The global legal system and the procedural construction of constituent power

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Abstract: This article proposes an alternative to more standard, neoclassical theories concerned with the proceduralisation of constituent power. It argues that more established theories of proceduralisation are insufficiently aligned to the sociological realities in which constituent power is located and expressed, and their residual fixation on the premises of classical constitutionalism impedes adequate understanding of constituent power in the global constitutional order of contemporary society. On this basis, the article offers a sociological examination of constituent power, which attempts to grasp constituent power in its objectively existing procedural form. In particular, it claims that constituent power now exists as an inner-legal function, activated through procedures within an increasingly differentiated legal system: whereas in classical theory constituent power was a primary political source of constitutional norms, it now appears only as a secondary expression of norms already contained within the global legal system. Rather than renouncing the idea of constituent power, however, the article uses its sociological focus to observe new procedural openings for the activation of constituent agency, adapted to the material/sociological fabric of contemporary society.

Keywords: constituent power; global legal system; legal procedures; sociology of law

I. Introduction

Since the 1970s, the debate about constituent power has been broadly oriented towards theories of proceduralisation. To some degree, of course, this is not new. The contractarian theories of constituent power developed...
in the Enlightenment already contained a procedural element. Moreover, classical theories of constituent power have not entirely disappeared from contemporary inquiry. In addition, the distinction between classical and procedural analyses of constituent power is not always entirely straightforward. Classical and neoclassical ideas of constituent power are broadly defined by the fact that they identify the express will of the popular sovereign as the origin of the legitimate polity. However, such theories do not necessarily see this will as a will that is expressed without any normative or procedural constraints. Nonetheless, current analyses of constituent power are generally marked by a tendency to renounce the idea that constituent power expresses the real will of the people, articulating concrete conscious decisions about the founding norms of the polity. Instead, reflection on constituent power converges distinctively around the assertion that, although some expression of constituent power remains a sine qua non for legitimate government, it is improbable to imagine, in a complex society, that political institutions can obtain legitimacy through the decisions of a simply manifest sovereign people, proposing single substantive norms for the use of public authority. As a result, many of the most important social and political theorists of the later twentieth century devoted some of their energy to showing that the theory of constituent power requires increased sociological nuance, and the activation of constituent power needs to be explained in terms that are plausible for large, differentiated societies. Above all, it has been widely claimed that, as the material presence of the people in government is diminished, legitimacy for laws can only be secured through a multi-level, mediated incorporation of the people – which needs to be institutionalised through multiple procedures. Through the later twentieth century, in fact,

1 I Kant, *Metaphysik der Sitten* in *Werkausgabe*, edited by W Weischedel in 12 vols (Suhrkamp, Frankfurt am Main, 1976 [1797]) VIII 437.


3 Classical ideas of constituent power are of course reflected in the works of Sieyès in the French Revolution. But the classical notion of the constituent power as producing a reflected ‘compact for civil government in any community’, stipulating subsequently binding ‘rules of government’, was most clearly formulated in the America Revolution. See D Shute, ‘An Election Sermon’ in *American Writing during the Founding Era 1760–1805*, edited in two vols by CS Hyneman and DS Lutz (Liberty Fund, Indianapolis, IN, 1983 [1768]) vol I, 109, 117.

procedure itself came widely to replace the exercise of constituent power as a founding legitimational framework of government.

This article is intended to supplement existing proceduralist theories of constituent power. It does so, primarily, by accentuating and extending the sociological focus of such theories. In particular, it aims to explain the position of constituent power by examining the transformation of legal and political practices in global society, linked especially to the growing differentiation of the legal system caused by the increasing consolidation of international law, and by locating constituent power in the systemic functions through which constitutional norm formation actually occurs. In so doing, it aims to outline a fully sociological theory of constituent power, able to explain new sources of constituent power in the legal reality of global society, in which classical forms of political agency and norm production become redundant.

II. Proceduralist theories of constituent power

We can see the turn to a proceduralist theory of constituent power in the model of political legitimacy set out by John Rawls, who imagined the establishment of fair procedures, within a counterfactually constructed reasonable community, as a precondition for any definition of the objectives of government, and thus as a constituent source of law’s binding authority.  

We can find this impetus in the works of Jürgen Habermas, during the middle and later part of his career. To be sure, Habermas never entirely renounced the classical theory of constituent power, and he eventually reconstructed this theory to explain the two-level constituent foundation of the European Union.  

By the 1970s, however, Habermas had elaborated a fully procedural conception of democracy, based on the principles that (a) ultimate justifications could no longer be presupposed for legitimate acts of government; (b) the people could not be fully present in processes of institutional foundation or systemic decision-making; (c) formal procedures must replace ultimately binding norms as the basis for creating laws likely to assume legitimate validity in society. At one level, this theory was intended

to describe the more general democratic procedures for authorising singular laws. However, it was also designed to describe the constituent presence of the people in government, and to provide an account of the basic discursive and volitional foundations of legitimate constitution-making processes.\(^8\)

In this regard, Habermas opted for a theory of multicentric discursive procedure as a means for producing democratically legitimated laws: that is, laws based in ‘the rationally motivated recognition’ of validity claims.\(^9\) This ‘procedural type of legitimacy’, he claimed, is most adequate to the conditions of rational uncertainty that prevail in modern society.\(^10\) He eventually developed the argument that popular sovereignty itself should be reconstructed as a mass of proceduralised communication processes, no longer ‘concretely concentrated in the people’, but institutionalised in a diffuse ‘communication network’ in which actors in ‘political public spheres’ could seek discursive consensus about the content of law.\(^11\) A proceduralist theory of democratic sovereignty was later outlined by Ingeborg Maus, who advocated the creation of a parliamentary system in which the legislative authority vested in parliament was supplemented by more decentralised ‘legislative procedures’.\(^12\)

We can also, albeit more remotely, find parallels to these ideas in the works of Niklas Luhmann. On one hand, Luhmann proposed a much-derided doctrine of *legitimation by procedure*, which appeared to promote a purely passive conception of political legitimacy.\(^13\) This theory advocated the development of procedures as institutions to facilitate role playing in the public administration, serving to promote and expedite the ‘recognition of binding decisions’ made by public institutions,\(^14\) and to ensure that decisions could be accepted, relatively unreflectingly, as obligatory by the persons affected by them.\(^15\) Alongside this, however, Luhmann also outlined a theory of proceduralisation, which was much closer to consensualist


\(^{9}\) J Habermas, *Legitimationsprobleme im Spätkapitalismus* (Suhrkamp, Frankfurt am Main, 1973) 148.

\(^{10}\) See (n 7) 278.

\(^{11}\) See Habermas, *Faktizität und Geltung* (n 8) 362–5.

\(^{12}\) I Maus, *Über Volkssouveränität: Elemente einer Demokratietheorie* (Suhrkamp, Frankfurt am Main, 2011) 89.

\(^{13}\) For a sample early critique see J Weiß, ‘Legitimationsbegriff und Legitimationsleistung der Systemtheorie Niklas Luhmann’s’ (1977) 18(1) *Politische Vierteljahresschrift* 80.

\(^{14}\) N Luhmann, *Legitimation durch Verfahren* (Suhrkamp, Frankfurt am Main, 1983 [1969]) 34.

\(^{15}\) N Luhmann, *RechtssozioLOGie* (Westdeutscher Verlag, Opladen, 1980) 261.
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accounts of democratic legitimisation. In this respect, he argued, first, that the institution of procedures in the legal system is a process in which the law can obtain legitimacy through the ‘introduction of learning necessities in the realm of normative expectation’. He thus observed procedures as cognitive antennae within the legal system, by means of which it is able to learn about the objective conditions of law’s application and reception, and so to orient itself around sustainable ‘cognitive structures of expectation’: proceduralisation facilitates a cognitive testing of the probable conditions of law’s effective societal generalisation and acceptance. In addition, second, he devised a further theory of proceduralisation, arguing that democracy as a whole can be seen as a proceduralisation of the communications linked to the political system, which helps to produce political decisions in a form adequate to the complex structure of contemporary society. A political system likely to obtain legitimacy, he explained, is one marked by a triadic differentiation into three subsystems, politics, administration, and public, each of which contains distinct procedures (e.g. elections, parliamentary recruitment processes, policy hearings, lobbying negotiations, civil-service briefings, public debates, grass-roots consultation, legislative drafting), which help to organise support and compliance for political decisions. Above all, he argued, the mass of procedural interactions between these subsystems serves to establish a form, commonly known as democracy, which simplifies the interactions between the political system and the legal system. These procedures allow the political system to utilise the law as a medium of political communication, and to distil decisions into the medial form of law, so that they can be easily transmitted across the surface of a differentiated society. Proceduralisation, in consequence, appeared to Luhmann as a precondition for formalising a basic relation of compatibility, or a ‘mutual dependency’, between the political system and the legal system, for ensuring that political decisions can be made in legally sanctioned fashion, and for enabling the legally authorised (legitimate) circulation of political power through society.

