Chapter 3
Law in Books Versus *Law in Action*: A Review of the Socio-legal Literature

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1 Introduction

The distinction between *law in books* and *law in action* is an important feature of socio-legal scholarship (Pound 1910). The focus on *law in action* distinguishes socio-legal scholarship from the approach taken in this edited and collaborative volume (Imbeau 2009; Imbeau and Jacob 2011, 2015). Legal interpretations develop and evolve over time without formal constitutional or other rule changing. Accordingly, socio-legal scholars are interested in how judges interpret and apply constitutional provisions, and how movements and interest groups turn to courts to protect their rights or to challenge current law and legal interpretation. Socio-legal scholarship also addresses the consequences of the mobilisation of law in everyday life. For example, constitutions are discussed in the light of their interpretability (Melton et al. 2013); they are compared in order to understand why some constitutional provisions empower social actors leading to policy change while others do not (e.g. Smith 2008; McCann 2009); their interpretation is analysed through theorising judicial behaviour (e.g. Epstein and Knight 1998; Segal and Spaeth 1993); or their impact on policy and social change—or lack thereof—is studied (Rosenberg 1991; McCann 1994, 1998). In short, formal constitutional change is not the primary focus of socio-legal scholarship as this is only one aspect of the understanding of constitutions in *action*.

As part of this focus on law in action, over the last few decades, scholars have been particularly intrigued by the increasingly important role of courts and judicial bodies in politics on the national and international level, in particular regarding the protection of rights. An important focus in this literature is the adoption of constitutional rules that delegate more power to independent courts through the introduction of constitutional review, i.e. empowering courts to invalidate legislation and governmental decisions if held unconstitutional or create more legal

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opportunities by adopting new rights, i.e. in the form of a charter or bill of rights. Hence, with respect to the principal interest of this volume on constitution drafting, socio-legal research on "how and why constitutional change occurs" has mainly focused on the issue of "entrenching rights and empowering judiciaries" (Whittington 2008: 294).

Regarding the spread of constitutional review and rights protection around the globe, socio-legal scholarship addresses the following questions:

- Why do established democracies adopt written bills of rights or a rights catalogue and (newly) allow courts to review legislation with respect to its constitutionality?
- Under what conditions do new democracies establish independent constitutional courts and establish judicial review?
- What accounts for the spread of human rights and rights protection in national constitutions and on the international level around the globe?

This chapter discusses the socio-legal literature explaining the adoption of rights and rights catalogues and of judicial review through the courts in order to address the volume's topic of the role of uncertainty in constitution making. As the discussion below reveals, different explanatory approaches have developed over time (Ginsburg 2008), some close to Buchanan's idea of the role of uncertainty in constitution making and others again radically different. We proceed in two steps. A first section provides a brief overview on the general findings about the global spread of rights protection. In a second, more elaborate section, we review the theoretical approaches, by first discussing the literature that operates most closely with the concept of *uncertainty* and then by contrasting these approaches with alternative explanations that more or less ignore this concept. This will allow us to compare and contrast competing explanations of the empowerment of courts through constitutional change, in order to situate the role of *uncertainty* within the larger socio-legal literature on how and why constitutions change.

2 Waves of Constitutionalisation

Waves of democratisation (Huntington 1991) have been identified as crucial moments for constitution drafting. As Choudhry (2010) points out, there are however important differences in terms of constitutional content across waves:

> Huntington does not describe the important changes in the constitutional package associated with democratization from wave to wave. In the first wave, this package would have consisted of competitive, multiparty elections for a legislature, a politically accountable head of the executive that is either directly or indirectly elected, an independent bureaucracy, independent courts, a separation of the party and the state, etc. In the second and, decisively, in the third wave, this constitutional package came to include rights-based constitutionalism. A bill of rights that is entrenched and supreme over legislative and executive action, backed up by judicial review by independent courts, is now what we associate with a "normal" state …. (Choudhry 2010: 602–03)

As this citation illustrates, constitutionalisation contains two elements, an entrenched catalogue of constitutional rights *and* judicial review, two institutions that in most modern democracies go together despite variation in the form that judicial review takes—strong or weak—and in the types of rights that are constitutionally entrenched. Rights protection is evidently not exclusively the role of courts, but as the term "judicialisation" implies, nowadays the judiciary assumes in many democracies a central role in this respect. Some authors have focused more strongly on the spread of the institution of judicial review, while others were more interested in the adoption of bills of rights. Depending on the empirical focus, they arrived at different conclusions regarding the types of waves or scenarios to be distinguished.

In terms of the "global spread of constitutional review", Ginsburg (2008: 82–88) distinguishes between three waves of constitutionalisation, the first wave starting with the USA at the beginning of the nineteenth century. Various explanations compete for explaining the emergence of constitutional review in the USA, taking into account legal traditions, actors strategies or functionalist explanations pointing to the complementarities between federalism and judicial review (Ginsburg 2008: 83). The second wave is tied to the adoption of Kelsen's model of constitutional review in post-war Europe by several post-fascist countries and also encompasses countries that adopted constitutional review as part of decolonisation and the related drafting of new constitutions (Ginsburg 2008: 85–87). Finally, the third wave of spreading constitutional review follows the fall of the Berlin wall and the democratisation of east European communist regimes. Most post-soviet constitutions provide for judicial review. The democratisation of former east European communist countries was also accompanied by processes of democratisation and constitutionalisation on other continents (Ginsburg 2008: 87–88).

