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Structural Rights

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Abstract

This working paper develops the concept of structural rights as a foundational source of the separation of powers. It starts from the understanding that the traditional division in constitutional law between rights provisions on the one hand and structural provisions on the other is outdated and does not accurately reflect the current complex reality of constitutional law. Structural rights are rights provisions that - when enforced - impose structural obligations upon the state, meaning that they have the power to alter the structure of government, thereby transcending the traditional division. This working paper first develops the concept of structural rights, with reference to other relevant literature. Then, it highlights examples of structural rights in practice, both on the national and supranational level. Finally, it connects the concept of structural rights to the separation of powers, showing how the former can be a foundational source of the latter.

Keywords

structural rights, structural provisions, rights provisions, separation of powers

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Structural Rights

Mathieu Leloup♣

1 Introduction

It will generally be met with little resistance to state that the separation of powers is a structural principle. As a doctrine of constitutional law it is occupied by questions of how the institutional architecture of a state is given shape and ought to be given shape. When discussing the separation of powers, we talk about institutions; about constitutional actors, and about the way in which these actors are composed, the manner in which they function, and the institutional and functional relationships between them.

As a structural principle, the separation of powers is generally considered not to create any clear and enforceable (fundamental) rights. Of course there is a connection between the separation of powers and fundamental rights. As a principle that is primarily concerned with the safeguarding of political liberty by preventing authoritarian rule, it is not difficult to see that a well-functioning system of separation of powers is instrumental to the effective protection of fundamental rights in practice.[1] For some, protecting fundamental rights is even one of the rationales of the separation-of-powers theory.[2] Yet, in and of itself the principle does not create or bestow any concrete rights. In general, the separation of powers is concerned about the institutional and functional playing field in which rights can flourish, rather than the content of the rights themselves.

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[1] While preventing authoritarian rule by dispersing powers is probably seen as the essence of the principle of separation of powers, recent scholarship tends to agree that this is not the only rationale behind the principle. As mentioned by Aileen Kavanagh, the separation of powers is a multi-value ideal which promotes a plurality of normative ends, including efficiency and safeguards, autonomy and constraint, specialisation and control. See: Aileen Kavanagh, *The Collaborative Constitution*, CUP, 2024, 96. See also her chapter on the rationales of the separation of powers in this volume.

[2] For example: Bruce Ackerman, "The New Separation of Powers", *Harvard Law Review* 2000, 640.

This way of looking at things – with the separation of powers being related to structure rather than rights – is well-established in legal thinking. Traditional constitutional scholarship indeed creates a distinction between two types of constitutional provisions: rights provisions on the one hand and structural provisions on the other. This traditional understanding keeps those two types of constitutional provisions neatly separate from each other; structural provisions do not create rights and rights provisions do not affect structure.

However, more recent scholarship has begun to show that this traditional dichotomy between rights and structure does not accurately reflect the current complex reality of constitutional law. More specifically, some authors have shown that certain rights may, when enforced, generate, extinguish and allocate government power, in the same way as structural provisions would. These so-called 'structural rights' must thus be seen as some kind of hybrid provisions,[3] straddling – or even transcending – the rights-structure dichotomy,[4] that underpins traditional constitutional scholarship. For example, the right to an independent tribunal – likely the example *par excellence* of a structural right – has given rise to an extensive and intricate case law that draws the acceptable boundaries between the judicial, executive and legislative branches, and dictates how the institutional and functional relationships between these branches should be given shape. Enforcing this right may then force a state to alter those relationships, thereby changing the very structure of the state apparatus.

This concept of structural rights is also important for the separation of powers. Given that those rights can entail structural effects, and for example alter the form, functioning or composition of government institutions and the relationship between them, they can affect the very way in which a system of separation of powers is given shape and operates within a given jurisdiction. These structural rights may then be understood as a foundational source of how a system of separation of powers operates.

The concept of structural rights is therefore theoretically important. It shows, first, that the traditional distinction between rights provisions and structural provisions that has underpinned general constitutional scholarship for a while now is incorrect, at the very least imprecise. Second, as further discussed

[3] F. Andrew Hessick and Elizabeth Fisher, "Structural rights and incorporation", *Alabama Law Review* 2019, 179.
[4] Ozan Varol, "Structural Rights", *The Georgetown Law Journal* 2017, 1005.

below, the fact that rights provisions may entail structural effects, implies that elements relating to the very structure of government can be challenged and litigated by individuals before a court. Put sharply, structural rights imply that choices concerning the very design of a state are no longer the exclusive prerogative of political discretion via democratic decision-making, but are becoming the subject of judicial rulings on individual enforceable rights.

Despite its theoretical importance, the idea of structural rights has so far remained conceptually underdeveloped. This chapter then aims to do two things. First, it will build on the limited existing literature relating to the concept of structural rights in order to attempt to further flesh out the concept. Second, it will connect the concept of structural rights to the principle of separation of powers, and show how it is important for a full and accurate understanding of how the separation of powers operates in practice in a given jurisdiction.