In each respect, Luhmann’s theory of proceduralisation was supported by an underlying concept of legal positivisation, which he saw as the general sociological premise of a modern differentiated society. He argued that the installation of complex procedures in the legal system allows law to be constructed on fully positivised foundations, capable of establishing

16 Ibid.
17 N Luhmann, Die Gesellschaft der Gesellschaft (Suhrkamp, Frankfurt am Main, 1997) 357.
18 N Luhmann, ‘Mächtkreislauf und Recht in Demokratien’ (1981) 2(2) Zeitschrift für Rechtssozioologie 165. See also (n 15) 425.
19 See (n 18) 164–5.
binding norms without reliance on substantial values, and this in turn abstracts a medium in which the political system can perform multiple contingent acts of decision making, adjusted to its complex environment. At one level, like Habermas, Luhmann was interested in describing quite general legislative arrangements in the legal/political system. However, he also saw proceduralisation as a founding dimension of both politics and law. In Luhmann’s thought, in fact, the proceduralisation of law and politics marks a decisively constituent moment: it marks the moment, for both the legal system and the political system, in which systemic exchanges are transposed onto flexibly self-authorising foundations, and both systems are able to produce legitimacy for their functions in positive, autonomous fashion. Luhmann is not usually seen as a theorist of constituent power. However, his theory of proceduralisation closely reflects the assumptions more obviously articulated in classical and neoclassical theories of democratic self-authorisation. In this respect, in fact, Luhmann clearly perceived a close relation between his theory of procedural legitimacy and that set out by Habermas. He suggested that discursive procedures for establishing consensual legitimacy for law in the Habermasian sense could be observed, from a systems-theoretical standpoint, as adaptive mechanisms, through which the legal system learns to produce non-substantial normative orientations for its functions, and, in so doing, to generate contingent, positive resources of legitimacy. Both Luhmann and Habermas, clearly, saw proceduralisation as a mode of legitimisation that reflects the fact that ultimately validated foundations for the exercise of public authority can no longer be elaborated.

In very different theoretical lineages, therefore, leading social and political theorists of the later twentieth century proposed procedural models of democracy to supersede more classical constructions of constituent power. In particular, they used these models to account for the underlying conditions of political legitimacy in a pluralistic, differentiated society, in which simple presumptions of homology between state and society had begun to appear improbable. Of course, we can speculate about the historical or sociological reasons for this broad theoretical shift.

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20 See (n 15) 237.
21 N Luhmann, ‘Quod omnes tangit ... Anmerkungen zur Rechtstheorie von Jürgen Habermas’ (1993) 12 Rechtshistorisches Journal 47.
22 For the claim that there exists a deep convergence between Luhmann and Habermas see P Kjaer, ‘Systems in Context: On the Outcome of the Habermas/Luhmann-Debate’ (2006) Ancilla Iuris 77.
23 For earlier accounts, reflecting the more expansive democratic ideals of the interwar era, see RC de Malberg, Contribution à la théorie générale de l’Etat, two vols (Sirey, Paris, 1920/22) II 490–1 and the classic distinction between constituent power as decision and constituted power as norm in C Schmitt, Verfassungslehre (Duncker & Humblot, Berlin, 1928) 76.
One reason may be that some of the most enduring legal/political orders created after 1945 had little claim to any foundation in authority extracted from constituent power. Another reason may be that, by the late twentieth century, some national constitutions had clearly been adapted to a reality having little in common with the conditions in which their constituent power had first been articulated, such that the original claim to legitimacy required reformulation. Whatever their motivation, however, it appears, in retrospect, that these attempts at a proceduralist reconstruction of constituent power gave at least intuitive expression to an objectively occurring historical process. As discussed below, the later decades of the twentieth century clearly saw a dramatic transformation of the objective reality of democratic formation, in which proceduralisation of constituent power became a widespread factual occurrence, and constituent authorisation of political norms began to occur in more partial, recursive, and selectively controlled form.

In some respects, however, it also appears, in retrospect, that the more established proceduralist theories of constituent power in the later twentieth century envisioned the proceduralisation of constituent power in a perspective which was not attuned to the factual transformation of constituent power. Striking in the spread of proceduralist democratic theories is that they aimed to offer a sociologically refined account of constituent power, while at the same time retaining a clearly neoclassical standpoint. Notably, these theories all still presumed that, despite the increasing contingency of law’s authority, law owes its legitimacy to the representation of distinctively political communications in society. Moreover, each of these positions claimed, ultimately, that legitimate law is established through a process in which the political, self-legislative choices of a given people or a given society are translated into generalisable norms. In each case, the proceduralisation of democracy was taken to reflect a temporally distended, multicentric, yet ultimately constitutive distillation of the political exchanges of society into normatively stable acts of legislation. For this reason, each of these theories implied that, although incapable of articulating a unifying or even normatively substantial social will, law can acquire legitimacy through procedures able to reflect and construct consensus amongst the persons to whom law is ultimately applied. As a result, all these theories moved, however residually,
in the terrain of classical constitutionalism: they remained attached to the belief that the enactment of constituent power has to entail the transposition of original political imperatives into the form of law, and they constructed procedures as communication channels, establishing conditions of *interaction or mediation* between politics and law. At the time that these theories were proposed, however, the conditions for the exercise of constituent power were developing, as discussed below, in very different ways, which could not easily be captured in a neoclassical paradigm. For this reason, although attempting to construct a sociologically plausible theory of constituent power, the most influential theories failed to observe the emerging sociological form of constituent power. As a result, although they retain a potential normative value, their ability to describe the reality of contemporary democracy and to comprehend the enactment of constituent power remains limited.

Against this background, the purpose of this article is twofold. At one level, it accepts the basic thesis, contained in the perspectives discussed above, that the activation of constituent power now inevitably presupposes proceduralisation. However, it aims to adjust the focus of this standard thesis. It argues that established theories of proceduralisation are insufficiently aligned to the sociological realities in which constituent power is located and expressed, and their residual fixation on the premises of classical constitutionalism impedes adequate understanding of the exercise of constituent power in contemporary society. On this basis, this article claims that we need to provide a sociological examination of constituent power, which observes constituent power in its objectively existing procedural form. At the same time, this article also accepts the claim, underlying the theories that it aims to correct, that the concept of constituent power should not be abandoned, and it should be rearticulated on a proceduralist design. Accordingly, it endorses the proposition that modern society affords new opportunities for the exercise of constituent power, which need to be examined through a proceduralist account of social and legal agency. However, it suggests that these opportunities are not fully recognised by other theories, and the sociological misdiagnosis at the heart of other theories has meant that the political opportunities created by proceduralisation are not fully accounted for. Towards the end of the argument, therefore, this article uses its sociological focus to observe new procedural openings for the activation of constituent agency, adapted to the material/sociological fabric of contemporary, global society.
In each of these respects, notably, this article argues that constituent power can now only be accurately understood if it is perceived as a mode of agency that pertains to a global legal order, and it is only explicable as part of an emergent global constitution, in which analogues to classical modes of political agency cannot be simply presupposed. In fact, the proceduralisation of the founding sources of democratic legitimacy is largely determined, sociologically, by the globalisation of legal norms, such that exercise of primary norm-founding power is categorically severed from the acts of an identifiable people. Established theories of a proceduralised constituent power in some respects – perhaps unwittingly – intuited the fact that constituent power is in the process of being transformed through the emergence of a globalised legal/constitutional system. However, they did not fully capture the global form of constituent power. In contrast, this article aims to translate debate about constituent power into categories that are adapted to the constitutional structures of global society, and it seems to explain constituent power as a sequence of acts supported by fully globalised normative agency. On this basis, it argues that analysis of the ways in which constituent power has been reconfigured is a vital key for interpreting the constitutional foundations of contemporary society. A radical sociological reconstruction of constituent power is needed to identify the constitutional form of global society.

III. International law and constituent power

The transformation of constituent power in the later twentieth century can be linked, above all, to the rising importance of international law, and especially to the growth of international human rights law, which began after 1945. Of primary importance in this process, first, is the fact that, in the years after 1945, some select international human rights norms began, very tentatively, to acquire standing as universal *jus cogens*. Naturally, this should not be taken to mean that post-1945 global society witnessed the immediate growth of a rights-based constitutional order. Clearly, the human rights norms spelled out after 1945 were hedged by multiple caveats, they often disappeared amidst the geopolitical realities of the cold war, decolonisation and widespread dictatorship, and it took many decades until reliable enforcement mechanisms were established to ensure binding implementation of international law. Nonetheless, with great variations across different parts of the globe, after 1945 national states became progressively unwilling to act in flagrant derogation of international human rights instruments, and human rights laws gradually became basic guidelines
for state action. As a result of this, second, after 1945 international human rights law gradually began to assume direct effect within national societies, and the presumption that singular persons could appeal to human rights law, above the heads of the states to which they were subject, was slowly, but also surely, reflected in institutional practices. Once again, the realisation of this was a very uneven process, and the penetration of international human rights law into domestic law was initially only visible in some regions. Eventually, however, international human rights became a general, although not universal, element of domestic law. Human rights protection is usually seen as most secure in Europe, under the European Convention on Human Rights, where the domestic impact of international law was originally most profound. However, international protection for human rights is now probably strongest in Latin America, where, in most societies, rulings of the Inter-American Court of Human Rights (IACtHR) are immediately translated into, and enforced as, domestic constitutional law.