Hirschl proposes to distinguish between six "scenarios of constitutionalisation and the establishment of judicial review" (Hirschl 2004b: 7–8) which are linked to specific historical circumstances. Similar to Ginsburg, he identifies the "'reconstruction' wave" after the WWII (e.g. Germany, Japan) as a first type of scenario. Then, as a second scenario, he points to the independence scenario, where constitutionalisation and the introduction of judicial review are part of the decolonisation process (e.g. India, Ghana, Nigeria, Kenya). For a third scenario, the democratic transition scenario, he distinguishes further between a single transition scenario, where countries move from an authoritarian to a democratic regime (e.g. many southern European countries) and a fourth scenario, the dual transition scenario, where a country moves to a market economy and democracy at the same time as was the case for various post-communist countries. While these four scenarios are linked to situations of democratic transition or reconstruction and decolonisation, the fifth type of scenario occurs independently from any fundamental change of regime and processes of European integration. He coins it the "no apparent transition" scenario. Canada, Sweden, New Zealand or Israel constitute some examples falling into this category as they have all undergone a process of constitutionalisation since the beginning of the 1980s without any fundamental regime change. Finally, there is the sixth scenario, the "incorporation"

scenario, where international norms, such as the European Convention of Human Rights (ECHR), are integrated into domestic law, as has been the case for various European countries, such as the UK.

The distinction of waves or scenarios of constitutionalisation is helpful for the analysis of constitution drafting in two different ways. They establish that there is an overall global trend towards constitutionalisation in the above-introduced sense and point to the fact that there are specific historical circumstances that are particularly conducive to constitutionalising rights protection. They also highlight the importance of the age of a constitution with respect to the type of rights and the extent to which human rights are incorporated into national constitutions. At the same time, the distinction among various scenarios indicates that there is great variation in the specific historical circumstances of constitutionalisation, reaching from established democracies, over supra-nationalisation to democratic transitions. Several theoretical approaches have been adopted to develop explanations of the occurrence of scenarios of constitutionalisation. We now turn to reviewing them.

3 Theoretical Approaches

One may readily identify three types of theoretical approaches that have been mobilised to make sense of the various waves of constitutionalisation. First of all, there are the approaches that operate with the concept of *uncertainty*. The *political insurance thesis* argues that the empowerment of independent courts through constitutional change aims at protecting those currently in power in case of a future loss to opposition forces (Ginsburg 2003). An alternative approach, the *political hegemonic thesis*, also emphasises uncertainty, but mainly argues that empowering courts through the adoption of fundamental right catalogues aims at securing the current political and economic elite's position in power (Hirschl 2004b). These approaches looking at the *uncertainty* of electoral democracy are the closest to Buchanan's emphasis on the role of uncertainty in rule adoption, and their findings support the basic theoretical assumptions underlying this volume.

To the contrary and secondly, *idea-based approaches* emphasise changing ideas and values about rights and point to the importance of lawyers and legal scholars, social movements and processes of diffusion of norms. The concept of uncertainty is not of importance to these approaches. This body of literature emphasises the importance of understanding and analysing how rights provisions and constitutional provisions are mobilised by various actors in politics and everyday life. Regarding constitutional changes, such a perspective proposes to tackle changing constitutional interpretation from a bottom-up perspective in order to understand how the mobilisation of legal norms influences judicial interpretation of rights provisions and other legal norms. Epp (1998, 2009) for example points to the importance of legal mobilisation for creating a "rights revolution". From this second perspective, using the distinction introduced by the editors in the theoretical

framework, it is preceptorial rather than political or economic power that explains the spread of judicial review and rights protection.

Third, socio-legal scholars as well as international relation specialists are interested in the internationalisation of human rights regimes and courts. On the one hand, there is the challenge to understand why countries adhere or not to international human rights regimes. On the other hand, scholars are interested in studying how international human rights regimes influence constitution drafting on the national level. Again, we find approaches based on a strategic actor model and operating with some variation of the insurance thesis alongside explanations based on transnational networks, international organisations and various mechanisms of diffusion.[1] Some rely more on political and economic power relations and other on preceptorial power relations to explain the genesis and impact of international human rights regimes.

All three approaches are based on empirical analysis, ranging from case studies and small-N comparisons to large-N research designs—the latter being less developed. The large body of literature that discusses constitutionalism from a normative and conceptual point of view is not object of this chapter (see e.g. Whittington 2008). The research discussed below looks at well-established democracies, analyses processes of democratisation and is also interested in the supra- and international level, notably in human rights instruments and courts. Evidently, this interest in the global spread of rights protection is shared with various sub-disciplines of political science, in particular with comparative politics and international relations.