To do this, the chapter is structured as follows. The next section will develop the concept of structural rights, with reference to other relevant literature, and explain how this concept will be understood and applied throughout the rest of the chapter. Section 3 then makes it more concrete and will provide some examples of structural rights on the national and international level, showing that there is a broad range of (fundamental) rights – more than one might expect at first glance – that can bring about such structural effects, and that there is equally a wide variety in those structural effects. Section 4 then takes a step back and discusses the legal and theoretical dynamics that are at play behind the structural rights. Finally, section 5 connects the concept of structural rights to that of the separation of powers, and shows its importance as a foundational source for separation-of-powers theory.

2 Structural rights as a concept

As mentioned in the introduction, traditional constitutional doctrine makes a distinction between two types of constitutional provisions: rights provisions on the one hand and structural provisions on the other. Rights provisions restrict government power and protect individuals from the government by either prohibiting it to act – also known as negative obligations – or requiring it to act – also known as positive obligations. Structural provisions, by contrast, establish or allocate government power among and within institutions.

This rights-structure dichotomy is most explicitly present in American constitutional law scholarship.[5] Yet, it underpins constitutional thinking in other parts of the world as well.[6] In fact, this distinction is reflected quite explicitly in the texts of the constitutions themselves, which place fundamental rights provisions in a separate chapter than those provisions which establish and regulate the institutions.

The two types of provisions have traditionally been understood to be conceptual opposites,[7] in the sense that structural provisions do not create rights for individuals and rights provisions have no bearing on the structure of government. More recent scholarship, however, has bridged this dichotomy between structural provisions and rights provisions via the concept of structural rights.[8] In the existing literature, the concept of structural rights has been defined in differing ways, which are not always reconcilable. A first step here will be to define how the concept of structural rights will be understood throughout this chapter, and indicate how that definition relates to the understanding of the concept in other literature. In this chapter, structural rights are understood to be those rights that, when enforced, impose structural obligations upon the state, meaning that they have the power to alter the structure of government, including the very existence of government institutions, the manner in which they are composed, and the way in which they relate to other government bodies.[9]

Structural rights are thus rights provisions that, when enforced, may force a state to amend part of its structure. In other words, they are rights provisions

[5] Among others: Jessica Bulman-Pozen and Miriam Seifter, "The Right to Amend State Constitutions", *The Yale Law Journal Forum* 2023, 201; Tavi Unger, "Mandatory Voting in Constitutional Context", *Harvard Civil Rights-Civil Liberties Law* Review 2022, 302; Daryl J. Levinson, Rights and Votes, 121 YALE L.J. 1286, 1293 (2012); Jules Lobel, Separation of Powers, Individual Rights, and the Constitution Abroad, 98 *IOWA L. REv.* 1629, 1631 (2013); Aziz Huq, "Standing for the Structural Constitution", *Virginia Law Review* 2013, 1449; Neil Kinkopf, "The Statutory Commander in Chief", *Indiana Law Journal* 2006, 1169-1197.

[6] Just by way of example: Scott Stephenson, "Constitutional Shoehorning", *Sydney Law Review* 2024, forthcoming; Adrienne Stone, "Judicial Review Without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review", *OJLS* 2008, 3; Kemal Bokhary, "Judicial Striking-Down of Unconstitutional Legislation", *Hong Kong Law Review* 2020, 77.

[7] Ozan Varol, "Structural Rights", *The Georgetown Law Journal* 2017, 1003.

[8] See also recently, stressing the interdependence between rights and structure: Vicki C. Jackson, "Holistic interpretation and the interdependence of constitutional structures and rights: an essay in honor of Cheryl Saunders", *Comparative Constitutional Studies* 2024, 196-217.

[9] See for this definition already: Mathieu Leloup, "The Concept of Structural Human Rights", *Human Rights Law Review* 2020, 484.

that bring about structural effects. This is different than Yasmin Dawood's understanding of structural rights. She defines structural rights as individual rights that take into account the broader institutional framework within which rights are defined, held, and exercised. A structural rights approach, she argues, is thus attentive to the larger social and political landscape within which individuals hold and exercise their rights.[10] She developed this concept with a view to democratic rights, which are in her view, particularly salient for such a structural view.[11] Dawood's understanding of structural rights deviates from the one that is adopted in this chapter. While she equally bridges the outdated conceptual divide between rights and structure, her proposed approach sees structure as being contained within the very definition of a right,[12] rather than as rights provisions that exhibit structural characteristics.

