: in the reforms pioneered by Gorbachev in the Soviet Union. In this setting, the political restructuring was initially heralded, specifically, through judicial reforms, and the origins of the transition can be traced to attempts by the Communist

Party leadership in the mid-1980s to commit the political system to the general rule of law, and even to impose principles derived from international law on the domestic order. Both the first programmatic plans for transformation of the political system and the first practical steps towards the implementation of reform measures in the Soviet Union resulted from projects to raise the independence of the judiciary, and to formalize its powers to control legislation and administrative acts (Thorson 2012: 28). Gorbachev in fact expressly promoted legal unity and uniformity as a revolutionary strategy to strip the state apparatus away from its obdurate linkage with private and personalistic sources of power, and to increase the quality of law as a formal inclusionary medium for the political system (White 1990: 37; Solomon 1990: 185; Devlin 1995: 40). In each of these contexts, international law pervasively re-shaped the inclusionary structure of national political systems. International law entered domestic law as a form of abstraction for the political system, and it began to construct domestic law as a more generalized medium, capable of legitimating actions, institutions and legislation at a certain degree of autonomy.

The structure-building impact of international human rights norms on the structure of national political systems in Eastern Europe was not exhausted in the early stirrings of reform. On the contrary, international human rights law played an enduring role in the internal and external activities of transitional polities. For instance, most post-Communist states were keen to accede to the ECHR as quickly as possible during the transition, as membership in the Council of Europe promised to open a pathway both to international recognition, and ultimately to membership in the European Union (EU). Moreover, the collapse of Communism gave impetus to international initiatives in support of human rights, and the later part of the process of transformation was influenced by the Vienna Declaration and Programme of Action (1993), which accorded clear supra-constitutional rank to human rights laws throughout Europe.

Through the second stage of systemic transformation, moreover, national judiciaries, especially Constitutional Courts, acquired increasing strength, and they promoted international norms to re-define the basic fabric of national polities. In this period, many states began constructively to utilize international rights norms as a primary legitimational basis for their functions. International human rights often became an independent source of state structure, enabling national political systems to operate independently of embedded organizations

and to construct autonomous foundations for legislation. In many cases, international law provided the normative premise for the consolidation of an autonomous corpus of public law within national societies, and national political institutions relied on international norms to form their basic inclusionary structure.

In some societies, notably Poland and Hungary, Constitutional Courts were established at an early stage in the process of re-structuring, and these courts rapidly assumed the power to shape the course of political reform. In many cases, courts developed a very activist jurisprudence, at least in part based in international law. In such examples, typically, senior figures in the judiciary insisted on the inviolability of certain formal rights norms (derived from international law) in order to review statutes and to adjudicate disputes in national societies. In addition, however, some judges assumed duties extending well beyond classical judicial functions, and they invoked international human rights norms to initiate new laws, and to provide normative guidance for legislation and acts of state.

In both Poland and Hungary, for example, Constitutional Courts at times acted as *de facto* constituent actors during the democratic transition, and they utilized international norms to define the fabric of a working constitution, before a final formal constitution had been fully elaborated. In Poland, the drafting of a new democratic constitution took place in two stages after 1989. A first constitution (the small constitution) was enacted in 1992, and this was superseded in 1997 by the final constitution. The 1992 Constitution provided for a Constitutional Court, but it did not contain a free-standing Bill of Rights. However, both before 1992, and then after the first constitution had entered force, the Constitutional Court assumed authority to solidify the constitution by promoting a distinctive rights jurisprudence, and it filled in the gaps in the texture of positive public law through its own interpretive/legislative acts, based in part in international law (Osiatynski 1994: 164). On this basis, some of the Constitutional Court's case rulings possessed authority close to that of a constituent power, and they constructed normative parameters, not only for single acts of legislation but for the entire architecture of the emergent state. In 1993, tellingly, the Constitutional Court ruled that judicial independence was an inviolable component of statehood,<sup>74</sup> and that certain principles formed global standards for judicial rulings. In 1992,

<sup>74</sup> Polish Constitutional Court (9.11.1993) (K11/93).

it ruled that courts were authorized to give effect to international treaties, unless expressly defined as not self-executing.<sup>75</sup> Therefore, although the 1992 Constitution did not expressly concern itself with the domestic standing of international law, the Constitutional Court decided that international law had to be applied *ex proprio vigore* in municipal law (Vereshchetin 1996: 8).