These processes had immediate consequences for the vocabulary and practices of national constitutionalism, and especially for the construction of constituent power. First, the rising force of international law after 1945 meant that a transnational constitutional order was, in part, placed above the legal structures of national states, defined by domestic constitutions. Arguably, in fact, national states were slowly but progressively (re)constructed, after 1945, as subjects whose power was circumscribed by a supranational legal order. Here, too, it is important not to simplify this process. Core documents of international law after 1945, for example Article 2(1) of the UN Charter and Article 38(1) of the Statute of the International Court of Justice (ICJ), remained wedded to positivist ideas of state sovereignty and state consent as the basis for the laws of international society. Nonetheless, even the UN treaties placed some constitutional


28 Although much contested in the wake of 1945, this principle was acknowledged in the war-crimes trials in Germany and Japan in 1946. It was formally established in art 2 of the ICCPR (1966).

constraints on national states. These constraints were subsequently reinforced through the rising entrenchment of global norms, and, above all, by the growing power of international courts, which were increasingly open to appeals from persons located in national legal systems. As a result, to some degree, domestic constitutions lost their classical position as defining points in a national hierarchy of public-legal norms, and the position of national constitutional norms was relativised by international legal norms, which at least rivalled their authority.

Additionally, the increasing power of international law after 1945 meant that domestic public law gradually lost its original foundation in classical political acts, and the extent to which national constituent power could be evoked as the primary origin of public law became questionable. At the heart of classical constitutional theory was always the view that the constitution of a given polity is determined by political decisions of a national constituent power, and all subsidiary legal acts are exercised within, and legitimised by, norms enacted by this power.\(^\text{30}\) To this degree, in classical doctrine, the constituent power always acts, as a political agent, outside or before the law, and it is most essentially defined by its capacity to project a decisive and publicly binding normative order without any prior legal determinacy.\(^\text{31}\) This idea was spelled out clearly by Ernst-Wolfgang Böckenförde,\(^\text{32}\) who argued that constituent power ‘necessarily belongs’ to the ‘sphere of the political’, and it forms the ‘historical-political origin’ of the legal constitution of the state. In the conditions that evolved after 1945, however, the claim that national public law could extract legitimacy from a founding, pre-legal act lost plausibility. After 1945, in fact, national public law increasingly derived its validity, not from the implied originating act of a national people, but rather from a generalised construction of the persons who were subject to it, which was originally produced and promulgated in international law. At this time, the law began, quite generally, to explain its authority by accounting for itself, not as willed by a particular actor or a particular set of actors, but as applied to persons endowed with certain characteristics and certain entitlements, which were constitutionally protected under international law: that is, by claiming that it was essentially proportioned to its addressees as individual rights.

\(^\text{30}\) Classically, Sieyès argued that, as constituent power, the people is ‘freed from all constraint’, and the constitutional form that it chooses to confer upon itself becomes binding, as higher law, on all subsequent legislation. E-J Sieyès, \textit{Qu’est-ce que le tiers-état?} (Pagnerre, Paris, 1839 [1789]) 20.

\(^\text{31}\) See Schmitt’s claim that in exercising the constituent power ‘the nation remains the original ground \textit{[Urgrund]} of all political occurrences’. See (n 23) 7.9.

\(^\text{32}\) See (n 4) 86–7.
holders. For this reason, the rise of international human rights law led to a process in which the law internalised the basic constituent source of its own authority. To an increasing degree, the generation of legitimacy for public law became an act performed within the law, and external, non-legal sources of legitimisation slowly lost some of their significance. Progressively, the law was able to store an account of its legitimacy (the rights holder) within itself, and, through this internal reference, it was able autonomously to constitute itself and to authorise its application, at an increasingly high level of systemic abstraction and iterability.

In addition to its more general implications, this transformation in the basic legitimational vocabulary of the law had particular consequences for the constitutional position of legal procedures in contemporary society. Indeed, this transformation conferred on legal procedures a quite distinctive role in the production of political legitimacy and the construction of constitutional norms.

On one hand, the rise of international human rights led to a growing differentiation of the legal system as a subsystem of global society, in which national systems of public law were locked into an increasingly autonomous global legal system. The fact that, after 1945, the law was slowly able to extract authority from an internally conserved image of its legitimacy (the person as rights holder) meant that the legal system as a whole was able to evolve, rapidly, to a high degree of inner self-reproducibility, and it disconnected itself quite comprehensively, as a free-standing global system, from its traditional historical environments. We can see this
in a number of ways. As the law became centred on the person as rights holder, for example, international judicial bodies began to acquire increasing independence vis-à-vis national political institutions, and they assumed authority to reach across national boundaries, to set international norms, to relativise powers of nation states, and even to create and invalidate domestic laws. In this respect, the global legal system obtained a relatively detached and self-perpetuating form, and relevant actors within the global legal system (e.g. courts, judges, tribunals) were able to transmit, apply, and authorise legal decisions across national boundaries without relying on support from organisations outside the legal system. Usually, the authority of international judicial bodies was underpinned by human rights norms, and these bodies brought validity to their transnational actions by referring to human rights as sources of infra-judicial legitimacy.

Equally importantly, national judicial bodies began to assume unprecedentedly powerful roles, and they typically exercised great license in entrenching laws, in promoting independent lines of jurisprudence, and even in initiating legislation in their own polities. Typically, national judicial institutions also utilised international human rights norms to secure their inner-societal authority, and human rights increasingly acted as powerful sources of judicial independence and influence for national courts and judges. As with the domestic penetration of international law, this increase in the power of domestic courts should not be seen as a uniform process. Initially, the rise of judicial power was only visible in Western Germany, Italy, Japan, and perhaps the USA. Only later did intensified political

35 The emergence of international law as a specific legal system can be traced to the immediate aftermath of the war, although it only became an evolved reality at a much later stage. From the late 1940s, the ICJ began to define individual persons as having rights under an international legal system. Eventually, this became an important principle in ICJ jurisprudence (see ICJ case *LaGrand (Germany) v United States of America* (2001)). Powers of states were relativised by the fact that other subjects could claim international legal personality, including the UN itself. See DJ Bederman, ‘The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel’ (1995) 36 *Virginia Journal of International Law* 275. The power of international courts to intervene directly in domestic politics was initially low, although, in the context of decolonisation, they could influence the constitutional design of new polities. By the 1980s, regional human rights courts routinely struck down domestic laws.

36 See (n 27) above.

37 The new democracies created after 1945 in Western Germany and Italy obtained powerful constitutional courts, backed by their role in protecting international defined human rights. In both cases, courts used international norms to block acts of other branches of government. This constitutional dimension became increasingly strong in new democracies, and in the democratic transitions beginning in the late 1980s, judicial bodies often used international law to invalidate domestic laws.

judicialisation become a widespread phenomenon. Democracy based in strong judicial power now obtains its most perfect expression in some Latin American states, for instance in Costa Rica and Colombia, where domestic political decision-making is often replaced by judicial citation of international law. Today, moreover, there remain striking variations in the authority of domestic judiciaries, and some societies, for example, Poland, Hungary and Venezuela are currently witnessing a backlash against judicial power. Nonetheless, even in societies such as China and Egypt, whose constitutions, either formally or informally, place limits both on judicial autonomy and on the impact of international law, the influence of judicial constitutionalism is not absent. Additionally, therefore, the rising differentiation of a free-standing legal system in the decades following 1945 was impelled by the interaction between international and national judicial institutions. In this period, it gradually became possible for judicial actors, at different locations in global society, to produce a shared normative order, based in common patterns of legal argument, common constructions of political legitimacy, and convergent lines of jurisprudence, which slowly dictated powerful norms for global society as a whole. Such collaboration between national and international courts was also, to a large degree, the result of the fact that their rulings were aligned to human rights law.

All these processes are signs, sociologically, of an accelerating differentiation of a global legal system in the decades following 1945, which encompassed both the extra-national and the national dimensions of global society. The precondition of this differentiated disembedding of the law was that the law increasingly extracted its authority from the vocabulary of human rights, and the legal system of global society approached a condition of intensified autonomy as it articulated and explained its functions through reference to human rights. In core respects, above all, this rise in the autonomy

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41 This collaboration is partly reflected in immediate interaction between national and international courts. But it is also reflected in the doctrines of the margin of appreciation and proportionality, included in major international human rights instruments, which promote fluid linkage between the two tiers of the global legal system.

of a global legal system had implications for the procedural foundations of legislation and legitimisation. At this time, judicial procedure became a core source of authority for laws, and judicial institutions, following neutrally prescribed procedures for reviewing legislation and for adjudicating cases, quietly assumed wide powers for the production and legitimisation of primary laws, both in national and in transnational settings. Judicial procedure became a core foundation for the validity of constitutional law.

Alongside this, second, the growing prominence of international human rights law has engendered a powerful impulse towards self-constitutionalisation in the international legal order, and, as it became more differentiated, the legal system acquired mechanisms for the inner, autonomous construction of legal norms with constitutional authority. Wherever we look for norms with constitutional force in contemporary society, in fact, we find that such norms are underpinned by human rights, and most laws with some claim to constitutional rank owe at least part of this standing, not to any act of a constituent power, but to a primary reference to human rights, secured within the legal system, and articulated by judicial institutions. As human rights are stored internally within the legal system, some laws can be designated as constitutional through an internalistic systemic process, and law’s constitutionalisation does not presuppose any outside act: international human rights, conserved and applied by legal actors, form the primary underlying authority for law, and constitutional laws are now usually only secondary expressions of overarching human rights provisions, produced from within the legal system.