3.1 Political Insurance and Hegemonic Preservation

Political insurance and hegemonic preservation explanations mainly draw on domestic factors in order to explain the adoption of constitutional review and the introduction of a written catalogue of basic rights. Ramseyer (1994) pointed to the fact that judicial independence is tributary to electoral competition. Even though recent research on Eastern Europe (Popova 2012) arrives at the conclusion that this relationship does not hold in all cases, the idea that electoral competition might be an important factor for explaining judicial review—in terms of formal institutions as well as actual behaviour of the court, e.g. whether it is willing to strike down laws and hence assume its independence—inspired the *hegemonic preservation argument* proposed by Hirschl (2004b) and the *judicial insurance approach* developed by Ginsburg (2003) among others. Hirschl is interested in established democracies, while Ginsburg looks at scenarios of transition.

[1] Going beyond constitution making on the national level and adherence to international treaties, comparative research also analyses to what extent such changes in formal institutions make a difference in terms of actual right protection. This chapter, however, will not engage with this part of the debate as it is too far removed from the interest on constitution drafting and would request a thorough debate on theories of compliance in supra- and international law.

3.1.1 Established Democracies: Hegemonic Preservation

In his book, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004), Hirschl addresses the intriguing puzzle of why in *well-established* democracies, politicians would shift power from representative institutions to the judiciary through the constitutionalisation of rights. He focuses his research on what he calls the "'*no apparent transition*' *scenario*, in which constitutional reforms have been neither accompanied by nor the result of any apparent fundamental changes in political or economic regimes" (Hirschl 2004b: 8). He chooses a most similar case approach by comparing four cases, all sharing a Westminster political system and a common law tradition, Canada, New Zealand, Israel, and South Africa which have all undergone constitutionalisation of rights in the 1980s and 1990s. He starts out with the puzzle that for politicians to voluntary limit their own policy-making authority through shifting power to the courts through the adoption of a written bill of rights seems counterintuitive. His basic explanation is based on what he coins "self-interested *hegemonic preservation*", i.e. "…those who are eager to pay the price of judicial empowerment must assume that their position (absolute or relative) would be improved under a juristocracy" (Hirschl 2004b: 11). More concretely, in his empirical analysis, he demonstrates that it is the strategic interaction of three key elite groups, the political elite, the economic elite and the judges that allow us to explain, why and when constitutionalisation takes place and what form it takes. In fact, the empirical analysis, which also looks at the consequences of the constitutionalisation, demonstrates that political interests seek to protect and insulate their policy preferences (Hirschl 2004b: 12). The principal reasons evoked are that in situations where the political future of the elite is uncertain, because there are various challenges to their dominant social and political position, removing certain questions from electoral politics is perceived as preserving "the social and political status quo" (Hirschl 2004b: 213). As Garber (2006) reminds us, judicial power is politically constructed by various actors, and as Dahl already pointed out in the 1950s, elite views and values matter in this respect (Dahl 1957).

Hirschl (2000, 2002, 2004a, b) rejects the idea that constitutionalisation should be interpreted as elites simply adhering to progressive ideals by looking at what he calls the political origins of constitutionalisation. Rather, the ruling elite entrenches their preferences before their opponents might gain a majority. Thereby, the specific motivations differ among politicians, economic elites and judges. Judges seek generally to strengthen the power of their institution, while economic elites see strong rights protection going hand in hand with preventing too much government intervention (e.g. property rights). For political elites, the concrete motivations depend on the political struggles characterising a polity; for example, in the case of Canada, the issue of national unity is a key for understanding constitutionalisation under Trudeau according to Hirschl. Hirschl also points to the importance of

> sufficient level of certainty among those initiating the transition to juristocracy that the judiciary in general, and the Supreme Court in particular, are likely to produce decisions that will serve their interests and reflect their ideological preferences (Hirschl 2008: 65).

Last but not least, he also argues that constitutionalisation has not had the progressive economic and social effects desired in terms of redistributive effects, but rather that juristocracy has to be understood as part of a global trend, fuelled by economic liberalisation, to delegate power to independent bodies, that are not electorally accountable (Thatcher and Sweet 2002; Roberts 2010; Vibert 2007). His systematic review of constitutional rights jurisprudence in the four countries points to a trend to adopt

> …a narrow conception of rights, emphasizing anti-statist aspects of constitutional rights. Despite the open-ended wording of the constitutional catalogues of rights in Canada, New Zealand, Israel, and South Africa, the national high courts of all four countries tend to conceptualize the purpose of rights as protecting the private sphere (whether human or economic) from interference by the "collective" (often understood as the long arm of the encroaching state) (Hirschl 2005: 471).

In short, in the case of no apparent transition scenarios, the origins of constitutionalisation are strongly rooted in the specific, often existential political struggles of a polity, and essentially serve elite interests and preferences. Uncertainty serves to align these interests in order to foster delegation to institutions that might protect elite's interests in the future and to empower them through adopting a written catalogue of constitutionally guaranteed rights. Increased rights protection by the courts ultimately serves to protect existing political and economic power relations in the future.