My understanding of structural rights is closer connected to that of Ozan Varol. In a 2017 article he pointed out that certain rights straddle the rights-structure dichotomy and complicate conventional constitutional theory. While textually those provisions are rights provisions, they exhibit structure-like characteristics because they serve the functions of generating and distributing power.[13] At its core, Varol's understanding of structural rights is the same as mine. Where I deviate from his view is in his understanding of when exactly a structural right generates structural effects. Varol argues that *all* rights have the capability of generating such structural consequences. He conceptualizes such rights on a spectrum, with some rights generating direct structural consequences and others doing so only indirectly,[14] for example because some rights require a state apparatus to exist in order to administer and enforce them.[15] Such an indirect understanding of structural consequences, in which all rights can obtain a structural character if one thinks hard enough about the downstream effects of their existence, is, in my eyes, overly broad and risks muddling the conceptual clarity and even usefulness of the concept

[10] Yasmin Dawood, "Electoral fairness and the law of democracy", *University of Toronto Law Journal* 2012, 519.
[11] Yasmin Dawood, "Effective Government and the Two Faces of Constitutionalism" in Vicki Jackson and Yasmin Dawood (eds.), *Constitutionalism and a right to effective government?*, CUP, 2022, 54.
[12] Yasmin Dawood, "Electoral fairness and the law of democracy", *University of Toronto Law Journal* 2012, 520.
[13] Ozan Varol, "Structural Rights", *The Georgetown Law Journal* 2017, 1010.
[14] Ozan Varol, "Structural Rights", *The Georgetown Law Journal* 2017, 1011.
[15] Ozan Varol, "Structural Rights", *The Georgetown Law Journal* 2017, 1014. He for example also suggested that the right to a criminal defence attorney is structural in nature, because it may require the establishment of supporting institutional structures, such as a public defender's office. See: Ozan Varol, "Constitutional Stickiness", *University of California, Davis* 2016, 932.

of structural rights. In my view, a key part of structural rights is that they entail direct structural effects.

At the same time, I am not convinced that these structural effects are limited to those instances where a structural right *allocates* government power, meaning that it dictates exactly which government institution should wield what power, as has been mentioned by others.[16] This is too limited an understanding of the effects that structural rights may have in practice. As will be shown further in this chapter, structural rights may also lead to changes in the composition of a government body, or alter the institutional and functional relationships between two institutions of different branches of government. In other words, arguing that structural rights only have such an allocative power, does not do justice to the richness of structural consequences that we can see taking place in practice.

Thus, to sum up, in this chapter, structural rights will be understood as rights provisions which entail structural effects. Those effects must be direct, meaning that the enforcement of the right must immediately bring about the structural consequences. There is, nevertheless, a variety in these structural effects. Structural rights may lead to the establishment or abolishing of government institutions, they may amend the ways in which those bodies are composed, or how their members are assigned, and they may change the functional and institutional relationship between two government bodies, either between two different branches of power or within one and the same branch.

The idea of structural rights should further be distinguished from the concept of structural reform litigation. The latter, by definition, pursues structural reform. The entire reason behind the legal claim is an attempt to challenge and rectify something that is considered a structural or widespread failure of the state.[17] This intentional element is not necessarily present with structural rights. As will become clear below, the structural consequences that structural rights entail, may perfectly well be an unintended consequence of an individual vindicating his or her rights.

[16] F. Andrew Hessick and Elizabeth Fisher, “Structural rights and incorporation”, *Alabama Law Review* 2019, 179.
[17] Alexandra Huneeus, "Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts”, *Yale Journal of International Law* 2015, 1-40; Abram Chayes, “The Role of the Judge in Public Law Litigation”, *Harvard Law Review* 1976, 1281-1316.

3 Structural rights in practice

The previous section aimed to give a definition of how the concept of structural rights is understood throughout this chapter. At this point, some may be sighing in exasperation, asking what any of this is exactly supposed to mean in practice. This section will hopefully alleviate these concerns, by giving some examples of structural rights and their structural effects. As will be shown, such examples can come from the supranational level,[18] as well as from the national level.

By far the clearest structural right is the right to a fair trial by an independent tribunal, which is present in all human rights treaties, as well as most domestic constitutions. The word 'independent' is inherently relational, and denotes a relationship between the judiciary and other government bodies. It thus automatically implies the structural features of a state.[19] By now, supranational and national jurisdictions have developed an incredibly rich case law on what constitutes a sufficiently independent judiciary. This case law has established detailed rules concerning the manner of appointment, status, career and remuneration of judges, judicial discipline, and the way in which judges can be removed from office, including impeachment, all of which indicate how the institutional and functional boundaries between the judiciary and the political branches should be given shape. By ruling on the right to an independent tribunal, the domestic and supranational courts thus automatically draw the lines between the judiciary and the political branches. Whenever a court finds a violation of the right to an independent judge, this immediately implies a duty for the government to redraw these boundaries in order to fully respect the judicial independence, thereby changing the very structure of the state.