Such increasing self-constitutionalisation of the law in contemporary society is independent of the manner in which we observe and define the basic principles of constitutionality in contemporary society. If we restrict our search for constitutional laws to the sphere of domestic public law, for example, we immediately find that such law is primarily legitimated by inner-legal, self-constituent acts, usually referring to human rights law. There are, of course, some very extreme instances of this. In some cases of national constitution making, for example, polity-building functions are conducted directly by persons representing international organisations, applying international law as the basis for constitution making. Even in less extreme contexts, however, few processes of constitutional-democratic foundation occur outside a normative realm that is predefined by international judicial actors, and controlled by powerful courts. In particular, as discussed, the rise

of powerful Constitutional Courts in many national contexts has created a political reality in which constitutional laws are formed through inter-judicial exchanges, and judicial instruments play a dominant role in setting the normative foundations for subsidiary political functions. Constitutional Courts now widely act as structural hinges between domestic law and international law, and they assume authority to set prior restrictions, usually at least influenced by international law, on the acts of the constituent people.

This function of courts is most clearly evident in new democracies. From 1945 to the present, most new democratic governments have imputed great authority to Constitutional Courts, charged with responsibility for assimilating human rights norms from the international domain. In many cases, they have instituted such courts in order both to signal legitimacy to external observers (i.e. other states)\(^44\) and to define secure principles of legitimacy to stabilise domestic institutions during precarious process of democratic consolidation. In more volatile examples of democratic transition, in fact, Constitutional Courts have enforced human rights laws specifically because such laws can easily presume authority above rival factions in the process of democratic constitutionalisation, thus constructing government on foundations that are withdrawn from political contest, separate from the factually existing constituent people. The democratic transition in South Africa in the early 1990s and the more recent transition in Kenya are striking examples of this.\(^45\)

To a less evident degree, however, this function of courts is also seen in more established democracies, in which the assimilation of international law is promoted to confer secure form on the legislative process, and to stabilise the relation between the people and its legislative acts.\(^46\)

\(^{44}\) This can be seen in many contexts. But, as a rather extreme example, we can observe the Concept of Judicial Reform, introduced in Russia by President Yeltsin in 1991. This document stated that the aim of the new state was to ‘return into the world civilization, which requires legal reforms in order to turn from a political state into a rule of law state’. According to this Concept, judicial reform had to be seen as the ‘nucleus of legal transformation of the country’. Importantly, the Concept recognised international law as an important source of law, regardless of whether it had been formally incorporated in the domestic legal system, and it prescribed to the courts the ‘universally recognized principles’ (see Supreme Council of RSFSR Decision No 1801-1 of 24 October 1991 ‘On the Concept of Judicial Reform in RSFSR’ [O Konseptsii sudebnoy reformy v RSFSR], Vedomosti SND i VS RSFSR 44, 31 October 1991, item 1435).

\(^{45}\) For discussion of Kenya, see below at pp 34–6. In South Africa in the early to mid-1990s, the constitutional transition was presided over by a very powerful Constitutional Court. Supported by reference to norms of international law, the court was able to review and in some cases to clear away legislation from the apartheid era, to stimulate trust in the emerging institutions of government, and generally to distil a new normative foundation to insulate the emergent political system against extreme external contestation. See B Dickson, ‘Protecting Human Rights through a Constitutional Court: The Case of South Africa’ (1997) 66 Fordham Law Review 566.

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In these various respects, international human rights law clearly acts to distil a judicial procedure for the national exercise of constituent power. In this procedure, human rights partly replace constituent power, extracting legitimacy for laws from a procedurally simplified image of the constituent people, and at times clearly occluding the objective process of constitution making against the intrusion of a factually existing national collective.47 Tellingly, the fact that rights can insulate a political system against its own constituent people has obtained particular importance in patterns of democratisation in ethnically divided societies, in which the presence of a clearly delineated national people is difficult to find.48 Through such processes, widely, international human rights law either forms an integral component of national constituent power, or it even acts as an inner-legal surrogate for it. Of course, international law is, in origin, itself part of a constituted order, which is created by already existing national states: states can be seen as the constituent subjects of international law. However, this order now widely pre-exists and predetermines the constitutional functions of its component parts (states), and it often re-enters domestic societies as a constituent agency, able to pre-structure the primary norms of national polities.

If, alternatively, we accept a broader conception of constitutional law, accepting the now widespread idea that global society as a whole has its own constitution,49 we can again see immediately that constitutionally
binding laws in the international domain are created through processes of inner-legal self-constitutionalisation. Such laws, above all, are founded in inner-systemic references to human rights law, and human rights norms act as an elemental inner-legal source of constituent authorisation for higher-order global law. To illustrate this, most obviously, human rights instruments have the highest constitutional rank in international law, and subsidiary legal agreements between states are constitutionally subordinate to these instruments. Moreover, we can think of many cases in which international law is formed and expanded by judicial actors through interpretive solidification of existing human rights instruments. Self-constitutionalisation in the international domain is most visible, however, in the constitutional organisation of actors that populate the interstate domain – especially international organisations. Most international organisations operate in a legal domain that is shaped by a deep logic of self-constitutionalisation, in which the factual exercise of agency by politically mandated actors is restricted, and judicial bodies assume a leading role in defining the constitution, or the legal personality, of the organisation as a whole. This is visible in the UN itself, in which the ICJ, using human rights norms, first defined the constitutional obligations and entitlements of persons representing the UN. Similar tendencies are evident in the International Labour Organization (ILO), in which courts have also defined the basic personality of the organisation through reference to human rights law. More extreme tendencies towards auto-constitutionalisation are manifest in the World Trade Organization (WTO),

50 Most importantly, arts 53 and 64, the Vienna Convention on the Law of Treaties indicated that all treaty law is bound by certain human rights norms, and treaties not reflecting such law should not be recognised as valid.

51 To some degree, the importance of human rights in international law after 1945 created a distinct systemic foundation on which it became possible for judicial bodies to elaborate international law through constructive acts of interpretation. It is noted that the framers of the UN Charter did not remotely envision that it would become the basis for a ‘vast and multifarious corpus juris’. See O Schachter, ‘The UN Legal Order: An Overview’ in O Schachter and CC Joyner (eds), United Nations Legal Order, in two vols (Cambridge University Press, Cambridge, 1995) I, 2 The fact that it did so was the result of an ongoing judicial elaboration of its primary principles, in which many different courts participated, and in which human rights law played a guiding role. Some international courts have openly defined themselves as interpreters of an ‘existing international corpus juris’. See as a leading example: IACtHR, Yakye Axa Indigenous Community v Paraguay (17 June 2005) 84.


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in which the Appellate Body has extracted norms from general international law to flesh out a relatively free-standing corpus of jurisprudence, which binds constituent states.\textsuperscript{54} However, these processes are most striking in the European Union (EU), in which judicial acts have served, first, to read a system of human rights into the interstate treaties that founded the EU and, second, to impose this judicial construction as a constitutional framework for binding Member States into a unified legal order.\textsuperscript{55}

The global intensification of self-constitutionalisation, referring to international human rights law, is particularly evident in the rise of new patterns of jurisprudence, which traverse national boundaries and create transnational constitutional norms, both in national polities and extra-national legal orders. Generally, in fact, if we widen our constitutional imagination and follow Gunther Teubner in observing multiple sites of constitutional formation in the transnational domain,\textsuperscript{56} it remains the case that laws with constitutional standing are produced, inner-systemically, through reference to human rights norms.

One notable example of this is visible in the growing impact of the right of personality (\textit{Persönlichkeitsrecht/derechos de la personalidad}), which is widely transplanted from jurisdiction to jurisdiction, and is now in the process of becoming a constitutional standard in many societies, creating new rights of personal inviolability, especially in the private sphere, and extending constitutional law to new spheres of social practice.\textsuperscript{57} Most importantly, however, this is visible in the increasing global proliferation of proportionality as a jurisprudential technique for assessment of the acts of public authorities. The use of proportionality, originating in Prussian law, but now promoted by many international conventions and by many national courts, is based in the idea that the legitimacy of political and administrative acts can be measured in light of overarching normative standards, and that


\textsuperscript{57} This line of jurisprudence began to gain impact in West Germany, as a means to extend basic constitutional rights to the private sphere. See West German Constitutional Court, 35 BVerfGE 202 (1973) [Lebach]. Ultimately, this jurisprudence acted, in a number of polities, to imprint a deep constitutional grammar on the private sphere, generating multiple new rights. See for important examples Chilean Court of Appeal, Rol 2.563-92 P (17 November 1992); Argentine Supreme Court 9080 (25 August 2009).
such acts can only legitimately deviate from international human rights norms to the degree that such deviation secures a proportionately valuable collective good.58 Underlying the theory of proportionality, accordingly, is the view that each public institution or aggregate of institutions operates within a sphere of latitude, which is constructed in relation to international norms, and courts are obliged to declare acts invalid where the limits of this latitude are exceeded.59 In consequence, the use of proportionality means that government acts are exposed to very substantial normative control by courts, and judges assessing government acts for proportionality are required to assess public acts by constructing (and in turn evaluating) the substantial goods and policy benefits which they are intended to secure. Judges thus become both judges of law, and by implication, judges of policy.60 In fact, in applying proportionality, judges assume a strict sociological function, observing and establishing the merits of public decisions as they take effect through society, ensuring that their consequences remain within a given sphere of discretion.61 To some degree, proportionality imposes a deep self-constituent logic on political interactions, and it implies that human rights norms provide an internal constitutional criterion to shadow and constrain all public acts, at all levels of societal purchase. Notably, in fact, proportionality is increasingly applied to private acts or exchanges traditionally covered by private law, and it widely expands a diction of constitutional law across all parts of society – both in national,62 and in transnational contexts.63