In Hungary, the post-1989 Constitutional Court acquired even more far-reaching competence; its powers during the transition have been described as ‘the most extensive on earth’ (Küpper 1998: 267). This court performed vital system-consolidating functions, reviewing and striking down a high volume of laws. In fact, the powers of the Hungarian court at times clearly deviated from those of a purely constituted institution, and it acted both to initiate legislation and to order parliament to implement human rights laws (Sajó 1995: 259). It was authorized under Art 7(1) of the amended constitution of 1989 to apply international law as the bedrock of legal order (Sajó 1995: 256), and judicial rulings were shaped by the view that the courts had a duty to use international norms to dictate the legal order of the new Hungarian state (Klingsberg 1992: 47; Küpper 1998: 271). On this basis, the court developed a distinctive, quasi-constituent jurisprudence, through which it strategically exploited international laws to build a solid jurisprudential basis for the emerging polity. For example, it began to cite the ECHR before Hungary was signatory to it (Sólyom 2003: 144). Indeed, on occasions, the court even invoked international law to override express national constitutional provisions. The most notable example of this is Decision 53 (1993), in which the Court stated that ‘generally recognized rules of international law’ needed to be seen ‘without any (additional) transformation’ as ‘part of Hungarian law’. This ruling declared participation in the ‘international community of people’ a ‘constitutional imperative for inner-state law’, having immediate effect through democratic legislation (see Brunner and Sólyom 1995: 524–5). In this respect, the Hungarian Constitutional Court at times effectively *constituted* the national constitution: acting both as constituent and constituted power, it established a powerful body of transnational jurisprudence. The court characterized its interventionist jurisprudence as *indirect constitutional review*, which it promoted to give meaning and substance to the emergent, but as yet unformed constitutional order (see Trang 1995: 8; Bos 2004: 270).

<sup>75</sup> Polish Constitutional Court (7.1.1992) (K8/91).



During the transitions in Poland and Hungary, therefore, international human rights became primary constituent components of the political system. Their impact on national states meant that, even in highly unstable transitions, defined by institutional weakness, these states could build relatively autonomous inclusionary structures, and they could articulate common principles to support positive acts of legislation at a reasonable level of generalization. In particular, this allowed the evolution of an inclusionary structure through which new states could legislate with increasing autonomy, and it diminished the historical reliance of political systems on external, personal sources of support.

These functions of international law were replicated in other transitions. In Bulgaria, for example, a strong Constitutional Court was established, which also (in Art 5(4)) sanctioned the primacy of international law over domestic statutes. Here, too, there is evidence that the creation of a strong independent court formed a basis on which the state could act in relative autonomy. Indeed, the court was able to obtain legitimacy for even the most unpopular rulings through inner reference to rights (Melone and Hays 1993: 253). At key junctures in the early period of transition, it defined the scope of interim governments and insulated the government against the claims of rapidly fluctuating parliamentary majorities (Ganev 2003: 601). Even in Russia, in which the process of transformation was repeatedly imperilled, judicial autonomy was often questionable, and the basic level of commitment to human rights norms remained uncertain, the ability of domestic courts to extract rights from an international legal domain played a key role in sustaining an inclusionary structure for the political system during the longer period of reform. Indeed, in Soviet Russia, there was no clearly defined body of public law, and from the late 1980s onwards judicial professionals, often using international law for support, played a leading role in devising a system of public law, *ex nihilo*, both for the state and for society as a whole.