More recently, the right to an independent tribunal has also been used as a vehicle to assess the composition of judicial councils. In its case law, the

[18] On the impact that supranational courts can have on the domestic separation of powers, see my other chapter in this volume. See also: Mathieu Leloup, "The constraints on the domestic separation of powers by supranational courts", *International Journal of Constitutional Law*, forthcoming; Christina Kamm, *EMRK und Gewaltenteilung*, 2023; Aikaterini Tsampi, *Le Principe de Séparation Des Pouvoirs Dans La Jurisprudence de La Cour Européenne Des Droits de l'homme*, LGDJ, 2019.

[19] See: Joost Sillen, "The Concept of "internal judicial independence" in the case law of the European Court of Human Rights", *European Constitutional Law Review* 2019, 105-106; Stefan Trechsel, *Human Rights in Criminal Proceedings*, OUP, 2005, 46; David Kosař en Samuel Spáč, "Judicial Independence" in Jeff King and Richard Bellamy (eds.), *The Cambridge Handbook on Constitutional Theory* (forthcoming).

Strasbourg Court requires that at least half of its members are judges.[20] At the same time, the African and European human rights courts have indicated that the Minister of Justice should not be an *ex officio* member in such a body.[21] As a result of this case law, several countries have had to amend the composition of their judicial council, thereby altering the balance between its judicial and political members.[22]

Such structural consequences are, however, not limited to the right to a fair trial by an independent tribunal, but can also stem from other rights, such as the right to an effective remedy. A clear example of this can be found in the judgment of *Mugemangango* by the Strasbourg Court. In that judgment, the Court ruled that the purely parliamentary system of election dispute resolution in Belgium, in which parliament itself rules in final instance over the validity of its own elections, cannot be seen as an effective remedy for challenges relating to the right to free and fair elections.[23] Rather, an appeal should be organized with a body that is sufficiently impartial, the decision-making power of which is sufficiently circumscribed, and which offers sufficient procedural safeguards. As a reaction to this judgment, the Belgian government decided to do away with the parliamentary system of election dispute resolution, and provide for a judicial review by the constitutional court.[24] In doing so, the Court's judgment changed the institutional relationship between the legislature and the judiciary in Belgium,[25] entailing structural effects.[26] In the same vein, the African Court has an extensive case law on the question when national election commissions can be seen as sufficiently independent.[27]

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[20] Most recently, with further references: ECtHR 23 January 2025, Case No. 20140/23, *Suren Antonyan v. Armenia*, para. 118.

[21] ECtHR 29 January 2023, Case No. 10473/05, *Cataña v. Moldova*. ACtHR 1 December 2022, Case No. 028/2020, *Houngue Éric Noudehouenou v. Republic of Benin*.

[22] For example in Ukraine after the Volkov judgment. See on this the action reports, available on HUDOC EXEC.

[23] ECtHR (GC) 10 July 2020, Case No. 310/15, *Mugemangango v Belgium*.

[24] See the action report, available on HUDOC EXEC.

[25] For a detailed analysis of the consequences of this judgment in the Belgian legal order: Mathieu Leloup, "Kroniek van een aangekondigde verdragsschending: het onderzoek van de geloofsbrieven getoetst aan de Europese mensenrechtenstandaarden", *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 2020, 383-407.

[26] For the same point of view, with explicit reference to the concept of structural rights: Eirik Holmoyvik, "The Right to an Effective (and Judicial) Examination of Election Complaints" in Philip Czech a.o. (eds.), *European Yearbook on Human Rights,* 2021, 560.

[27] ACtHR 13 June 2023, *Bob Chacha Wangwe and Legal and Human Rights Centre v United Republic of Tanzania*. And the references cited in this judgment.

While the right to a fair trial by an independent tribunal and the right to an effective remedy seemingly have an inherent link to government structure, other rights that at first glance have no such link can just as well bring about structural effects, depending on the circumstances in which they are invoked. Take the judgment of *Özpinar*, for example. In this case, the Turkish High Council of Justice had imposed a disciplinary sanction on Ms. Özpinar, a Turkish judge, among others on the basis of the clothes she wore and the relationships she kept. The Strasbourg Court tackled the case under the right to respect for private life, a right seemingly far removed from structural considerations. The crux of the case concerned the question whether the interference had been surrounded by sufficient procedural safeguards. Specifically, the Court required that there should be a subsequent review by an impartial and independent body that can examine all questions of law and fact. The Court ruled that Özpinar had not been afforded such minimal guarantees. In doing so, it indicated that the Turkish High Council was not an independent an impartial body. In wake of this judgment, Turkey decided to allow for a judicial review of the decisions of the High Council, which altered the balance of power between two important constitutional bodies, and gave this judgment important structural effects in the Turkish legal order.