3.1.2 Regime Transitions: Political Insurance

Ginsburg (2003, 2008) applies the idea of electoral uncertainty not to established democracies, but to situations of democratic transition. In his comparative study of the establishment of judicial review in China, Mongolia and Korea, he adds power relations and politics as explanatory factors to the conventional "demand"-side theory (Ginsburg 2008), which argues that the global expansion of judicial review and rights protection has to do with a globally increased "rights consciousness" (see below). Instead of simply assuming that there is a spread of judicial review that is linked to processes of democratisation around the globe, he wants to understand what motivates politicians to establish independent constitutional courts or to the contrary what motivates them not to render them independent. In sum, he explains "…the emergence of judicial review as a result of institutions and politics, rather than culture" (Ginsburg 2003: 15).

Ginsburg argues that "judicial review is a solution to the problem of political uncertainty at the time of constitutional design" (Ginsburg 2008: 90). Electoral uncertainty, the fact that winning parties will alternate in a democracy, makes it desirable for all parties involved in constitution drawing to "adopt judicial review as an alternative forum in which to challenge government policy as long as they perceive that there is some probability that a court will side against electoral winners" (Ginsburg 2004: 248). Hence, judicial review is seen as a form of insurance, and electoral uncertainty provides the thick veil of ignorance (without Ginsburg

using this term) that helps parties to find common ground in constitution drafting with respect to delegating power to the courts (Ginsburg 2004: 248). The creation of independent courts for judicial review with broad competences and ease of access is less likely in situations where the constitution drafters expect to remain in power (Ginsburg 2004: 248). Electoral competition and uncertainty lead to all parties being willing to constrain future winners of election. These are, however, not the only motivations of constitution drawers. Other motivations have to do with protecting ethnic minorities—as judicial review provides a form of "minoritarian guarantee"—and with assuring investors of the protection of property rights, in other words an insurance against arbitrary state intervention (Ginsburg 2004: 248).

Ginsburg is not simply interested in the adoption of judicial review, and he also analyses how the highest court performs. As we know from the comparative literature on courts, similar formal review powers do not necessarily result in similar "behaviour", i.e. how willing the court is to strike down unconstitutional legislation and hence to provide "insurance" to use Ginsburg's term. As Ginsburg demonstrates, in Korea, competition among three parties with comparable strength led to the creation of an independent constitutional court (1988) that succeeded to assure its independence throughout various decisions in the first years after establishment. Also in Mongolia, the rise of a vital opposition favoured the creation of a relatively autonomous constitutional court (in 1992). To the contrary, Taiwan's party system was dominated by the hegemonic Kuomintang party and the constitutional court did not succeed in assuming its autonomy (Ginsburg 2008).

Ginsburg's book is part of a larger debate about the relationship between party competition and judicial independence of highest court. Various studies rely on intertemporal electoral uncertainty as a central explanation for the adoption of constitutional review but also for the effective independence of highest courts as expressed in their actual jurisprudence (Ramseyer 1994; Smithey and Ishiyama 2002; Chavez 2004; Finkel 2005, 2008). As explained in the introduction, the debate focuses on constitutional provisions (law in books) as well as actual behaviour of highest courts and other non-constitutional measures (law in action) to foster independence, i.e. whether they are willing and able to check governmental powers through judicial review. The logic behind the insurance thesis remains the same as discussed for Ginsburg. As Popova summarises, strategic actors engage in a cost-benefit calculation of the benefits and danger of independent highest courts. The greater electoral uncertainty, i.e. the stronger electoral competition is, the more likely is a ruling party to constitutionally establish and sustain independent highest courts in order to prevent future governments to persecute them once they are not in power any more (Popova 2012: 28–30).[2] The insurance thesis has become the most prominent approach for explaining the establishment of independent highest court in democratic transitions (Popova 2012: 29).

The discussion up to know has focused on approaches that we can consider to be related to Buchanan's idea about the role of uncertainty in constitution making

[2] Popova's research on post-communist countries, however, shows that this assumption does not work for lower courts (2012).

as they attribute an important place to electoral uncertainty to explain strategic behaviour leading to constitutionalisation in the form of written rights and delegation of rights protection to judicial institutions in established democracies as well as in situation of regime transitions. The following section contrasts these approaches with what has been termed "demand-side" explanations discussing the importance of ideas, civil society and various mechanism of diffusion for explaining the spread of the "rights revolution" (Epp 1998) around the globe.

3.2 Fragmentation of Power, Ideas and Legal Mobilisation

Traditionally, powerful courts have been associated with specific institutional features and legal traditions (Shapiro 1999). The federalism and separation of power thesis (Shapiro 1999: 196–199) proposes that judicial review particularly developed in countries with federal systems and systems of separation of power (presidential systems) on the governmental level. Lijphart (1999: 216–242) associates judicial review with other institutions of power division, such as federalism or bicameralism (for an update, see Vatter 2009). As comparative empirical studies have revealed, the fragmentation of power within political systems constitutes an important explanatory factor for explaining the development of a legalised and judicialised form of policy implementation, as Kagan (2001) and Kagan and Axelred (2001) for the USA and Kelemen (2011) have convincingly argued.[3] The separation of power thesis per se, however, cannot account for the spread of judicial review around the globe (Shapiro 1999), as judicial review has also flourished in unitary states and states where power is concentrated in the executive, as for example in Canada.