In analysis of Russia in this respect, quite self-evidently, certain caveats are required. At one level, it can easily appear absurd to imagine judicial actors as serving to stabilize state structure in Russia in the 1990s. First, it is well documented that, although Gorbachev promoted judicial autonomy and ultimately established procedures for judicial review, Yeltsin attacked the Constitutional Court in 1993, after it supported the Duma in conflict over presidential authority. After that time, arguably, the Constitutional Court assumed a more acquiescent role,

and its ability to function as a fully separate organ of state has often been queried.<sup>76</sup> Moreover, through the middle of the 1990s, it is generally difficult, in any plausible way, to apply concepts of state autonomy or independent inclusionary structure to the Russian political system. At different points in this period, national statehood approached a condition of near conclusive collapse, and the traditionally endemic weaknesses of public order in the Soviet era (office grabbing, extreme corruption, clientelism, personal arrogation of public goods and offices, low levels of legislative consistency and general pathological *re-feudalization* of public life) re-emerged, in acutely exacerbated fashion.<sup>77</sup> This process has been neatly summarized as *state capture* by powerful elites (see Gel'man 2004: 1024). Despite this, nonetheless, it is perceptible that even in Russia the role of internationally extracted rights, applied through a national Constitutional Court and other superior courts, played an important role in preserving, and finally in reinforcing, some degree of inclusionary structure to sustain the Russian political system.

This impact of international law in Russia was visible – initially – in the early years of systemic transformation (1989–1991). During this time, a Constitutional Supervision Committee, created by Gorbachev, acquired powers, close to those of a Constitutional Court, to scrutinize new laws for compliance with international law, and it provided a normative framework for the early reforms (Hausmaninger 1990: 302, 306). Both prior to and after the formal adoption of the Russian Constitution in 1993, an appointed Constitutional Court (founded in 1991) acted as a vital source of legal direction. This court used international law to support rulings before the 1993 Constitution was adopted, and it autonomously fleshed out a legal basis for some of the most controversial functions of the reformed state (especially those linked to guarantees over property and contract) (Danilenko 1999: 56; Trochev 2008: 167). Ultimately, Art 15(4) of the 1993 Constitution made strong provisions for the standing of international law throughout society. In 1995, in fact, international law was defined by the Supreme Court as a basis for lower-court rulings (Danilenko 1999: 58, 63). The 1993 Constitution also provided for a very powerful Constitutional Court, which, like other courts, had authority to apply international

<sup>76</sup> For very polarized views on this question see Trochev (2008: 185), Thorson (2012: 120–52) and Mazmanyan (2015: 214). For my opinion on this question, see note 88; it seems quite clear that the Constitutional Court still plays an active role in checking the executive.

<sup>77</sup> See Shlapentokh (1996: 394, 396), Easter (2002: 602, 606), Tompson (2002: 936–37), Garcelon (2005: 7, 221) and Taylor (2011: 25).

law directly. Even after its dissolution and its reconvention in 1995, this court continued to play a significant role in hardening normative structure, and it emerged as one of the most consistent pillars of the state, retaining the capacity to use international norms to address very controversial questions (Trochev 2008: 185; Thorson 2012: 44, 144). Importantly, for example, the reconstituted court developed a strong line of jurisprudence regarding trade unions and industrial relations, and it used international human rights norms to provide limited guarantees of trade-union autonomy.<sup>78</sup> Indeed, Yeltsin viewed reform and improvement of judicial functions as a key part of the path to regime stability (Solomon 2010: 439).

Under Putin's presidency, however, judicial bodies began to play a very distinctive and significant role in expanding the inclusionary structure of the political system, and the assimilation of international law had great importance in this process. At this time, questions of judicial politics became locked into Putin's wider political strategies, designed to promote growth in state capacity and state autonomy, after its near implosion under Yeltsin (see Gerrits and van den Berg 2000: 8; Sharlet 2001: 201; Taylor 2011: 2). Notably, Putin initiated a series of ambitious judicial reforms, which were intended to heighten the uniformity of law enforcement, to tighten procedures for use of judicial power and to separate public functions from control by oligarchs. In initiating this reform process, Putin expressly declared that a state not governed by law is a *weak state*.<sup>79</sup> Indeed, Putin's judicial policies were designed, programmatically at least, to promote *dictatorship through law*.