So far, the examples that were given stem from case law of the supranational courts. Yet, one can just as well find important examples from the national level. For one, the national courts may just as well apply the right to an independent tribunal, enshrined in the domestic Constitution. Another excellent example can be found in the strengthened principle of legality that exists in certain jurisdictions. The Belgian and Dutch Constitutions, for example, only allow limitations on fundamental rights when they have a basis in formal legislation, adopted by Parliament, thereby in principle excluding such limitations based solely on norms issued by members of the executive.[28] In Belgian legal doctrine, this has been referred to as “the right to the

[28] The supranational fundamental rights instruments generally do not have a similar requirement. Only when it comes to the right to a tribunal established by law, and the organization of the judiciary, do the supranational courts require the legal framework to be laid down in formal legislation. See: *Guðmundur Andri Ástráðsson v. Iceland*, App. No. 26374/18, para. 214 (Dec. 1, 2020); Case C-542/18/ RX-II, Review *Simpson v. Council* (26 March 2020); Case of *Cajahuanca Vásquez v. Peru*, Inter-Am. Ct. H.R., para. 108 (Nov. 27, 2023)

legislature".[29] These domestic fundamental rights provisions thus have important effects in terms of the division of competences between the legislative and executive branch. The exact way in which this works is slightly different between the Dutch and Belgian legal systems. In the Netherlands, the text of the constitutional provision itself indicates for which fundamental rights the legislature can delegate its power to limit the fundamental right in question to the executive.[30] The Belgian constitution remains silent on this matter. Rather, the Belgian judiciary has accepted that the legislature may delegate the power to specify certain details in sub-legislative norms, on the condition that the essential elements are laid down by parliament in formal legislation.[31] It is the Belgian courts that decide what exactly those essential elements are for each fundamental right and police whether this condition has been met in each instance.[32] In doing so, when interpreting these rights, the courts may bring about important structural effects, shaping and defining the functional balance of power between the legislative and executive branches.[33]

4 The dynamics of structural rights

The previous section set forth some examples of structural rights. It aimed to show that a broad range of (fundamental) rights – more than one might expect at first glance – can bring about such structural effects, and that there is equally a wide variety in those structural effects. Structural rights can have an impact on nearly every aspect of a country's organizational structure, both on the level of the institution itself, as well as its relationship to other government bodies. This section then builds on those examples and aims to elucidate on a more abstract, theoretical level what legal dynamics are at play with those structural rights.

[29] Jan Velaers, "Het 'recht op de wetgever': beschouwingen over de voorbehouden en de residuaire bevoegdheden" in Robert Anders (ed.), *En hommage à Francis Delpérée. Itinéraires d'un constitutionnalist,* Bruylant, 2007, 1631-1641.

[30] Marten Burkens a.o., *Beginselen van de democratische rechtsstaat*, 9th ed., Wolters Kluwer, 2022, 140.

[31] Stefan Sottiaux, *Grondwettelijk Recht*, 2nd ed., Intersentia, 2021, 320.

[32] For example: Constitutional Court (Belgium) 10 March 2022, nr. 33/2022, B.13.1. In this judgment, the Court indicated that the essential elements in respect of the processing of personal data are 1) the category of data processed; 2) the category of persons involved; 3) the objective pursued by the processing; 4) the category of persons having access to the data processed; and 5) the maximum retention period of the data.

[33] Similar legal constructions exist in other jurisdictions as well. In German constitutional law, for example, the *Bundesverfassungsgericht* has developed the *wesentlichkeitsdoktrin*, in which it requires that all essential decisions which directly affect citizens shall be subject to legislative decision-making. BVerfGE 40, 237, 249.

A first observation here is that it is mostly *fundamental* rights that bring about such structural effects, whether they are enshrined in an international treaty or in a domestic constitution. The reason as to why it is mostly fundamental rights that function as structural rights is not difficult to understand. Fundamental rights, generally, concern the vertical relationship between an individual and the state,[34] meaning that these rights inherently address the state and its legal obligations. This link with the state is largely absent in more traditional, non-fundamental rights, such as renters law or estate law, which concern the horizontal relationship between private actors. While I do not think that it is entirely impossible that such rights can equally entail structural effects in certain instances,[35] the likelihood of this is much lower.[36]

Secondly, while certain structural effects are a direct consequence of the text of the rights provision,[37] often those effects are only really given shape when those provisions are invoked before the courts. The right to an independent tribunal, for example, a structural right *par excellence*, relies heavily on judicial interpretation for it to become more concrete in its structural effects. As a consequence of this, the exact content and requirements of similar structural rights provisions can differ between jurisdictions, depending on the interpretations by the competent courts.[38]

Thirdly, and relatedly, it seems possible to make a distinction between certain types of structural rights. Some rights can be understood to have an inherent structural nature. Again, the right to an independent tribunal is probably the

[34] Leaving aside for a second the so-called *drittwerkung* or horizontal application of fundamental rights.

[35] This is of course also linked to the definition of structural rights that one adopts. If, like Varol, one takes indirect structural effects to count as well, even renters laws may be understood to have structural effects, because a bureaucratic structure, as well as housing courts, are established to execute and enforce those provisions.

