

## CHAPTER ONE

# THE NATIONAL POLITICAL SYSTEM AND THE CLASSICAL CONSTITUTIONAL FORMULA

### CLASSICAL CONSTITUTIONS AND SOCIETY'S FUNCTIONAL STRUCTURE

Analyses of contemporary constitutionalism normally explain the emergent constitutional law of global society by contrasting it with the classical constitutions of national societies. As mentioned, accounts of global constitutional law, whether critical or affirmative, usually presuppose that classical constitutions were inextricably linked to the concept of *national sovereignty*, and they assumed force as they expressed the will of one sovereign nation, both, internally, as the source of legislation, and, externally, as the basis of the state's territorial unity.<sup>1</sup> In much inquiry into global constitutional law, classical constitutions appear, simply and literally, as single normative documents, in which, in Alexander Hamilton's words, 'societies of men' establish the foundation of 'good government', using rational capacities of 'reflection and choice' (Madison, Hamilton and Jay 1987 [1787–88]: 87), and in which states derive legitimacy from the aggregated will of a national society. Against this background, most established literature on global constitutions claims that there exists a deep caesura between classical/national and contemporary/global patterns of constitutional norm formation.

The analysis below argues that research on contemporary constitutionalism has often interpreted transnational constitutional law in rather simplified fashion. One important reason for this is that it has

<sup>1</sup> See above p. 22.

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tended to misconstrue national constitutional law, and its perception of classical constitutionalism has stood in the way of an adequate analysis of contemporary constitutional tendencies. To understand the constitutional law of global society, it is necessary to revise widespread accounts of classical constitutionalism, and to develop a more sociological analysis of the origins and functions of constitutions in their original national environments. In particular, it is necessary to abandon *methodological literalism* in observing classical constitutional norms, and to renounce the principle that constitutions originally produced legitimacy for the political system by articulating simple processes of will formation for different national societies: this belief obstructs comprehension of both classical and contemporary constitutional norms. Constitutions first gained effect, most importantly, in a dimension of social organization that is not easily captured in literal analysis. Classical constitutions can be seen, not solely as literally objectivized normative agreements, but as adaptive instruments, through which, beneath the level of practical deliberation, societies consolidated their functional exchanges, and through which, above all, they learned to elaborate and preserve structures of general political inclusion. Constitutions, and the norms that they contain, thus, possess functional meanings alongside their literal meanings, and their functional meaning is expressed, not as literally agreed 'objects of public good' (Tomkins 2003: 5), but as formative elements in the inclusionary structure of society. In fact, we can observe the normative core of classical constitutions as a set of principles produced by, and within, the political system of society, through which modern society generally consolidated an inclusionary structure for its political functions, and through which, progressively, the political system insulated itself against the increasingly complex demands for legislation that it encountered. If we elucidate this non-literal, societally embedded meaning of classical constitutions, we can also gain fuller understanding of the constitutional law of global society.

This submerged dimension of constitutional law can be approached, most simply, through a sociological discussion of the rise of classical constitutionalism. It can be illustrated through observation of the different constitutional revolutions, which, beginning in 1688 in England and ending in 1795 in post-Thermidorian France, marked the division between the inclusionary forms typical of early modern society and those typical of a modern, relatively differentiated social order. Accordingly, this chapter proposes a dual foundation for sociological inquiry

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into classical constitutions, which provides the premise for the examination of transnational constitutional norms in later chapters. First, it proposes a sociological reconstruction of the *basic norms* of classical constitutions – that is, of the norms by which classical constitutions, created in the revolutionary époques in Europe and America, brought legitimacy to their political systems. It offers a sociological analysis both of the implications of these constitutions, and the norms expressed through them, for the inclusionary structure of society at the time of their foundation. Then, second, it proposes a sociological analysis of the implications of classical constitutional norms for society in its changing contemporary form. In both respects, it sets out a historical-sociological perspective for understanding the origins of transnational constitutional law in contemporary society.