The legal tradition approach argues that English common law tradition emphasises more strongly the neutrality of judges and the ideal of limited government, and former English colonies are therefore more receptive for judicial review and show more judicial activism. As Shapiro (1999) and Helmke and Rosenbluth (2009), among others, have convincingly demonstrated, despite important difference in legal traditions between common and civil law regarding procedures and legal reasoning, the common law tradition is a weak predictor for strong judicial review and judicial independence.

In sum, institutional features and legal traditions cannot account for the global spread of constitutional review. The development of a human rights culture after WWII is the best contender for understanding the phenomenon. Shapiro (1994, 1999) essentially argues that advanced industrial democracies share a number of features that favour the development of judicial review and stronger rights protection not only for constitutional but also for administrative law. He points to

[3] The debate about the transformation of regulatory styles in the USA and Europe is not situated on the level of constitution drafting but rather on the level of policy formulation and implementation and will therefore not be discussed in more detail here.

the importance of increased delegation to independent agents along with the growing importance of the state in many domains of life after WWII to which citizens reacted with increased demands for transparency and accountability in modern democracies. According to Shapiro, therefore, the spread of judicial review and constitutionalisation of rights and rights protection around the globe essentially responds to social demand within a changing institutional context of delegation, liberalisation and raising welfare states.

There is a longstanding tradition and debate within socio-legal scholarship about the importance of social demand, but also social support for the spread of rights protection but also the actual impact of judicial review on policy making. There are different strands of literature that we can distinguish. There is the more human rights and international relations-oriented literature looking at the actual spread and diffusion of human rights and adherence to international rights regimes. From that approach, we can distinguish a more socio-legal tradition that looks at domestic legal mobilisation and the role of professionals for explaining the "rights revolution". Regarding the first stream of literature, there are competing explanations within this literature, some adopting a more strategic actor perspective based on how governments weigh the loss of sovereignty versus possible gains domestically and internationally, some focusing on civil society demands, mobilisation and processes of learning, and others again looking at mechanism of coercion. These various approaches from a diffusion perspective will be discussed further in Sect. 3.3. In this section, we concentrate on the socio-legal literature that looks at domestic factors explaining rights revolutions, namely the support by and mobilisation of civil society actors.

Within the socio-legal tradition, there is a longstanding debate about the importance of a written bill of rights for developing strong judicial review (Epp 1996; Songer 2008). Charles Epp has argued that a written bill of rights cannot per se explain the rights revolution that we can observe in several countries in the late twentieth century (Epp 1996, 1998, 2009). His analysis of the US case points to the fact that the expansion of judicially protected rights in the USA was the result of the mobilisation of civic actors and lawyers—rather than the change in formal institutions or the increased judicial activism by the judges. He points to three important elements in what he terms the "support structure" for the rights revolution: organised groups or movements that lobby and mobilise legally for better rights protection, lawyers that engage with the movements and civil rights actors, and third sufficient resources for litigating in court. In his well-known book, *The Rights Revolution*, Epp (1998), starting from the US case, compares Canada, India and Britain in order to test whether his theory about the importance of a support structure also holds from a comparative perspective. His comparison aims, among other things, at exploring "…the contingent conditions that shape the development of constitutional rights and judicial power in practice" (1998: 198). His comparison arrives at the conclusion that "…rights are conditioned on the extent of a support structure for legal mobilization" (1998: 198). It is hence the demand and pressure of civil society actors disposing of broad support in society that leads to expanding rights and rights protection. While written bills of rights and responsive judges also played a role, it is the sustained and broadly supported pressure from

below with the support of lawyers (Sarat and Scheingold 2006; Kagan 1996) that created what he terms the right revolution.

Others share Epps's perspective that the "rights revolution" needs to be explained through a combination of factors attributing a prominent place to civil society pressure and changing values. In his book, *Delegating Rights Protection*, David Erdos studies the adoption of Bills of Right in Westminster systems by comparing Canada, New Zealand, the UK and Australia, which have all adopted bills of rights in the 1980s and 1990s with the exception of Australia. While there are specific political triggers for each of the cases that explain why the change occurred (or failed to happen) at a specific moment in time, ideas and changing values are the crucial background factors explaining the move to written bills of rights within a family of systems traditionally considered to provide a less favourable institutional environment compared to other, non-Westminster parliamentary systems. He arrives at the conclusion that

> Postmaterialization has constituted the most important background factor behind BORI [Bill of Rights] projects in countries such as Canada, the United Kingdom, New Zealand, and Australia (Erdos 2010: 149).

The rise of post-materialist values with its greater emphasis on civil liberties and equality led to the growth of a "post-materialist rights constituency" that mobilised for a greater formalisation and hence protection of civil liberties and equality directly or at least provided generalised support for such demands by specific civil society groups (Erdos 2010: 24–27).