At an evident level, therefore, judicial reform under Putin contributed to state abstraction and political structure building in quite predictable ways. One clear motive behind Putin's judicial reforms, for example, was to restrict private monopoly of judicial office, to manage corruption (however selectively) and to bring consistency and authority to the application of legislation across society (Fogelklou 2001: 244; Kahn 2004; Trochev 2004: 541). This had particular significance in the context of Russian federalism, as under Yeltsin many regional governors had become semi-independent, and the President had routinely contracted out power to the republics in return for personal support (Sharlet 2001: 208; Easter 2008: 216). Accordingly, Putin pursued judicial reform as a strategy for tying the regions more closely to

<sup>78</sup> Russian Constitutional Court, Decision on merits (Postanovlenie) No. 5-P (17.5.1995).

<sup>79</sup> Open letter from Putin to Citizens (February 2000). Published in the newspapers *Izvestia*, *Kommersant* and *Komsomolskaya Pravda*.

Moscow and to create a *unified legal space* across the whole of the Russian federation.<sup>80</sup> In promoting relative consistency in judicial functions, consequently, the Constitutional Court reinforced procedures for the vertical enforcement of political power from Moscow, and it brought institutional support to an increasingly hardened, even semi-authoritarian executive that began to develop under Putin's leadership (Nußberger 2007: 228). To this extent, judicial reform was pursued to solidify the executive-led system of the partial democracy created in Russia, and the general growth in judicial power and regularity clearly reflected a strategy to augment the effective executive power of the state (Trochev 2008 185).

Alongside this, however, the changing status of judicial power under Putin did not solely reinforce state power because the courts acted as instrumental adjuncts to the executive. On the contrary, the rising independence of judicial institutions intensified the power of the state precisely because it detached the organic form of the state from the authority of particular persons in the executive, and it constructed a legal-normative core for the state that was distinct from single agents and single holders of power. Under Putin, in fact, the constitution created in 1993 was increasingly consolidated as a free-standing corpus of norms, which could be successfully mobilized against public authorities. By many indicators, under Putin the legal system experienced a striking increase in autonomy, and the constitution obtained more substantial and more independent binding force. Equally importantly, *access to law* for single social agents, even in proceedings against the government, expanded quite substantially at the same time. These factors also directly promoted an increase in state structure and autonomy, and the changing character of the judiciary discernibly extended the inclusionary reach of the political system into society.

Overall, the legal form of the Russian state as it evolved during the long period of Putin's influence had a paradoxical character. On one hand, evidently, this period saw a partial return to governance by strong executive, in which leading figures in the executive exercised some control over access to governmental office and limited the immediate *political accountability* of government bodies (see Balzer 2003: 191). Yet, on the other hand, this period experienced a continuous increase in the independent authority of the law, and in the willingness of judges to

<sup>80</sup> One of Putin's most important early orders was Order No. 1486 of 10 August 2000: 'On Additional Measures to Ensure the Unity of the Legal Space in the Russian Federation'.

rule against public bodies. Indeed, this period was marked by a general rise in the quality of law and in the *legal accountability* of state authorities.