### **i Norm 1: Constituent power and national sovereignty**

The primary norm by which classical constitutions distilled legitimacy for the political system is associated with the concept of *constituent power* and with the closely related concept of *national sovereignty*. Indeed, classical constitutions were almost invariably founded in some variation on the theory of national sovereignty and national constituent power. Obviously, the concept of national sovereignty has a range of quite distinct implications, and its meaning differs when applied to the international actions of a political system. In relation to the domestic constituency of a polity, however, the concepts of national sovereignty and constituent power imply that legitimate public order must be established through common processes of popular will formation, and that a political system derives its legitimacy from demonstrable acts of collective self-legislation, by a given people, in a given society, at a given historical moment. The concept of constituent power, in particular, implies that a polity only obtains authority to pass laws insofar as it gives immediate constitutional expression to the sovereign will of a particular people (or nation), so that the basic institutional order of the political system can be traced back to an original act of political volition, with some claim to express objectives shared by all society (Böckenförde 1991: 91). The classical theory of constituent power suggests that the legitimacy of a political system is derived from an *ex nihilo* moment of foundation, in which the national will, albeit perhaps mediated through representative actors, enunciates the original constitutional norms by which the polity as a whole is to be governed, and by which later acts of legislation are pre-determined. The

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nation, thus exercises constituent power as a sovereign agent, which is not subject in advance to any given constitution. In this founding position, the nation 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 (Sieyès 1789a: 20), determining and bringing legitimacy to all later governmental acts – especially statutes. Naturally, the concept of constituent power has been repeatedly modified. In its post-classical expression, this theory allows for more flexible forms of higher law making, incremental constitutional revision, and discursive re-direction of the polity (Ackerman 1991: 19–21). However, even such variations on the original doctrine contain the clear implication that constituent power constructs legitimate political order through exceptional moments of collective re-direction, in which the popular or national will is elevated above ordinary acts of law making, giving binding constitutional orientation to the polity as a whole. Throughout the history of modern political and constitutional reflection, the process of constituent authorization repeatedly figures as the condition *sine qua non* of a legitimate political system, and law enjoying legitimacy is almost invariably perceived as a directly authorized constitutional enactment of a national or popular will (see Carré de Malberg 1920–22: 490–91; Schmitt 1928: 23; Habermas 1992: 349; Loughlin 2013: 218).<sup>2</sup> Of course, more recent theorists of constituent power do not imply that legitimate order is invariably created through some manifest display of collective law making; the theory of constituent power or popular sovereignty now typically conceives of constituent power as a basic *procedure of justification* (see Habermas 1992: 466). However, the classical concept of constituent power is still echoed in the common theoretical claim that the legitimate political system draws legitimacy from a set of constitutional norms in which the people recognize themselves as the original source of law's authority: the constitution is still widely seen as a legal order in which the nation publicly enshrines its own primary authority.

The genealogy of the concept of constituent power is highly contested, and its emergence is visible in different ways at different points in modern history. The origins of this doctrine are perennially associated with the writings of Sieyès (1839 [1789a]: 45), who, in the months before the French Revolution, modified Rousseau's doctrine of

<sup>2</sup> This is perfectly exemplified by Grimm (2012: 223), who observes the 'distinction between *pouvoir constituant* and *pouvoir constitué*' as 'constitutive' of modern constitutionalism.

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the general will to claim that only the single and unified will of the sovereign nation, admitting no privileges or distinctions of standing, can bring legitimacy to the state.<sup>3</sup> Notably, this theory gained intense influence in summer 1789, as the convention of the Estates-General, summoned by the Bourbon king to address the fiscal problems of the monarchy, collapsed, and the Third Estate, acting independently of the other Estates, claimed authority to reform the monarchy and to write a new republican constitution: Sieyès's theory of national sovereignty thus formed the original legitimating premise for the reconstruction of monarchical government in revolutionary France (see Sewell 1980: 83; Fehrenbach 1986: 75). Despite the importance of Sieyès, however, the doctrine of constituent power did not belong solely to the French Revolution. Something close to a constituent power can be perceived in the English convention parliament of 1688/89 (Pincus 2009: 283–6). Although it did not give rise to a new state in any strict sense, this parliament acted outside pre-constituted juridical constraints to draft a series of basic laws, which then became, and today still remain, binding on subsequent acts of the legislature and the executive. Moreover, it is often argued, especially by theorists standing in intellectual proximity to Sieyès, that the American Revolution (defined here as the period between the Declaration of Independence in 1776 and the interim completion of the Federal Constitution in 1791) did not produce a consistent theory of constituent power. This is usually ascribed to the loosely integrated federal substructure of the early American polity, and to the absence of a clearly unified nation, during the Founding era (see Schmitt 1928: 76). As a consequence, purportedly, the American people(s) could not be palpably imagined as the authors of public laws, and the public order created in the revolution could not be explained as the result of one concerted national will. Nonetheless, in the state legislatures prior to 1787 and then both in the Philadelphia Convention and the subsequent state ratifying conventions (1787–88), a constituent power, albeit pluralistically assembled and voiced, clearly shaped the rise of the constitutional state in America.<sup>4</sup> The concept of constituent