For demand-side explanations, i.e. the hypothesis that the spread of judicial review together with an increased rights protection and rights culture is a response to social forces (Ginsburg 2008: 89), uncertainty does not enter into the explanation. In contrast to the strategic model of behaviour by elites, which is at the centre of the political insurance and the political hegemony thesis, changing values and bottom-up mobilisation rely more strongly on a sociological than an economic model of behaviour and take a bottom-up perspective to constitutional rights, not limiting their analysis strictly to constitution drafting. From a different angle and closer to the interest of this volume, Blount et al. (2012) comparative empirical research on participation in constitution making show that there is an association between public involvement and rights: "Processes involving a referendum produce constitutions that are more likely to have virtually every category of right" (2012: 54). However, they are correct to be prudent to draw conclusions on the causality at work, as "the problem of endogeneity is endemic in efforts to tie process to outcomes" (2012: 57). As the authors point out, further research on the genesis of public participation in the constitution-making process will have to sort out whether such participation results from pressure and demand by the civic society or rather is part of an elite strategy or agreement in order to decrease uncertainty in terms of the acceptance, legitimacy but also constitutional endurance. As we know from research by the same authors, public participation in constitution making, in form of a referendum or the election of a constitutional assembly, increases the lifespan of a constitution in democratic systems (Elkins et al. 2009).

So far, the results produced by the Comparative Constitutions Project per se do not allow favouring the elitist over the popular account or vice versa. In addition, as the following section argues, the focus on national processes of constitution making needs to be complemented through an analysis of the emergence of international and supra-national rights regimes and concurring processes of diffusion.

3.3 The Internationalisation of Human Rights Regimes

Socio-legal scholars are also interested in international human rights regimes and courts. Over the last few decades, we can observe a proliferation of international judicial institutions. This proliferation went along with a fundamental change in the form of international courts. Such institutions are increasingly addressing cases between individuals and states or between private actors instead of settling conflict between nation states; their jurisdiction is more often compulsory, and most importantly, access rules have changed, hence allowing individuals to challenge their own states' decisions or policies before an international court (Alter 2006; Keohane et al. 2000). It is the "…empowerment of individual citizens to bring suit to challenge the domestic activities of their own government" (Moravcsik 2000: 217) that radically distinguishes international human rights regimes and courts from previous generations of international adjudication and international law. Hence, not only socio-legal scholars, but also international relations and European integration specialists address the multilevel characteristics of rights regimes and rights protection in their work from various theoretical angles. This section first discusses approaches in line with the political insurance thesis discussed above. Alternative explanations, based on various diffusion mechanisms and emphasising the ideational mechanism at work in this proliferation process, are discussed after. The focus will thereby be on the impact that international human rights regimes exert on national constitutions, i.e. how they influence their content. The literature on international human rights regimes is also interested in the question of whether the spread of rights and rights protection mechanism around the globe actually makes a difference regarding the actual protection and guarantee of human rights, e.g. whether they contribute to reduce the prevalence of rights violation. As this debate is more removed from the focus of this volume, this section only discusses the question of adhering to international rights regimes and their impact on the content of constitutions even though from a socio-legal perspective human rights in action need as much to be studied as formal human rights provisions on the international and national level.

3.3.1 European Convention of Human Rights and Other International Rights Regimes

By emphasising the aspect of delegating power to an independent international actor, Moravscik (2000) states a research puzzle comparable to the work by

Ginsburg and Hirschl discussed above in order to explain the creation of international human rights regimes in post-war Europe:

> Why would any government, democratic or dictatorial, favour establishing an effective independent international authority, the sole purpose of which is to constrain its domestic sovereignty in such an unprecedentedly invasive and overtly nonmajoritarian manner? (Moravscik 2000: 219)

Adherence to international human rights regimes is interpreted as a mean for governments to protect their democratic institutions from possible, undemocratic future challenges, "…thereby enhancing their credibility and stability vis-à-vis nondemocratic political threats" (Moravscik 2000: 220). Political uncertainty plays a crucial role in his argument of how governments ponder the potential benefits against the "negative" impact on their sovereignty. In fact, he proposes that those governments, who face greater uncertainty regarding their democratic future, will more likely accept the limitations that come with adhering to an international rights regime. New democracies will favour human rights regimes as a form of *insurance*, while well-established democracies see the loss in sovereignty to outweigh potential benefits. For new democracies, the creation of an international court to enforce the human rights will set constrains on future governments by creating a judicial body responsible for enforcing a human rights regime.

Empirically, Moravscik analyses the positions of European governments towards the creation of the ECHR. Based on the analysis of the negotiations, he distinguishes between those governments in favour of strong enforcement mechanism, i.e. compulsory jurisdiction and the possibility for individual petitions, from those opposing such mechanism (Moravskik 2000: 231). He finds support for his thesis in that new democracies (defined as democracies only since a date between 1920 and 1950) were those that supported strong enforcement mechanism (Austria, France, Italy, Iceland, Ireland and Germany), while established democracies were rather opposed. In short, theoretically and empirically, Moravscik's work emphasises the importance of uncertainty in how countries define their positions and, as is the case for Ginsburg and Hirschl, conceptualises the delegation of rights protection to international bodies as a form of insurance against future possible backlashes against the transition to (liberal) democracies.

In a different institutional context, for the International Criminal Court (ICC), Simmons and Danner (2010: 233) also argue that governments weight sovereignty costs against the possible gains through tying their hands by adhering to the ICC. In their research, they show that the states that are the most vulnerable to future prosecution through the ICC together with states that are the most unlikely to find themselves before the ICC are the ones that adhered the most readily:

> In fact, other factors being equal, unaccountable autocracies are more likely to commit themselves to the Court than are democratic countries with a recent history of such conflicts (Simmons and Danner 2010: 227).