60 For the claim that judicial review on proportionality grounds is ‘inescapably an exercise in applied lawmaker’ see A Stone Sweet and J Matthews, ‘Proportionality and Global Constitutionalism’ (2008) 47 Columbia Journal of Transnational Law 161.
61 UK judges have openly ascribed to themselves the duty to make a ‘sociological assessment’ of the impact of administrative acts and to ensure accordance of such acts with higher rights norms. See Wilson v First County Trust Ltd [2003] UKHL 40 142 (Hobhouse LJ). UK judges have also, rather unconvincingly, tried to claim, as follows, that proportionality does not involve a constitutional shift to merits review: ‘In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued. The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving Convention rights must be analysed in the correct way. That does not mean that there has been a shift to merits review’. This view is expressed in Huang and others v The Secretary of State for The Home Department [2005] EWCA Civ 105 (Laws LJ).
62 See (n 58) 127.
63 See the recent ECJ cases: Joined Cases C-92/09 and C-93/09 Volker und Markus Schecke and Eifert (9 November 2010).
In each of these examples, functions classically allotted to constituent actors have been translated, to a large degree, into judicial procedures. In each case, the legal system itself creates constitutional norms, both for subsidiary acts of law and for the entire political orders in which judicial bodies are located. In each case, human rights laws set the prior premises for the enactment of constitutional norms, and such norms are generated through the inner-legal reproduction of human rights principles. In each case, moreover, legal institutions provide the procedural horizon and the procedural mechanisms in which the enactment of founding political norms occurs. In simple terms, in each of these instances, the basic constitutional form of a given political system is defined through exchanges within the law: there is no external or political dimension to the process of constitution making, and the creation of constitutional norms occurs as a proceduralised articulation of norms that already exist within the legal system. Through such inner-legal proceduralisation of constituent power, moreover, the autonomy and positivity of the law increase, and the law evolves as an externally constructed reality, withdrawn from reflected human agency.

The ultimate theoretical implication of these observations is that neoclassical theorists of constituent power have been insufficiently radical in their proceduralist approach to constituent power. Such theories are surely correct in acknowledging that constituent power is no longer asserted by a simple people or a simple national group; it is clear that there can be no objective proximity between a legal/political system and a given quantity of persons in a given physical location. However, in more established theories, the subject of proceduralisation remains very simplified. Typically, as mentioned, constituent power remains associated with normatively formative acts that are located outside the law, normally involving communications between a given set of social agents, or at least between social systems, which are translated into binding legal form. In the factual realities of contemporary global society, however, constituent power has been largely internalised within a sequence of legal or judicial functions, and, in this position, constituent power is activated in isolation from a particular people or society. That is to say, the legal norms that constitutionally underpin the different dimensions of contemporary society are produced within highly constructed judicial domains, and they usually result from judicial procedures whose outcomes are structured, not by an openness to the political exchanges of society, but by inner-systemic norms, primarily

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64 Luhmann, of course, denies the possibility of direct communication between politics and law. However, he viewed the institutionalisation of procedures in the political system as a means by which the political system could learn ‘society as its immediate environment’. See (n 14) 237.
based in recognition of international human rights norms. Indeed, the proceduralisation of constituent power is not a proceduralisation of anything outside the law: it is a proceduralisation of the law itself, and it does not entail an enactment of functions external to the law. Constituent power is now expressed through moments in multiple legal procedures, located in national and in international settings – i.e. in legal hearings, acts of adjudication and review, referrals, advisory opinions, rulings, declarations, acts of balancing. In these procedures, the global legal system articulates principles (based in human rights) that it already contains, and it projects these principles, through judicial decisions, as the foundation for subsidiary legislative processes, both in national and in international domains. Quite widely, in fact, the proceduralisation of constituent power, which other theorists propose as a means for the acentric redirecting of political agency into the legal system, is a process in which the legal system constantly accentuates its autonomy, or even its dominance, in relation to the political system, such that founding acts of norm production, once conceived as political, are now performed by and within the law alone. This autoconstitutionalisation of law is a distinctive characteristic of the constitutional law of global society, and it defines a reality in which constitutional law is produced through the global hyperdifferentiation of the legal system. The sociological weakness of theories of proceduralisation is clearly due, in part, to the fact that they overstate the importance of the political system in contemporary society, and they underestimate the degree to which the legal system has acquired a globally autonomous position.

IV. Auto-constitutionalisation and new subjects of constituent power

The absorption of constituent power into rights means that basic approaches to constituent power need to be thoroughly re-evaluated. In fact, we can clearly observe some sociological processes which demand, simply, that constituent power should be erased from the contemporary political imagination. In some respects, the procedures through which foundational laws are formed in contemporary society have nothing to do with political democracy or human self-legislation, and, to this degree, the classical theory of constituent power cannot be reconstructed in a form adequate to contemporary society. The dream of constituent power was originally tied

65 Naturally, Luhmann argued that the political system could not be accorded any primacy in a differentiated society. See N Luhmann, *Politische Theorie im Wohlfahrtsstaat* (Olzog, Vienna, 1981) 23. Yet, this theory still centres society around a normative compatibility between politics and law.
to the dream of collective human autonomy, and it expressed the notion, still championed in some works of neoclassical Staatslehre, that the political system acquires legitimacy through an autonomous self-enactment of a given people. 66 This dream of constituent power as collective autonomy then resurfaced in some accounts proposed by proceduralist theories of democracy. 67 On the account offered above, however, this dream is now without substance. The global differentiation of the legal system means that constituent power, even as a symbolic construct, has finally disappeared. On this basis, it is tempting simply to dismiss the concept of constituent power.

In certain respects, however, the increasingly differentiated autonomy of the law and the increasing construction of legal/political norms through law’s self-constitutionalisation do not lead exclusively to an elimination of constituent power. On the contrary, law’s growing autonomy has created space for distinctive, alternative modes of constituent agency. 68 In fact, international human rights law now widely forms a primary, original constituent power within the global legal system, on the basis of which subsidiary or secondary modes of constituent power can be asserted, in a variety of locations, and by a variety of different procedural subjects. At one level, international human rights law creates an increasingly unitary primary constitution for global society as a whole. At the same time, however, the abstraction of constituent power around norms articulated within the global legal system has begun to institute a more acentric secondary constitution in different societies. The transformation of constituent power means that, within terms defined by the primary constitution of the global legal system, laws with secondary constitutional authority can be projected through multiple acts and procedures, often through highly contingent inner-legal processes. The eradication of classical acts of constituent power has thus been flanked by a splitting or a multiplication of constituent power, allowing new patterns of constitutional agency to proliferate through society. Through the rise of international human rights law, constituent power is separated from the physical presence, or at least the projection, of a people, and it is instilled within the legal system itself. Far from leading to a closure of the legal system, however, the fact that constituent power becomes

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66 See Loughlin’s views at (n 2) above.
67 This is most notably the case in Habermas’s idea of the legitimate state as one created through ‘the gradually improved institutionalization of procedures of rational collective will formation’. See Habermas, Faktizität und Geltung (n 8) 629.
68 For debate on the international dimensions of this see M Patberg, ‘Constituent Power beyond the State: An Emerging Debate in International Political Theory’ (2015) 42(1) Millennium: Journal of International Studies 1.
normatively independent of the people means that secondary powers of constitutional norm formation can be accorded to many persons, and many highly atypical constitutional subjects can take part in the procedures that lead to the authorisation of constitutional laws. In consequence, the original claim of constituent power to provide the basis for democratic political existence has not entirely disappeared, and the emergence of new, secondary modes of constituent power gives rise to new patterns of democratic practice. In fact, the co-originality of rights and democracy, often identified as the foundation of modern politics, is distinctively preserved through the transformation of constituent power in the global legal order. As a result, moreover, although the procedural-democratic reconstruction of constituent power has only limited value in explaining primary patterns of norm formation in contemporary democracy, such theory can be adapted to explain secondary patterns of democratic foundation. Indeed, if we renounce the idea of democratic procedures as sources of primary norms, but focus instead on procedures as sources of secondary norms, assuming effect within an already given legal system, the proceduralist approach offers a key paradigm for explaining contemporary global dynamics of legal authorisation and legitimisation. Patterns of proceduralisation within the global constitution relativise the foundational dimension of constitutional practice. However, they also create opportunities for new expressions of democratic engagement.