<sup>3</sup> Sieyès defined the nation (people) as 'the origin of everything [...] the law itself' (1789a: 79).

<sup>4</sup> Lafayette himself declared in his reflections on Sieyès that the distinction between *pouvoir constituant* and *pouvoir constitué* had already been established in the American Revolution. He concluded that the French Revolution actually weakened the force of this concept owing to its recurrent 'mixture of constituent and legislative functions' (1839: 50). On the anteriority of the American Revolution in elaborating the principle of constituent power, see additionally Laboulaye (1872: 381), Zweig (1909: 2), Klein (1996: 15), Boehl (1997: 26) and Adams (2001: 63).

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power had in fact been theoretically formulated in revolutionary America some years before Sieyès (see Tucker 1983 [1784]: 610). While drafting the Federal Constitution, then, Madison himself expressed a classical doctrine of constituent power, differentiating between ‘a Constitution established by the people and unalterable by the government, and a law established by the government and alterable by the government’ (Madison, Hamilton and Jay 1987 [1787–88]: 327). The theory of constituent power as a higher, and specifically protected, source of law thus obtained particularly prominent expression in the American Revolution. Overall, therefore, it is perhaps most appropriate to adopt a broad construction of the doctrine of constituent power, which can be defined as the claim that the state owes its legitimacy to its public enactment of the collective will of the nation (or people). On this broad construction, constituent power, with wide variations, was at the core of classical constitution making, and even the most cautious processes of early national constitution writing contained some reference to the prior sovereignty of the nation as the sole source of legitimacy.<sup>5</sup>

In many ways, clearly, the constitutional revolutions in England, America and France in the period 1688–1795 reflected a deep conceptual disjuncture between early modern and modern patterns of social formation. Moreover, these constitutions clearly articulated deliberated agreements between powerful actors in society about the conditions of government, and they declared strict normative principles to which politically relevant actors in society publicly acceded. For instance, the constitution of England resulting from the revolutionary Civil Wars of the seventeenth century and cemented in 1688/89 established a system of restricted parliamentary government. This constitution permitted some degree of popular representation, showing respect for clearly delineated rights, and it probably reflected convergent opinions in society about the desirable aims and limits of government, at least amongst politically participant elites. Later, the constitutions of the US-American states and then of the early American Republic as a whole sanctioned some degree of popular- or national-sovereign will formation, and (in most cases) they accorded entrenched status to certain prior rights (natural, civil or human). As such, these documents projected a founding normative consensus in society, and we might feel inclined to presume that they condensed a broad resentment fostered by the suppression of colonial liberties and fiscal conventions by the

<sup>5</sup> See Art 3 of the Spanish Constitution of 1812.

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Westminster parliament prior to 1776. By the same token, the constitutions of revolutionary France can be seen as documents, impelled by collective acrimony regarding the unaccountable use of power by the Bourbon monarchy, which distilled normative ideas about singular rights, the separation of powers, and popular participation, as essential components of legitimate government. As such, the constitutions introduced in France in 1791, 1793 and 1795 can be interpreted as texts that formulated normatively determined alternatives to the personalistic modes of government used under the pre-1789 monarchy. Viewed from this perspective, all classical constitutions possessed a certain literal, objective reality; all formalized common ideals of societal organization, and they framed the use of public power in terms giving immediate expression to shared political goals in one national society. Seen literally, classical constitutions were obviously written as normative documents by reflexive political agents, whose ideas were shaped both by a historical discourse of constitutional rationality, and who endeavoured to place the powers of government onto publicly accepted and inclusively legitimated conceptual foundations. To this degree, the revolutionary idea of constituent power or national sovereignty expressed a clear *literal norm*, which, in many settings, obtained foundational value for the general form of the political system (see Loughlin 2010: 228). Overtly, this norm imprinted on the emergent form of modern society the presumption that political power must originate in collective acts and general interests, and it cannot be applied to agents in society in the service of purely private prerogatives.<sup>6</sup> Many institutional structures – for example, national statehood, separation of powers, general rule of law, political representation of social interests – which are now viewed as invariable normative characteristics of modern society, were objectively devised, or at least solidified and justified, through this norm.