In this case, the credible commitment has the function to *reduce political uncertainty* in terms of future violence, and signal to the domestic forces and opposing rebels, the credible commitment of the government to end the spiral of violence

because it risks to be prosecuted through the ICC. And indeed, the authors find empirical evidence of positive effects on peace processes of such early commitment. Again, political uncertainty is used to explain the puzzle of delegating more power to courts, in this case on the international level.

For both types of supra-national and international institutions, we can conclude that political uncertainty is an important—but not the only—factor explaining actor's strategy of promoting and adhering to an international institution promoting rights protection through the creation of a convention and enforcement institutions with the power to legally pursue violations. The following paragraphs discuss a different theoretical take on the same phenomenon of increased rights protection and delegation to courts on the international level, which operates with a more sociological model of human behaviour.

Civil society actors in general and social movements more specifically have been shown to be the important actors influencing rights and rights discourses. The literature on international human rights in particular points to the importance of social movements and civil society actors in the establishment of international human right regimes after the Second World War. As Tsutsui et al. (2012) in a literature overview show, there are many studies pointing to the important influence of specific movements and civil society actors in the push for establishing international human rights after the Second World War, in particular for the Universal Declaration of Human Rights (adopted in 1948, UDHR), but also in the further development of human rights regimes later on, starting from basic civic rights, over human rights, to women rights, indigenous rights to genocide and torture, etc. In particular, they also emphasise the importance of social movements for translating human rights into actual practice, while drawing attention to the limits of the mobilisation for human rights in terms of influencing actual practice.[4] Reviewing this mainly, IR focused literature on the genesis of international human rights regimes would demand a chapter on its own. Research from a socio-legal perspective is of more immediate interest to the purpose of this volume. Madsen (2007) proposes an interesting, more law focused account of the genesis of the ECHR.

Regarding the ECHR discussed above, Madsen (2007) takes ideas and legal actors centre stage for explaining its genesis and institutionalisation:

> …the objective is a sociology …that centers on the *circulation* of ideas and models – how competing ideas and models were being promoted by a host of actors using their specific national and international resources, expertise, and other capitals, and how these exchanges helped produce European law and institutions… (Madsen 2007: 139).

His historical analysis highlights the importance of legal actors and ideas in the genesis of ECHR. His analysis reveals that besides political factors initiating and spurring Europeanisation, legal actors and diplomats with legal careers were crucial in creating and circulating ideas from the national to the European level and back, ultimately generating a "novel doctrine" of autonomous human rights law

[4] As international relations scholars are well aware of, there is abundant debate between such more constructivist traditions of research versus realist approaches in IR. However, this is not the object of this chapter.

(Madsen 2007: 156) and creating new opportunities for national actors to simultaneously engage on national and supra-national arenas. This process created a forth and back of exporting and importing ideas on human rights across political levels and ultimately through EU enlargement beyond the initial borders of European integration (Madsen 2007: 157).

The literature cited to illustrate a more bottom-up and stronger socio-legal take on the emergence of supra-national human rights instruments does not apply a rational actor model in the sense of Buchanan, and uncertainty does not have any explanatory power. Specific historical circumstances create opportunities and also contribute to mobilise civil society actors promoting ideas and formulating demands as the literature overview by Tsutsui et al. (2012) explains. Madsen further emphasises the importance of elite legal actors in these processes and hence points to the importance of legal expertise and entrepreneurs in shaping supra-national institutions and their evolution. On the international level, "constitutionalisation" can thus be explained in rather parallel terms to what we observed for national processes, a combination of social demand and legal expertise and support—at least from a socio-legal perspective and within a constructivist approach to international relations. For national constitution drafting, the more important question is nevertheless whether and to what extent international human rights regimes influence the content of national constitutions.

3.3.2 Diffusion and Convergence in National Constitutions

There is a longstanding interest in "constitutional borrowing" (Epstein and Knight 2003) fostered by processes of globalisation (Slaughter 2000, 2003). Various aspects are studied under the label of constitutional borrowing, reaching from emulation of other nations' constitutions to citing foreign precedent (Epstein and Knight 2003: 196–197). Recent large-N research is particularly interested in the influence of international factors on the content of national institutions, and this will be the main focus of the literature reviewed in this section. Evidently, within this literature, various explanations compete in terms of the mechanism explaining diffusion, as Dobbin et al. (2007) distinguish: social construction, coercion, competition and learning. The following discussion will not review this debate, but rather concentrate on the empirical results: Are constitutions converging because of international human rights institution and globalised legal communities (Slaughter 2000, 2003)?

Beck et al. (2012) analysed to what extent "…modern national constitutions adapt to the global human rights movement…" (2012: 487) and test a straightforward hypotheses stating that the most recent constitutions and the constitutions of the most recent democracies incorporate human rights the strongest. Theoretically, they assume that the international environment, i.e. how prominent the human rights discourse is at the time of the adoption of the constitution, has an impact on the incorporation of human rights into the national constitution in addition to more traditional citizen rights. Their multivariate regression shows that while regime

characteristics and history are relevant, the ratification of human rights treaties and the global human rights discourse are strong predictors for the incorporation of human rights language into national constitutions.