To illustrate this, first, we can think of many recent examples of constitution making in Latin America, in which the constituent power, underpinned by human rights norms, has acquired a pluralistic factual form. This is evident, for example, in Colombia, where social movements played an important role in the early part of the constitution-making process, leading to the 1991 Constitution. 69 This is also evident in Ecuador and, above all, in Bolivia, where indigenous communities formed distinct parts of the constituent power that created the 2009 constitution. 70 In some Latin American constitutions, in fact, openings for the participation of atypical subjects in processes of constitutional foundation were not closed off after the ratification of the constitution, and multiple subjects remain live within the constitution, even after its approval. 71 These tendencies

71 The Bolivian Constitution (art 196) declares that the will of the constituent power has to be recognised as the highest interpretive criterion for all law. Bolivian judges have openly advocated a strong doctrine of constituent power (Bolivian Constitutional Court 0168/2010-R, at 14). Many articles of the Venezuelan constitution of 1999 (especially arts 6, 62, 70, 168, 182
towards the expansion of constituent power in Latin America are often explained as reactions against the constraining of national sovereignty by international law.\footnote{72} Indeed, many theorists and practitioners of Andean constitutionalism have construed recently created constitutions in Latin America as documents that bring the legal order of the state into more immediate proximity to the constituent power of the national people, and which weaken the horizontally checking force of international law, especially international economic law.\footnote{73} In certain respects, however, these constitutions are quite eminent examples of the formative role of international human rights law in the creation of constitutional norms, and they clearly result from a secondary procedural enactment of normative principles that are already dictated, at the international level, within the global legal system. For example, the multicentric, plurinational constitutions created in Bolivia and Ecuador were partly based in provisions for indigenous rights previously promoted in international law, especially in ILO Convention 169. During the constitution-making process in Bolivia, tellingly, the constituent mobilisation of indigenous groups was partly concentrated around the proclamation of international norms.\footnote{74} Notably, moreover, the constitution-making process in Colombia was not only determined by its opening to a plurality of social groups and movements. It was also determined, subsequently, by auto-constituent acts of the Constitutional Court, which exercised great latitude in its incorporation of international law in domestic public law,\footnote{75} even autonomously declaring that certain norms of international law, including principles of soft law, could be integrated as higher norms in the constitutional system.\footnote{76} Inclusion of multicentric populations in constitution making in Latin America thus generally occurred as part of a deepening process of inner-legal proceduralisation, and in most of these processes a constituent power was enacted that was inseparable from...
principles already stored, within the legal system, in international human rights provisions. Indeed, in most cases, the assertion of a pluralised constituent power in the objective process of constitution making was only possible because this power worked in the shadow of a primary original constituent power – constructed through international law.

In such examples, we can see that the interpenetration of international law and domestic law has created constitution-making environments in which new constitutional subjects are able both to draw authority from preconstituted inner-legal norms, yet also to act as analogues to more classical holders of constituent power. In such environments, international law pre-structures the constituent process, and it provides the normative setting within which atypical modes of constituent agency can be exercised: such atypical constituent agency, however, always remains part of a legally preconstructed, in fact inner-legal procedure. Nonetheless, in such processes, constituent subjects at least uphold the symbolism of classical constituent agency, and they preserve the classical appearance that they act outside, or prior to, the law, renewing and even revitalising the external position of the constituent power vis-à-vis the legal/political system as a whole. In other contemporary constitution-making settings, however, the self-constitutionalisation of the legal system creates openings for the exercise of secondary constituent agency, in which constituent power occurs entirely and unmistakably within the law, and it is expressed conclusively as a function of law’s autonomy. In such cases, however, inner-legal constitutionalisation still does not suppress all traces of constituent agency and collective autonomy. On the contrary, it often produces a horizon for a dramatic increase in the number of acts containing constituent power, albeit on the foundation of already existing legal norms. Most notably, one widespread result of the translation of constituent power into an inner-legal function is that litigation has now become a dominant mode of constituent agency. Naturally, this does not apply equally to all categories of litigation. However, litigation that activates norms relating to human rights laws, articulated primarily at an international level, widely assumes a quasi-constituent role. Many processes of constitutional norm setting that traditionally fell to a national people, or at least to a collective actor, now occur through the actions of social agents, not in their capacity as citizens, but in their capacity as litigants. In this respect, again, constituent power is widely enacted as an inner-legal function, which still, nonetheless, preserves some features of classical constituent agency.

In some cases, first, the exercise of constituent power by litigants occurs, quite obviously, because of the position of domestic polities within a transnational constitutional system. The fact that nation states are subjects of international law means that agents in national societies can initiate
domestic litigation in questions with relevance for international norms, and, where they obtain redress or remedy in their national polities, they often intensify the standing of international norms and trigger constitutional changes within domestic public law. Mobilisation around preformed international human rights is in fact a well-established mode of exercising constituent power, and it can be observed in most processes of constitutional transition. This was widely evidenced in democratic transitions in Latin America and Eastern Europe, and in the now largely stalled processes of systemic restructuring in North Africa. However, this is not restricted to polities in transitions or in processes of systemic transformation. On the contrary, this is now a frequent phenomenon in established constitutional states, and litigation around international norms often has emphatic constitution-making potential in such contexts. Important examples of this can be found in the UK, a polity traditionally relatively closed to international law, in which core principles of public law have been shaped and even renounced because of the domestic penetration of international court rulings resulting from domestic litigation. In one particularly noteworthy case, the basic common-law principles of judicial review were revised following the outcome of a series of cases brought before the European Court of Human Rights, involving litigation caused by anti-homosexual discrimination in the UK army. However, perhaps the most important cases of constituent litigation have occurred in US-American extraterritorial tort cases, which have projected human rights norms outside the borders of the USA to create a basic constitutional structure for human rights violations, even applying constitutional principles to impute constitutional obligations to essentially private actors. To be sure, the line of jurisprudence authorising extraterritorial litigation under the Alien Tort Statute was cut off in Kiobel v Royal Dutch Petroleum Co. (2013). However, in other national and international systems, presumptions in favour of extraterritorial liability still remain strong, and are arguably becoming stronger.

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79 See R v Secretary of State for the Home Department, ex parte Daly [2001] All ER (D) 280 (May) (Steyn L.J.).

80 Doe v Unocal, 395 F.3d 932 (9th Cir 2002).

81 See Lubbe v Cape Plc [2000] UKHL 41 in the UK; Canada (Justice) v Khadr [2008] 2 SCR 125, 2008 SCC 28 in Canada. See also Familia Pacheco Tineo v Estado Plurinacional de Bolivia (2013) in the IACtHR. As a core case in this line of reasoning, see Italian Constitutional Court (238/2014).
Quite widely, therefore, litigation focused on international human rights law can be construed as an inner-legal distillation of constituent power. Through this distillation, grievances at different positions in society can be immediately transposed into a diction of legal contestation, which assumes a de facto constituent form. Notably, in fact, this increasingly gives rise to a pluralistic constitution, which is able to capture actors classically outside the constitutional domain. In many cases, litigation referring to international human rights serves, not only to widen the range of subjects capable of creating constitutional norms, but also to extend the range of bodies subject to constitutional law, and it typically leads to an application of constitutional law to new legal persons, especially to persons classically located in the private domain.82

The constituent role of litigation is also evident in changing patterns of litigation and changing patterns of legal argument. As discussed, recent years have seen a dramatic increase in litigation on proportionality grounds, which has widely produced and reinforced a sociologically penetrating constitutional structure for national governmental systems.83 Across the globe, in fact, the proceduralisation of constituent power in litigation is reflected in the growing importance of administrative law, which is deeply shaped by the growth of proportionality, and which routinely acts as a source of constitutional norms. In many societies, the classical relation between constitutional law and administrative law is gradually being inverted. Whereas once administrative law was classified as applied constitutional law,84 administrative law has been transformed into a vital communication loop around the political system, constructing constitutional norms through autonomous legal procedures. We can find innumerable examples of cases, in which, owing to the impact of internationally defined norms, administrative law litigation has spelled out new, stricter norms for the use of discretionary powers by governmental institutions, usually extracted in

part from international human rights laws. We can also find many cases in which administrative litigation has given rise to new legislation, typically designed to remedy an administrative shortcoming noted in the original litigation. In fact, in some societies, administrative law litigation is specifically facilitated and encouraged by government bodies, and it is openly promoted as a mode of legal mobilisation, which is sanctioned in the absence of more classical patterns of constituent power.

The most striking constitutional result of litigation, however, appears in the realm of public interest litigation, in particular in cases that have relevance for human rights law. This is now a legal domain, in which the separation between litigation and constitutional formation making has become very blurred, and in which litigants can clearly exercise quasi-constituent power in a variety of different ways.