To support these claims, first, the early period of Putin's first presidency saw a rapid rise in litigation against government actions, and the entire period of Putin's influence witnessed a significant increase in the number of cases successfully brought against the government (see Trochev 2012: 18).<sup>81</sup> In many respects, in fact, the government deliberately facilitated, or even actively encouraged, the growth of litigation. Indicatively, as a part of his wider policies of legal and judicial reform, Putin signed into force the Civil Procedure Code in 2002. Before this, anti-government litigation had mainly been regulated under a law of 1993, which was finally replaced in 2015. Notably, the 2002 code made anti-government litigation in general much easier. It also recognized international law as a source of law for considering civil claims. In both respects, it provided an important opening for the mobilization of human rights law in Russian society. In 2010, further, federal legislation was passed to provide compensation in cases in which courts had failed to hear applications or failed to execute rulings, including rulings regarding human rights violations, in reasonable time. This law was motivated by a pilot judgment of the ECtHR in *Burdov v. Russia* (no. 2) (2009), which criticized the lack of domestic remedies for non-enforcement of judicial decisions in Russia. This law expressly defines the civil-law mechanisms that can be used to protect human rights harmed by public authorities. Eventually, in 2015, Putin passed the Administrative Litigation Code, giving effect to Art 118 of the Constitution, which consolidates procedures for anti-government litigation, including litigation regarding human rights abuses, and permits courts to play a very activist role in scrutinizing executive agencies.<sup>82</sup> Through the period of Putin's influence, therefore, the power of courts was substantially elevated, and the independence of the courts was reinforced, even in politically sensitive litigation. In 2011, in fact, a presidential

<sup>81</sup> Much of the data on Russia discussed in the sections below was compiled by my brilliant Research Associate, Maria Smirnova, who extracted this data from the public legal database, ConsultantPlus and from other publicly available sources. It is difficult to show due appreciation of the value of Maria's assistance in this research. She also added material to these sections after their first preparation in draft. Of course, all usual caveats apply.

<sup>82</sup> The Constitutional Court has also played a prominent role in facilitating use of petitions against public and private bodies performing public functions. See Russian Constitutional Court Decision on merits (*Postanovlenie*) No. 19-P (18.7.2012).

decree (passed by Medvedev) was introduced to monitor implementation of rulings of the Constitutional Court, and to ensure that laws struck down by the courts were rendered invalid.

As further support, second, Putin's policies of state reinforcement coincided generally with an increase in the force of international human rights law, especially the ECHR, which now penetrates very deeply into the national political system in Russia. Here, by way of qualification, it needs to be stated, clearly, that the recognition of international human rights law in recent Russian history has remained patchy. Since the ECHR came into force in Russia in 1998, Russia has repeatedly been criticized in the ECtHR. For example, in 2013 alone the ECtHR delivered 119 judgments finding Russia in violation of the ECHR. Nonetheless, although debate has persisted as to its efficacy, the ECHR has impacted pervasively both on judicial and legislative practice and on patterns of legal adjudication in Russia, and Convention rights form an important foundation for the law.<sup>83</sup> In *Kalashnikov v Russia* (2002), notably, the ECtHR criticized legal remedies available in Russia, thus prescribing improvements for the domestic legal system, and this gradually produced an alignment between domestic norms and international expectations. In 2003, the plenum of the Supreme Court issued rules and recommendations regarding the application of the ECHR in domestic hearings.<sup>84</sup> Draft legislation and even draft judicial rulings are commonly referred to external independent experts for scrutiny for compliance with international standards. Moreover, although in *Konstantin Markin v Russia* (2012) the ECtHR overturned one of its rulings, the Russian Constitutional Court has contributed greatly to promotion of ECHR standards in Russian law, and it has repeatedly referred to the case law of the ECtHR in important hearings (Nußberger 2006: 266–7; Marochkin 2007: 333, 341). In fact, the landmark ruling in *Maslov* (No. 11.P. 2000), in which a domestic judgment was formally supported by the ECHR, led to extensive citation of the ECHR in Russian courts. In very recent cases, the Constitutional Court, while allowing a margin of appreciation in domestic law, has defined dialogue with the ECtHR as a vital source of legal authority

<sup>83</sup> For an early balanced view of Russia's compliance (or otherwise) with the ECHR, see Bowring (2000).