Elkins et al. (2013) are also interested in the "role of international human rights documents in coordinating state behaviour with regard to national constitution making" (Elkins et al. 2013: 63). They notably want to verify the claim that we can observe a convergence among nation states in terms of human rights constitutionally guaranteed. Theoretically, they do not privilege one theoretical explanation for the convergence over another, but point to the fact that "theories 'on acculturation and socialisation'" (Elkins et al. 2013: 68) imply that the internationalisation of human rights would lead to some convergence in national constitutions. Empirically, they look at 680 "constitutional systems" from 1789 to 2006. Their data document that the number of countries with rights provisions in their constitution has increased over time. At the same time, constitutions include a greater number of rights over time (Elkins et al. 2013: 71). Not all rights have had the same degree of success though:

> Some rights – for example, freedom of expression and freedom of religion – appear to be so central that almost nine of every ten contemporary constitutions include them. The vast majority of rights, however, have penetrated fewer than half of contemporary constitutions and appear to be optional constitutional features (Elkins et al. 2013: 72).

There seems to be a difference between the trajectories of first- and second-generation rights, where first-generation rights such as freedom of expression, freedom of association or freedom of religion have become almost universal, which is not the case for second-generation rights such as economic and social rights (Elkins et al. 2013: 73). In terms of the role of international human rights instruments, they point to the importance of the UDHR and International Covenant on Civil and Political Rights (ICCPR) for the proliferation of rights in national constitutions:

> Constitution writers working under the umbrella of international rights treaties are more likely to pattern their documents after the international instruments, but they are even more likely to do so if their country has ratified the instrument. These findings are consistent with a view in which international instruments provide a focal set of norms for constitution makers" (Elkins et al. 2013: 91–92).

Go (2003) came to a similar conclusion in terms of the importance of international human rights for the content of national constitution in post-colonial states. Like Elkins et al., he rejects the convergence thesis. Even though isomorphism increased after 1990s, he also observes a complexification and differentiation:

> Thus, if globalizing constitutionalism has emerged at all, it is one wracked with divergence as much as convergence, a differentiation in content as much as a homogenization in form (2003: 90).

This might be the result of various different mechanisms of diffusion being at play at the same time, not to forget the importance of past constitutions and legal heritage for drafting new constitutions. As Goderis and Versteeg argue, which rights are constitutionally entrenched is influenced by other countries' constitutions in

particular those with similar legal traditions and the same former colonising power (2013: 33). Economic dependence also is crucial as countries tend to emulate the constitutions of their principal aid donors (2013: 33). Hence, there might be learning, acculturation and coercion processes at work at the same time in order to explain transnational influence on rights provisions in constitutions.

Within the literature discussed in this section, national constitution making is not independent anymore from international and transnational processes, even though the precise mechanisms at work in these processes of diffusion remain contested. Furthermore, it would be erroneous to think that processes of emulation and diffusion in constitution drafting are a fairly recent phenomenon, mainly concerning constitution drafting related to the waves of decolonisation and democratisation after the Second World War. Elkins has convincingly argued that the diffusion perspective is also useful for explaining the first wave of democratisation and constitution drafting in the nineteenth-century Europe (Elkins 2010).

4 Conclusion

The preceding literature review shows that a large part of socio-legal scholarship is focusing on the mobilisation and interpretation of constitutional norms and not on constitution drafting per se. Recently, there has been more research on constitution drafting given greater efforts to collect comparative data on constitutions (see the work by Elkins, Ginsburg and others cited above). By emphasising the importance of law in action, this research reminds us of the fact that constitution making is not limited to times of constitution drafting but represents a continuous process through which constitutional norms evolve—sometimes in important ways without any formal changes at all. Recent research has also made additional efforts to connect national episodes of constitution drafting to international processes of generating and reinforcing international human right regimes. The literature on the proliferation of human rights reveals that the focus on the national level provides a too limited perspective. Processes of diffusion are important in terms of the types of rights and the extent to which human rights are entrenched in national constitutions.

The literature review points to an ongoing debate between demand and supply, between bottom-up perspectives and top-down elite-driven explanations. Uncertainty enters mainly into the latter approach in order to explain the decision of political elites to adopt judicial review and entrench written rights in the national constitution or in order to understand why national governments are willing to tie their own hands by adhering to international rights institutions. Electoral uncertainty is used to explain why elites would transfer power to other institutions through judicial review and entrenching rights. In this perspective, the spread of constitutional review and rights protection around the globe needs to be primarily explained on the basis of an analysis of political and economic power relations at the national and international level. Demand-side and bottom-up explanations do

not negate the important role of elites in these processes, but emphasise preceptorial power and how changing ideas and values ultimately allow for explaining the global spread of rights protection.

It seems fair to conclude that a good part of the literature takes Rawl's veil of ignorance seriously in the opposite sense: actors interpreting or making constitutions are never stripped of their roles and positions in history and society. Research therefore asks how their position in society and history influences their ideas, their interest and behaviour in the interpretation and mobilisation of constitutional provisions or in the formulation of such provisions. Legal ideas and expertise, thereby, constitute an important source of knowledge as socio-legal research demonstrates.

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