[36] One example that one might consider as a purely private law norm that acted like a structural right, can be found in a recent judgment by the court of first instance in Brussels. In this judgment, the court found that the Belgian state was liable for damages that had occurred because of a structural problem in the Belgian judicial system to guarantee enough judges to make sure that pending cases can be dealt with within a reasonable time. Depending on how one wants to interpret the judgment, it can be read as obliging the government to appoint the number of judges that the law requires, giving it structural effect. Nevertheless, this is also not an entirely pure example of a private law norm acting as a structural right, because it resulted from a claim for compensation against the government, giving it also a more vertical dynamic.

[37] Think of the allocative power of the fundamental rights provisions in the Belgian and Dutch Constitutions.

[38] See for example the Supreme Court of Canada who interpreted the right to an independent and impartial court to require an objective, independent and effective process for determining judicial remuneration in case judicial salaries should be reduced. According to the Court, this required an independent commission or other body, intermediary between the courts and the legislature. *Reference re Remuneration of [Provincial] Judges* [1997] 3 SCR 3. No such requirement can be found in, for example, the case law of the European Court of Human Rights.

clearest example. As mentioned above, the idea of independence is inherently relational and thus denotes the relationship between the judiciary and other branches of government. It thus automatically implies a country's institutional architecture. Yet, it is important to point out that rights can also assume a structural character as a result of external factors. One of those factors is the identity of the applicant. In the *Özpinar* case, for example, the applicant, a judge, complained about a disciplinary sanction violating her right to respect for private life, a fundamental right that seemingly has no inherent structural nature. In its judgment, the Court ruled that this right had been violated, because the sanction had been imposed by a body that did not offer sufficient safeguards of independence, which meant that the interference was not necessary in a democratic society.[39] The structural effects of the case at hand are thus a consequence of the particular institutional position of the applicant and the particular constitutional bodies,[40] such as a judicial council, that this institutional position implies.[41]

In this light, the idea of procedural (fundamental) rights is relevant to the concept of structural rights. While certainly not all procedural rights are structural rights as they have been defined in the chapter, there is a connection between the two concepts. The increasing focus on sufficient procedural safeguards, and the requirement for these safeguards to be effective – among others by being conducted independently – can give a structural character to fundamental rights that have seemingly no structural character whatsoever. The *Özpinar* case provides an excellent case in point of this dynamic.

Fourth, the structural effects of structural rights are connected to the distinction between concrete application and abstract interpretation of (fundamental) rights provisions. When rights provisions are applied to the specific circumstances of an individual case, underlying this concrete

[39] ECtHR 19 October 2010, Case No. 20999/04, *Özpinar v Turkey*.

[40] The same can also be said for, for example, members of parliament. A good example of this can be found in the case of Karácsony (ECtHR (GC) 17 May 2016, App. No. 42461/13 a.o., *Karácsony v Hungary*. In this case a member of parliament had received a disciplinary sanction by the speaker of the house. Relying on article 10 ECHR and his freedom of expression, as well as the right to an effective remedy, he challenged this sanction and argued among other things that there should have been a possibility of judicial review of the sanction, thereby implying the relationship between parliament and the judiciary.

[41] See for this point: Mathieu Leloup, "The Concept of Structural Human Rights", Human Rights Law Review 2020, 499. In the same sense: Christina Kamm, *EMRK und Gewaltenteilung*, 2023, 800.

application is a more abstract analytical exercise of how that right should be interpreted. Even in the absence of a binding theory of precedent, one can expect that courts will interpret and apply those rights provisions in the same or a similar manner when they are confronted with the same issue again in a similar case.[42] Because of that, it can be expected that people who are in an identical or similar position as a person in whose case a violation of their rights was established, may also claim a violation of that right. In the context of the European Court of Human Rights, mention is made of the *res interpretata* effect, which makes the Court's interpretation of the Convention binding *erga omnes*, at least in its effects in practice.[43]

This interpretational carry-over beyond the confines of the case is an important dynamic of what provides rights their structural character. If a court finds a violation of an individual's right to an independent tribunal, behind that concrete ruling is the more abstract assessment that the current institutional architecture does not suffice to guarantee the independence of that tribunal. In similar vein, when the Belgian Constitutional Court holds that a certain law violates the principle of legality enshrined in the right to respect for private life, because the legislature did not sufficiently determine the essential elements of the interference with that right in formal legislation, this individual and concrete assessment inherently includes a more abstract interpretation of the balance between the legislature and the executive. In other words, every right can be understood as having an inherently dual nature. On the one hand, each (fundamental) right primarily provides individuals with certain well-defined rights in specific circumstances. On the other, these (fundamental) rights provisions, as interpreted by the courts, simultaneously constitute an abstract benchmark, a yardstick against which a country's institutional and functional framework can be assessed,[44] allowing it to have structural consequences.[45]

[42] See for example for the Strasbourg Court: ECtHR 9 June 200, App. No. 33401/02, *Opuz v Turkey*, para. 163. The Court holds that it will consider whether national authorities have sufficiently taken into account the principles flowing from its judgments, even when they concern other states.