<sup>84</sup> Decision No. 5 (10.10.2003) 'On application by the courts of general jurisdiction of the universally recognized principles and norms of international law and international treaties of the Russian Federation'.

and improvement.<sup>85</sup> Even in remote regional courts, the ECHR is used as a core source of authoritative jurisprudence.<sup>86</sup> By 2013, the annual citation rate of the ECHR in Russia reached 6,000. Between 2002 and 2013, the number of cases ruled through reference to the ECHR in the highest courts increased from less than fifty to over 350. Although Convention rights have mainly been enforced against lower government agencies, there are also notable cases in which the courts have used the ECHR to obstruct high-level policies.<sup>87</sup>

For both these reasons it is clear that recent years have seen the formation of an increasingly autonomous legal order in Russia, whose autonomy is partly constructed and sustained through international human rights law. The increase in the autonomy of the Russian legal order, and its resultant receptivity to international norms, has had a deep structural impact on the state, and it has helped to stabilize an inclusionary structure for the domestic political system. To some degree, of course, it remains observable that, under Putin, the government has tightened principles of legal accountability and widened access to law for quite strategic reasons. For example, opportunities for litigation allow a vent for public disaffection in a society in which political accountability is restricted and political representation is largely mediated through one party. Moreover, litigation establishes fora for dissent in a political system in which political institutions have a partly clientelistic character, and the political system is unresponsive to classical patterns of ideologically motivated interest expression (see Remington 2008: 984). Increasing legal accountability in Russia might, on these grounds, be seen to compensate for the incompleteness of the process of democratization, such that the legal system is deployed to insulate the political system against its own legitimational deficiencies. However, as in other societies in a longer process of institutional rebuilding, the fact that single citizens have recourse to free-standing rights norms has brought many structural, inclusionary benefits for political institutions. In particular, the underpinning of law – however incompletely –

<sup>85</sup> Russian Constitutional Court Decision on merits (*Postanovlenie*) No. 21-P (14.7.2015). For comment, see Smirnova (2015).

<sup>86</sup> Rare and invaluable insights into this process are given in Zazdravnykh (2010), an account written by a regional judge giving details of the transmission of ECtHR rulings and practice to regional courts, and of rapidly expanding use of international norms in lower courts.

<sup>87</sup> Note the Russian Constitutional Court case No 4-P (March 2015), in which the court declared the policy of deporting HIV-infected foreigners unconstitutional. In Decision No. AKPI12–588 (April 2012), the Supreme Court, following an ECtHR ruling, overruled the liquidation of a political party.

by expectations regarding international human rights has served to strengthen the basic integrity of the state and significantly to widen its inclusivity.<sup>88</sup> On one hand, as mentioned, this is connected to the federal structure of the Russian state, and it reflects Putin's endeavour to offset the egregious loss of power to the regions under Yeltsin, which the superior courts have supported (Kahn, Trochev and Balayan 2009: 326). The use of international norms in cases involving a collision between federal and regional legal norms is common, and international norms are often applied to bring authority to rulings on such questions. Alongside this, however, the use of international law also enhances the basic public quality of the state, and it has helped to reduce the centrifugal pull of private actors, and to intensify the societal reach of the political system. This is illustrated, for example, by the fact that, in some cases, higher courts use international norms to overrule judgments in lower courts, often located far from the political centre, especially in cases of litigation against government bodies or politicians. In fact, the 2010 law on compensation specifically penalizes local authorities under standards derived from international law for ineffective processing of cases, and it actively encourages rights-based litigation against regional authorities. Notably, an early draft of this law was prepared following a visit of the UN Special Rapporteur on judicial independence. Since 2010, the Supreme Court has adopted the practice, previously very rare, of overturning the decisions of lower courts on grounds derived from international law, especially in politically sensitive issues such as deportation. In 2013, the plenum of the Supreme Court set out guidelines regarding use of Art 8 ECHR in such cases.<sup>89</sup>

In each respect, international law has played a vital role in reinforcing the inclusionary structure of the Russian political system. Quite clearly, international law is utilized as a means to ensure legal consistency between centre and periphery in Russian society, and it allows the national political system to reach more consistently into peripheral parts of society, stabilizing the political system as a whole against traditionally corrosive centres of local power.<sup>90</sup> As a result, international law heightens the authority of the political system, and it constructs the

<sup>88</sup> The close connection between international law and anti-government litigation is clearest in the Russian Constitutional Court Decision on merits (*Postanovlenie*) No. 2-P (17.2.2015). In this case, certain provisions of the Federal Law on the Prosecutor's Office regarding the agency's power to inspect non-government organizations and suspend their activities without a court decision were held unconstitutional. The application was made by a group of NGOs.