On one hand, we can find important cases of public interest litigation, in which such litigation helps to promote the solidification of constitutional norms in situations in which constitutional law is not yet fully established. One very important instance of this can be found in the introduction of legislation legalising class-action cases in Brazil in 1985, following the onset of the democratisation process. With this law, the Public Civil Action Act, rules on standing in class actions were widened, and collective litigation became a form of legal/political agency open to many social actors, often facilitating action against public bodies. Arguably, in fact, in transitional Brazil public interest litigation was expressly promoted by


87 See for example the Russian Administrative Litigation Code (2015), which is designed to facilitate litigation against government bodies and to simplify procedures for public interest litigation. The 2015 Code was anticipated in one of Putin’s post-election memoranda (2012), in which he outlined his priorities for the development of the judicial system, based on harmonisation of public services standards with international norms through the use of best practices of other countries in state-building processes.

government bodies as a second line of communication between the political system and society, acting to reinforce constitutional law in the early stages of democratic reorientation. Class-action cases were ascribed a status close to that of a secondary constituent power. Ultimately, alongside protection for class-action cases, the Brazilian Constitution of 1988 gave constitutional standing to the right to initiate public-interest cases (Article 5, LXXIII). This established a clear distinction between class action and public interest litigation cases which later became vital for constitutional practices in many Latin American societies.89

On the other hand, we can find cases of public interest litigation, in which litigation serves to consolidate the position, and, above all, to extend the societal reach, of an existing constitution. Early examples of the constituent role of public interest litigation can, of course, be found in litigation connected to the civil rights movement in the USA. Brown v Board of Education (1954) is widely recognised as the end point in a long strategy devised by civil rights advocates, dedicated to deploying litigation as an instrument of social/constitutional transformation, and promoting the enforcement of new constitutional rights of social equality.90 Notably, this case occurred in a background marked by the deepening penetration of international human rights law into American society.91

Amongst public-interest cases, further, we find many instances in which the courts have unilaterally relaxed laws on standing in order to simplify access to law for classically marginalised legal actors, thus strategically allocating ius-generative force to new subjects, across a range of socio-economic variations.92 Indeed, courts often quite consciously encourage public interest litigation in order to increase the number of social agents assuming formative relevance for law, and, in so doing, they use litigation to

89 This distinction is now quite emphatically declared in Colombia and Bolivia, where public interest litigation is seen as focused on rights that pertain to persons, not as members of a legal group or class, but simply as members of the nation. See discussion below at p 32.
92 The cases discussed below occurred in common-law settings, and they saw a liberalisation of standing rules partly because this permitted a shift away from English metropolitan law, towards a more decidedly post colonial constitution. English laws on standing were traditionally very restrictive, as expressed in the following: ‘a private person could only bring an action to restrain a threatened breach of the law if his claim was based on an allegation that the threatened breach would constitute an infringement of his private rights or would inflict special damage on him.’ Gouriet v Union of Post Office Workers and others [1977] 3 All ER 70.
open the legal system, to intensify lines of articulation between government and its social environment, and to link the legal system more conclusively to its addressees (its constituents). In consequence of this, public-interest cases commonly give rise to new rights, allocated to newly personified legal interests, such that public litigation over rights, actively encouraged by the judiciary, is often able to alter the basic constitutional structure of society.

The locus classicus for such usage of public interest litigation can be found in the case law of the superior courts in India, which have linked their own jurisprudence very directly to international human rights law. 93 This is illustrated most notably by the case, *S.P. Gupta vs President of India and ors* (1981). In this case, it was concluded that it was essential for the court ‘to democratise judicial remedies’, and to ‘promote public interest litigation so that the large masses of people belonging to the deprived and exploited sections of humanity may be able to realise and enjoy the socio-economic rights granted to them’. In this case, moreover, it was argued that the classical restrictive law on standing was ‘a rule of ancient vintage and it arose during an era when private law dominated the legal scene and public law had not yet been born’. 94 Accordingly, the Court emphasised the importance of access to law for non-typical subjects, which it expressly identified as a means of widening and reconfiguring the constitutional domain of public law. Similar principles have been spelled out in many other countries influenced by Indian law. 95

However, the capacity of public interest litigation for generating new rights has reached its apotheosis in Colombia, in which such litigation is

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93 In India, the basic structure doctrine, asserting the absolute entrenchment of certain elements of the constitution, was partly worked out through reference to international human rights law. See arguments in *Kesavananda Bharati v State of Kerela* (1973) 4 SCC 225.

94 *S.P. Gupta vs President of India and ors* on 30 December 1981 (Bhagwati J).

95 See the Tanzanian case *Christopher Mtikila v Attorney General*, Civ Case No 5 of 1993 (High Court, Dodoma, 1993). Here the argument runs as follows: ‘The relevance of public interest litigation in Tanzania cannot be overemphasised. Having regard to our socio-economic conditions, this development promises more hope to our people than any other strategy currently in place. First of all, illiteracy is still rampant … Secondly, Tanzanians are massively poor. Our ranking in the world on the basis of per capita income has persistently been the source of embarrassment. Public interest litigation is a sophisticated mechanism which requires professional handling. By reason of limited resources the vast majority of our people cannot afford to engage lawyers even where they were aware of the infringement of their rights and the perversion of the Constitution. Other factors could be listed but perhaps the most painful of all is that over the years since independence Tanzanians have developed a culture of apathy and silence. This, in large measure, is a product of institutionalised mono-party politics which in its repressive dimension, like detention without trial, supped up initiative and guts.’ My thanks are due to Elizabeth O’Loughlin (PhD researcher, University of Manchester) for drawing my attention to this case.
very emphatically identified as a mode of constituent practice. The expansion of public interest litigation was a particular objective of the Constituent Assembly in 1990, which viewed such litigation as a core mechanism for reinforcing democratic engagement; it was thus strongly protected in the Constitution of 1991 (Article 88). Protection for public interest litigation was later solidified in legislation of 1998 (Law 472), which clearly defined the categories of persons, including single persons and NGOs, that were authorised to initiate public-interest cases. The importance of public interest litigation in Colombia was then further accentuated in subsequent case law, in which it was seen as a core instrument for promoting ‘law based in participation and solidarity’. In particular, public interest litigation was construed in the Colombian courts as a practice for protecting interests of a very strictly collective, diffuse nature, not attached to specific subjects, and not registered through damages to clearly identified, entrenched rights.

In leading relevant rulings, the courts stated that in public-interest cases matters should be treated that do not have a ‘subjective or individual content’, and which do not relate to a ‘damage that can be repaired subjectively’. In consequence, such cases were to be focused on ‘collective rights, in contrast to individual rights’, which ‘belong to the entire community’, and whose holder ‘is a plurality of persons’. In Colombia, accordingly, public interest litigation was envisioned as a legal activity in which socially overarching concerns could be transmitted through the legal system, and in which, if legally recognised, such interests could be constitutionally hardened, as general constitutional rights. As a result, such litigation created a setting in which the people as a whole could appear within the legal system, as a legal person with distinct collective concerns, and in which the established law of the constitution could be reopened to collective popular agency, transmitted through legal channels and procedures. This possessed particular significance in the Colombian constitutional order, because the Colombian constitution is based in the assumption that the rights that it enumerates are not exhaustive, and new rights (for example, environmental rights, rights to natural resources) can be formed or solidified to adapt the constitution to general social conditions. In the Colombian setting, therefore, public interest litigation is clearly observed as a rights-generating activity, in which new constituent impulses can be admitted to the legal/political system. Later, Bolivia followed the Colombian example, and in Articles

97 Colombian Constitutional Court C-215/99.
135–136 the 2009 Constitution of Bolivia made specific provision for public interest litigation. These provisions were reinforced in 2012. In leading rulings, then, the Bolivian courts described public interest litigation as reflecting ‘a new conception of the human being’, which is not ‘simply individual’, but part of a collective developmental community and which promotes rights of a communitarian character. In both Colombia and Bolivia, notably, claims to rights expressed through public interest litigation have normally been supported by reference to international treaties and instruments, and the domestic rights consolidated through such cases are usually extracted from principles of international law.

In public interest litigation, constituent power is clearly condensed into particular procedure, in which a number of subjects play legally formative roles. In such litigation, self-evidently, litigants and their advocates assume a leading position in the creation of new constitutional laws. This is particularly the case because broad laws on standing specifically encourage an expansionary, institutionally disruptive construction of given constitutional rights, and they generate opportunities in which litigants can articulate new interpretations of existing constitutional norms. However, in public interest litigation, members of the judiciary also acquire a share in the constituent power, as the relaxation of rules of procedure enables judges to assume a more proactive fact-finding role in hearing cases, thus simplifying communication between the legal system and its addressees and establishing new openings for cognitive norm construction.

In both respects, public interest litigation provides a context in which the constituent power is both procedurally reconstructed and reactivated. Indeed, although focused on selectively defined prerogatives, public interest litigation is at times capable of enacting a more integrally national constituent agency than is allowed in more classical delegatory expressions of constituent power: in open-ended processes of litigation, multiple actors, from very divergent

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100 Bolivian Constitutional Court 1018/2011-R.
103 See the following comment: ‘PIL cases must be based on constitutional claims and can be brought only against the government, not private parties. Unlike traditional litigation, PIL has looser procedural requirements, particularly in regard to legal standing. Furthermore, in a PIL case there is no trial; the governmental respondents are expected to cooperate with the petitioners, rather than act as opponents; objective third parties, such as amici curiae and expert committees, are often involved in the litigation; and the Court plays a particularly active role in directing the proceedings and monitoring the implementation of its orders.’ AM Sood, Litigating Reproductive Rights: Using Public Interest Litigation and International Law to Promote Gender Justice in India (Center for Reproductive Rights, New York, NY, 2006) 24.
backgrounds, can assume inclusion in the constitution-making process, and
can shape the constitutional fabric of society. Not coincidentally, in fact, a
particularly important development in public interest litigation is that, like
proportionality, it often acts as a mechanism in which exchanges usually
determined as belonging to private law are transferred into the domain of
constitutional law, and it concretises rights with a wider scope and with wider
reach than is typical of either classical litigation or classical constitution-
making processes.\footnote{See for example Indian cases above at p 31. However, public interest litigation has also
been used to secure new rights regarding environmental protection and rights of recognition
for sexual minorities. In Kenya, notably, public interest litigation has widely focused on
environmental rights BYK Sang, ‘Tending towards Greater Eco-Protection in Kenya: Public
Interest Environmental Litigation and Its Prospects within the New Constitutional Order’
(2013) 57(1) Journal of African Law 40.}
As a result, public interest litigation commonly
constitutionalises new spheres of society, and it deepens the societal
penetration of laws with strictly constitutional character.