[43] Christos Giannopoulos, 'The Reception by Domestic Courts of the *Res Interpretata* Effect of Jurisprudence of the EuropeanCourt ofHuman Rights' (2019) 19 *Human Rights Law Review* 537 at 538; Oddný Mjöll Arnardóttir, *'Res Intepretata, Erga Omnes* Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights' (2017) 28 *European Journal of International Law* 819

[44] Compare to: Frédéric Krenc, ""Dire le droit", "rendre la justice". Quelle Cour européenne des droits de l'homme", *Revue trimestrielle des droits de l'homme* 2018, 311-346.

[45] In this sense: Mathieu Leloup, "The Concept of Structural Human Rights", *Human Rights Law Review* 2020, 486. Confirming this point of view: Christina Kamm, *EMRK und Gewaltenteilung*, 2023, 797.

5 Structural rights and the separation of powers

This final substantive section of the chapter then brings the topic full circle. It aims to link the concept of structural rights to the principle of separation of powers and discusses why the former is important for a proper and full understanding of the latter.

The above sections have shown that rights provisions – whether on the national or international level – can be the basis for the establishment or abolishment of government institutions, a change in the ways in which those bodies are composed, or how their members are assigned, as well as changes in the functional and institutional relationship between two government bodies, either between two different branches of power or within one and the same branch. They thus show that the enforcement of certain concrete subjective rights may immediately imply more abstract, objective consequences for the form and functioning of a system of government. As such, they may be a key foundational source of how a system of separation of powers operates in a given jurisdiction. The concept of structural rights is thus clearly relevant for our understanding of the separation of powers.

Yet, the fact that enforcing specific fundamental rights before a national or international court may affect the very structure of government has some significant implications, as it means that the separation of powers, much more than one may think at first glance, has become something that can be challenged and litigated.[46] It also somewhat qualifies the statement found in certain legal literature that there is no such thing as a "right" to separated powers.[47] While there may indeed not be an encompassing right to "the" separation of powers, if such a thing were to exist at all, this chapter shows that one may very well attempt to litigate specific elements of a domestic system of separation of powers before a court. The condition is, however, that one can frame this element in light of an enforceable structural right. Given the overall content of fundamental rights catalogues, the application of structural rights will most often be geared towards the protection of the independence of the judiciary, and to a lesser extent the legislature. Yet, these

[46] Elizabeth Earle Beske, 'Litigating the Separation of Powers', 73 *ALA. L. REV.* 823 (2022). See also my chapter on supranational courts in this book.

[47] Aikaterini Tsampi, *Le Principe de Séparation Des Pouvoirs Dans La Jurisprudence de La Cour Européenne Des Droits de l'homme*, LGDJ, 2019, 35-36.

structural effects do not necessarily have to be limited to those elements of the separation of powers. For example, the freedom of expression has also been used to underscore the importance of the independence of media regulators, making it relevant for fourth branch institutions.[48] In the same sense, I do not exclude that structural rights may be invoked to protect and empower some aspect of the executive branch, provided that the right case is brought before the courts.

As a consequence, the concept of structural rights underscores the crucial position of the judiciary – whether domestic or international – when it comes to the way in which a system of separation of powers operates within a given jurisdiction. It shows that, to really understand the dynamics and the complexity at play within any given system of separation of powers, one must also study the case law concerning structural rights. Even though it is not uncommon for domestic courts – especially constitutional courts – to be tasked with refereeing some elements of the balance between the branches of powers,[49] our understanding of structural rights shows that essentially any court may affect this balance, provided that the right case comes before it. The concept of structural rights thus, to an extent, negates the explicit choice made by some (constitutional) legislatures and affords all courts the competence to police issues of the separation of powers.

In this light, courts should be well aware of the structural implications that their individual-rights rulings may have.[50] What may look like a simple case about an individual right, may indirectly bring about important structural effects, which establish significant limitations or require significant changes in terms of the domestic separation of powers. Such cases may certainly help in making the government structure more compliant with fundamental rights requirements and may force the government to amend some problematic elements of the functional or institutional framework for which there is little

[48] See: ECtHR (GC) 5 April 2022, Case No. 28470/12, *NIT S.R.L. v. The Republic of Moldova*. See on the topic of fourth branch institutions the chapter by Mark Tushnet in this volume.

[49] See: Druscilla L. Scribner, "The Judicialization of (Separation of Powers) Politics: Lessons from Chile", *Journal of Politics in Latin America* 2010, 71-97; Aziz Huq and Jon Michaels, 'The Cycles of Separation-of-Powers Jurisprudence', *Yale Law Review 2016*; Koen Muylle and Jan Theunis, "La Cour constitutionnelle comme juge de la séparation des pouvoirs: le cas des délégations et des validations" in Michel Melchior, Paul Martens, Marc Bossuyt and Claude Courtoy (eds), *Liège, Strasbourg, Bruxelles: Parcours des droits de l'homme. Liber Amicorum Michel Melchior*, Anthemis, 2010, 138.