<sup>89</sup> Supreme Court Plenary Ruling No. 5 (24.3. 2005).

<sup>90</sup> See Supreme Court Decision No. 10-KG13-2 (10.12.2013).



political system as an effective sovereign actor, at the centre of national society. As in other cases, the increasing consolidation of the legal order around internationally defined rights has underpinned the extraction of a generalized, relatively autonomous system of public law in a setting which had previously, for embedded sociological reasons, resisted the enduring formation of independent institutions, with functions defined by public legal norms. Indeed, the political system increasingly now partly relies on international law as its basic inclusionary structure.

In addition to this, the growing interaction between national and international law in Russia has meant that law is transmitted more consistently and authoritatively through society, and law's general capacity for public inclusion is enhanced. Tellingly, one outcome of the growth of human rights in Russia is that common access of individual persons to law has increased, and public willingness to use law as a means for claiming rights or addressing perceived violation by public institutions has grown. After 1998, as mentioned, Russian courts heard a rapidly growing volume of cases brought by individuals against government bodies. In 2007, there were over 500,000 cases in which individuals took action against regional and federal government bodies, and 91 per cent of cases were successful for the applicant.<sup>91</sup> As mentioned, further, such litigation has at times been openly encouraged by the government. Notably, the 2015 Administrative Litigation Code is designed to simplify public-law litigation, and it clearly endorses collective action and public interest litigation, previously less formally recognized in Russian law. However, the increasing impact of international human rights law appears to have stimulated a broader change in attitude towards the law. Quite generally, the period of Putin's influence has witnessed a dramatic increase in litigation across Russian society. The number of civil cases heard in court increased by well over 100 per cent in the longer period of Putin's influence (Sakwa 2010: 201),<sup>92</sup> and the total number of cases brought before the highest courts increased very substantially between 2005 and 2013. In 2014, Russian courts received a total of well over 2,000,000 cases of litigation by individuals. In some respects, predictably, the increasing litigiousness of the population has had unsettling implications for the political order; as mentioned, this is expressed, in part, in a high volume of litigation against public authorities. Yet, the increase in cases heard by courts has clearly extended legal

<sup>91</sup> The Judicial Department of the Supreme Court annually issues official statistics at: [www.cdep.ru](http://www.cdep.ru).

<sup>92</sup> For precise statistics, see Hendley (2009: 243).

order across society, and it has reflected an increasing demand for law across society, so indicating a rising recognition of the legal/political system as a dominant source of public arbitration. In turn, this has brought social agents in different, geographically diffuse parts of society into a more immediate, controlled and inclusive relation to the political system, and it clearly suggests an increase in the public power of the state.

In each of these respects, the growing power of the Russian judiciary, sustained by strong presumptions in favour of international human rights, proved vital for the Russian political system both because it served to abstract a public-legal structure for the state and because it helped to circulate law more evenly across society. Indeed, against a background of endemic legal and political collapse in the 1990s, the gradual growth of human rights as elements of legal order made it possible for Russian society as a whole clearly to identify and apply certain statutes and procedures as clearly *lawful*, and it enabled institutions within society to underline clear distinctions between lawful power and non-lawful power, and authentic law and mere acts of private command. Putin in fact made this point quite clearly when he initiated the judicial reforms in 2001; he claimed that lack of trust in the state had led to the promotion of 'shadow justice', in which citizens were inclined to seek remedies for legal problems by private means, thus fragmenting the power of the state.<sup>93</sup> The use of internationally defined rights to underline the public quality of the law would appear to be a core dimension in the emergent inclusionary structure of the Russian political system. Actors in the Russian political system would appear to be willing to accept that recognition of international human rights law means that they must, on occasions, be exposed to criticism and censure by domestic superior courts, or even by international rights tribunals. However, they appear willing to accept such opprobrium as the price for acquiring external authorization and legitimization for law, and for elevating the authority and inclusivity of law throughout domestic society. The fact that domestic law obtains a source of authority outside the national domain means that the political system in Russia is able to solidify its