Notable in the proliferation of public interest litigation, moreover, is the
fact that public-interest challenges to public authorities are increasingly
used to activate and expand rights, not only with relevance for socio-economic
variations, but also with significance for the construction and inclusion of
distinct ethnic groups in national societies.

In some societies, on one hand, public interest litigation brings
constitutional protection to the interests of sub- or pre-national population
groups, outside the national population as a whole. Very notably, for
example, public-interest cases in Bolivia often act as fora in which the
rights of indigenous social groups can be legally articulated, and public
interest litigation is formally designated as a legal practice that is especially
appropriate for securing particular rights of indigenous communities,
such as rights to water, ancestral land, and basic services.\footnote{See Bolivian Constitutional Court 0572/2014. See extensive discussion of this in MEA
Bellido, Sistematización de jurisprudencia y esquema jurisprudencial en los pueblos indígenas
en el marco del sistema plural de control de constitucionalidad (Fundación CONSTRUIR, La
Paz, 2014) 210–11.} In other
societies, by contrast, public interest litigation serves to distil a unifi ed
national constituent power, not only above socio-economic fissures, but
also above the ethnic cleavages that fragment national populations. In
the case law of the Kenyan higher courts, for instance, public interest
litigation has assumed a quite distinctive importance. The recent process
democratic constitution-making was driven forward, in part, by public
interest litigation, and public interest litigation then acquired a core role in
the process of embedding the new 2010 Constitution in society, and in
bringing reality to the rights contained in the constitution. Notably, wide
rules on standing were established by President Moi in the Environment Management and Co-ordination Act of 1999, and the Constitution of 2010 gives particular protection (in Articles 22(1)(c) and 258(2)(c)) to rights of public interest litigation. To some degree, such litigation simply follows the Indian model in promoting social rights jurisprudence. Especially noteworthy in this respect, however, is the famous case *Nj joya and Others v Attorney General and Others* (2004). In this case, a Presbyterian pastor, together with other applicants, challenged the authority of the National Constitutional Conference (an adjunct to the sitting parliament) to approve a new constitution. Significantly, the applicants argued that the sitting parliament was not entitled to claim the right to exercise constituent power, and a new constitution could not be accorded validity by an already elected government. In addition, the applicants protested against the division of the Kenyan nation into separate districts during the writing of the constitution, claiming that this accorded undue privilege to distinct ethnic groups, and generally impeded the formation of a nationally legitimated constitution. Ultimately, the court found in favour of the applicants, declaring that a new constitution could only acquire legitimacy if it were established by a higher-order political will, and it needed to extract its authority from the *single and sovereign national people*, acting, not as a parliamentary assembly, but as a *primary constituent power*. Decisively, the Court ruled that ‘every person in Kenya’ had an ‘equal right to review the constitution’ and even to participate ‘in writing and ratifying the Constitution’. In marked contrast to conventional jurisprudence in Kenya, which had usually accentuated the primacy of domestic law over international law, the Court also cited Article 21 of the Universal Declaration of Human Rights to reject the apparent discriminatory composition of the constitution-making body. On this basis, the court

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107 For a long time, *Okunda v Republic* [1970] EA 453, in which international law was ruled subordinate to domestic law, remained a leading case regarding the status of international law. This approach was sustained in later leading cases, notably in *Rono v Rono* (29 April 2005), Civil Appeal No 66 of 2002, [2008] 1 KLR 803. However, this position changed gradually in the course of the transition. For example, in *In Re Estate of Lerionka Ole Ntutu (Deceased)* [2008] eKLR, the Kenyan High Court announced that it would adopt a more purposive ‘living tree’ approach to constitutional interpretation, citing international covenants to overrule customary law. The line of reasoning in *Rono v Rono* was abandoned in later cases, in particular in *Satrose Ayuma and others v The Registered Trustees of the Kenya Railway Staff Benefits Scheme and others* (High Court petition No 65 of 2010), where the Justices ruled that the principle stated in *Rono v Rono* was not ‘good law’. Note though that before 2010 some rulings had already given particular weight to international law. An important example is *In Re the Estate of Andrew Manunzyu Musyoka (Deceased)* [2005] eKLR.

concluded that a referendum was required to endorse the constitution, and it concluded that the applicants possessed a ‘constituent right’ to ‘adopt and ratify a new Constitution’ and even that this right was the ‘centre-piece of a people-driven constitutional review process’. The collective right to exercise constituent power assumed particular weight, the court argued, because of the ethnic or regionalistic bias of the institutions responsible for drafting and approving the constitution, which, allegedly, sought to ‘fragment and Balkanize the Republic of Kenya into ethnic mini-states’. The eventual practical result of this case was that a new constitution was drafted, which was, in 2010, approved by national referendum. The theoretical result of this was that, to all intents and purposes, public interest litigation became the constituent power, and the basic foundation for the national polity was distilled by the courts in the course of a litigation procedure. In Bolivia, therefore, public-interest cases help to incorporate different ethnic groups in the body of constitutional law. In Kenya, by contrast, public-interest cases have helped to solidify a national constituent body above particular interests. Although diametrically opposed, however, both lines of litigation have acted to widen the national constituent power. Indeed, both lines of litigation have promoted an expansion of constituent power that is not easy to achieve in regular constitution-making situations.

In these different examples, it is observable that litigation has now extended far beyond its classical compass as a process referring to the already acknowledged norms of a constitution. Across different societies, litigation has acquired a powerful constituent force, and, especially when linked to international law, it clearly shapes the constitutional order of national societies in a number of different ways. Most societies are characterised by a de facto recognition that litigation is at least a mode of agency that supplements classical constitution-making processes. In some societies, litigation is fast becoming an essential mode of constitutional norm construction. In each respect, the constitutional power of litigation illustrates the rising autonomy of the legal system, and it assumes constituent force because it elaborates norms already stored, at a primary level, in the system of global law. In each respect, however, it illustrates new procedures for the enactment of constituent power, made possible by law’s increasing autonomy. Public interest litigation has become paradigmatic for the new modes of constituent agency emerging through the global differentiation of the law.

V. Conclusion

Theories of the proceduralisation of national constituent power are intended to direct political analysis away from political substantialism, and they promote analysis of procedure as a basis for the legitimate political system because they see this as a way of gaining insight into the relatively contingent, acentric foundations of the legal/political system in modern society. In many ways, however, established doctrines of proceduralisation are insufficiently acentric in their analyses, and they tend too literally to reproduce an essentially politicised model of constituent power, presuming the existence of constituent power as the will of a collective political actor, located in a particular society. Above all, these theories miss the sociologically striking point that, in the global legal/political system, constituent power is exercised inner-legally – as the secondary enactment of a normative content that has already been enacted. In the increasingly global constitutional order, the proceduralisation of constituent power unfolds, not as the elaboration of a still inchoate political will, but as the (albeit variable) enactment of human rights provisions that are already stored in the legal system, and through which the legal system determines and reproduces its own differentiated autonomy. This proceduralisation of constituent power occurs within the law, and it reflects and hardens the growing autonomy of the legal system. The procedural articulation of human rights law constructs a reality in which the legal system, as a fully differentiated system of global society, is increasingly capable of authorising the law on its own, and processes of political volition are now fully internalised in the law. Nonetheless, the loss of national constituent power that occurs through the autonomy of law does not unequivocally reflect a loss of human social autonomy or human participation in legal norm construction. On the contrary, the fact that constituent power is constructed within the law, and differentiated from a given factual people, opens new opportunities for the assertion of constitutional imperatives, and it institutionalises multiple points of constituent interaction between the legal system and its societal addressees. The site of global democracy is thus transferred from politics to law.

Central to this process is the fact that the law does not construct constituent power for politics. In ordering its procedures around rights, the law constructs constituent power for itself; it does not direct its rulings towards a central set of institutions, it does not procedurally articulate inner-systemic conditions of compatibility between itself and politics, and

it merely distils constituent power as it reproduces its inner vocabulary – human rights. To be sure, the legal system produces a normative structure for society as a whole. But it does this only incidentally, or inner-legally, through its own procedural self-reproduction. Perhaps, in fact, the internalisation of constituent power in rights might be taken to indicate that, in global society, the political system has become increasingly integrated into the legal system, and the global autonomy of the law reflects a condition in which much of what was once perceived politics has now become law. The mistake of other procedural theories of constituent power was that they replicated the literal perceptions of classical constitutionalism, and they interpreted procedures as enduring links between politics and law. In fact, however, the proceduralisation of constituent power which is now factually visible can easily be taken to imply that there are no eminently political functions in global society; instead, there is merely law. In any case, we might anticipate that, as constituent power is replaced by rights, politics as a social system will also increasingly be replaced by law, and law, coded around rights/not rights, will become the dominant form of political agency in the future of global society and its constitution.