[50] Ozan Varol, "Structural Rights", *The Georgetown Law Journal* 2017, 1005-1106 and the references cited there.

political will to introduce the necessary changes. Yet, at the same time this insight should urge the courts – especially the supranational courts – to take a restrained position and not impose sweeping standards that bring about far-reaching structural effects.[51]

At the same time, this chapter should lead us to reconsider the relationship between fundamental rights on the one hand, and the separation of powers on the other. Whereas some authors keep the two notions completely separate,[52] others stress the intimate connection between them, but solely in the sense that a system of separation of powers is consubstantial to the effective protection of rights and that no right can be guaranteed when there is no effective separation of powers.[53] This connection between government structure and the protection of rights has also been stressed more explicitly in the recent case law of the supranational human rights courts.[54] Yet, this chapter has shown just how close that connection really is. Moreover, and importantly, it has demonstrated that this connection goes both ways. The enforcement of said rights may in turn also lead to a reshaping of the structure of government and the way in which the system of separation of powers is given shape. The separation of powers, as a structural principle, and rights provisions are therefore interdependent and inherently and continuously affect each other.

6 Conclusion

This chapter discussed the novel concept of structural rights. They are rights that, when enforced, entail structural effects. They may generate, extinguish

[51] For this point see also Mathieu Leloup, "The constraints on the domestic separation of powers by supranational courts", *International Journal of Constitutional Law*, forthcoming.

[52] Jonathan Macey, "How Separation of Powers Protects Individual Liberties", *Rutgers Law Review* 1989, 813-814. He holds that "after all, human rights are one thing and the separation of powers under the Constitution is quite another. Indeed, in theory it would be quite possible to have a system of government that systematically denied individuals their basic human rights, but retained a rigid separation of powers; just as it is conceivable that a system of government that had no separation of powers might provide its citizenry with a wide range of individual liberties. Individual rights and the separation of powers are distinct attributes of our constitutional regime, and as such, they serve specialized functions."

[53] Nina Le Bonniec, "L'appréhension Du Principe de La Séparation Des Pouvoirs Par La Cour Européenne Des Droits de l'Homme" *Revue Française de Droit Constitutionnel* 2016, 337; Agnès Roblot-Troizier, "Un Concept Moderne: Séparation Des Pouvoirs et Contrôle de La Loi", *Pouvoirs* 2012, 101.

[54] See, among others: Inter-American Court Judgment *Aguinaga Aillón v. Ecuador* (30 january 2023), para 67; ECtHR (GC) 15 March 2022, Case No. 43572/18, *Grzeda v Poland*, para 324.; ECJ 27 February 2018, C-64/16, *Associação Sindical dos Juízes Portugueses*.

and allocate government power, in the same way as structural constitutional provisions would. In this sense, these provisions transcend the traditional dichotomy between rights provisions and structural provisions, present in constitutional law scholarship.

This chapter aimed to do two things. First, it attempted to further flesh out this novel concept, by building on the existing literature, and to lay bare the dynamics that are at play with these structural rights. This chapter has held that the structural effects of structural rights must be direct, meaning that the enforcement of the right must immediately bring about the structural consequences, but showed that there may be a wide variety in these structural effects. Structural rights may lead to the establishment or abolishing of government institutions, they may amend the ways in which those bodies are composed, or how their members are appointed, and they may change the functional and institutional relationship between two government bodies, either between two different branches of power or within one and the same branch. At the same time, it showed that a wide variety of fundamental rights can entail structural effects, and that rights can also assume a structural character as a result of external factors.

As a second aim, the chapter tried to make the connection between the concept of structural rights and the principle of separation of powers, showing how the former may be a foundational source of how the latter operates in a given jurisdiction. It has pointed out that the concept of structural rights has important theoretical implications, because it means that the separation of powers, and with it, the very institutional architecture of a state, is something that can be challenged and litigated by individuals. As a logical corollary, it has underscored the crucial position of the judiciary when it comes to the way in which a system of separation of powers operates within a given jurisdiction. Put sharply, a theory of structural rights implies that choices concerning the very design of a state are no longer the exclusive prerogative of political discretion via democratic decision-making, but are becoming the subject of judicial rulings on individual enforceable rights. Finally, it has shown the intricate connection that exists between (fundamental) rights on the one hand and the separation of powers on the other. While scholars were long aware of the importance of a well-functioning system of separation of powers when it comes to respect for (fundamental) rights, the concept of structural rights

shows that this connection also works the other way around, demonstrating that structural rights may in turn contribute in (re)shaping the separation of powers.