<sup>93</sup> Annual Address of the President of the Russian Federation to the Federal Assembly, delivered on 3 April 2001. As background to Putin's policies, see the account of shadow justice as a legal order in which the state does not have full social control in Baranov (2002). By 2012, Putin claimed that great success had been achieved in ending shadow justice. See Speech of the President of the Russian Federation at the VIII National Congress of Judges, 18 December 2012.

basic inclusionary structure, and it can presuppose relative institutional hardness, consistency and evenness in legislation, and increased societal acceptance of legal decisions.<sup>94</sup> In this setting, international human rights law has not magically eradicated private power from the political system. It is widely documented that the Russian political system retains a partial basis in patronage, and, more importantly, that party offices are not strictly distinct from the state (Makarenko 2012: 63). However, the systemic assimilation of international law has allowed principles of general legal rationality to take hold both within the political system and in society at large. It has made it possible for society to differentiate, on the basis of abstracted norms, between private power and public power, and it has facilitated the increasingly uniform distribution of law into different parts of society. In a society defined even in very recent history by extreme privatization of power and by extremely depleted confidence in law, this use of external norms has become a precondition for the entire abstraction of a political system, able to produce, and to assume acceptance of, law across society (Hendley 1999: 89, 94).

In the processes of systemic transformation in Eastern Europe that began in the 1980s, in sum, two distinct constitutional factors can be observed. First, the linkage of national states to an international legal order, mediated through rights-based constitutions and through the acts of powerful independent courts of review, helped to consolidate the basic inclusionary structure of national political systems. As in earlier cases, the rise of a multi-normative legal order formed a precondition for the evolution of national political systems, able to perform their functions at a sustainable level of stability and positive/inclusionary independence. Vital in this process, second, was the fact that states used international norms in order to construct reserves of legitimacy, which they were able to store internalistically, without obligation to include the national people as a factual set of social agents. At certain key junctures, the fact that political actors deployed rights norms, originally extracted from the international domain, to support and underwrite legislation (primary and secondary), meant that political institutions could be insulated against the unmanageable external

<sup>94</sup> This role of international law has been widely noted in Russia. One commentator (Tjunov 2011: 82) observes: 'Development of international law suggests that it manifests itself as the main instrument of harmonization and unification of domestic legal systems by putting into action universally recognized principles, norms and standards that are universal democratic rules of conduct, which are used in interstate relations of the Russian Federation, including those generated by decisions of the Constitutional Court of the Russian Federation'.

pressures with which they had been confronted by their previous national-constitutional form. At an immediate level, internationally defined rights norms proved important in securing political institutions against private interests, and in authorizing laws, relatively consistently, against precarious and contested societal backgrounds. Seen in a broader historical perspective, international human rights norms created a constitutional formula that hardened the inclusionary structure of national political systems, and helped to solidify political institutions which had traditionally experienced deep inclusionary crises because of their fusion of political and socio-material rights. In each respect, internationally defined rights formed a basic premise for the emergence of societies whose political systems were marked by at least a degree of autonomy, and by an inclusionary structure able to lend authority to laws at a reasonable level of national uniformity. In each respect, in fact, internationally defined rights formed a basis for sovereign statehood in social contents in which national inclusion had traditionally experienced endemic obstruction. Indicatively, sovereign statehood evolved at a point where the political system no longer derived its legitimacy solely from the formula of national sovereignty.