Notably, however, the early concepts of national sovereignty and constituent power also reflected a set of less manifest, more subliminal functional or sociological processes in society. The constitutional importance of national sovereignty was linked to less visible evolutionary tendencies underlying emergent modern societies, which, in Europe in particular, were in the process of dramatically transforming the position of the political system and of reconfiguring society's structure as a whole. To this degree, the norms distilled through the ideas of constituent power and national sovereignty were articulated, not solely in

<sup>6</sup> See the classic formulation of this view in Kant (1976 [1797]: 569).

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the diction of manifest public argument but also at a more submerged level, *for and within* the inclusionary structure of society. These concepts helped to cast a new inclusionary form for the political system as it was confronted with new demands for legislation, and with pressures released by deep-lying processes of social change. Accordingly, these norms possessed a deep sociological meaning outside the positive sphere of deliberated discussion, and they had a structural impact on society for reasons quite separate from their literally intended content.

The sociological significance of the concepts of national sovereignty and constituent power resulted, first, from the fact that they imputed the authority of the political system to a collective will, standing outside the political system. These concepts defined this will, distinct from the interests of mere physical persons such as regents or magistrates, as a force that transmitted generalized social imperatives through the state. This meant that, as states were founded as constitutional states, defining their legitimacy as arising from a national constituent power, they were able to present themselves as institutions in possession of a distinctively apersonal, or *public* authority. In turn, this meant that, in constitutional states, holders of political power could distinguish themselves more strictly from other sources of coercion, and the essential differentiation of the political system in society was increased. The rise of constituent power as a norm of political legitimacy was deeply linked to the abstraction of a categorically *political* sphere in society, marked by a distinct body of public law, and capable of producing decisions with distinctive political authority.<sup>7</sup> Second, the sociological importance of the concept of national constituent power resulted from the fact that it instilled a principle of higher legitimacy in the state. As states were founded as *nationally constituted* states, they became a focus of distinct and superior legitimacy, claiming distinct authority to carry out regulative acts for all society, and for all members of society. As a result, the ideas of constituent power and national sovereignty created a societal condition in which states, once formed as constitutional states, proposed themselves as centres of *collective inclusion* in society, able to subject exchanges in all parts of society to uniform laws, so that, at least in principle, all actors in society were transformed into actors subject to laws enforced by the state. Political institutions extracting legitimacy from constituent power were able

<sup>7</sup> Tellingly, one eminent historian of early modern Europe observed that societies before the revolutionary constitutional caesura in the eighteenth century *did not possess politics* in the modern sense of the word (Sonenscher 1989: 46).



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rapidly to introduce new laws, and – equally – importantly – to clear away old laws, and they acquired the power autonomously to define the basic legal/normative form of society as a whole. Most notably, where political systems claimed to embody constituent power and national sovereignty, they were able to assume authority endorsed by all society, and they could make, implement and transmit laws across society in rapidly accelerated, internally legitimated fashion. In both respects, the concepts of national sovereignty and constituent power led to a profound reinforcement of the political system and its inclusionary structure: these concepts greatly heightened the law-making capacities of the political system, promoting, simultaneously, an increased differentiation of the political system, an increased centralization of societies around political institutions, an increasing inclusion of society in the legal/political system and a rapid growth in the volume of law that the political system could make available for society. Overall, therefore, the concept of constituent power provided a basic inclusionary structure for modern society's political system at a decisive historical moment – at the moment at which the political system finally assumed the form of a state. Once explained as entities based in constituent power, states obtained a central position in their national societies, and they declared clear principles to underscore their monopoly of power across society. In this respect, the core concepts of early constitutionalism reflected a wider process of differentiation in society, and they evolved as norms that allowed the political system to separate itself from other social functions, to harden itself, in differentiated form, as a state, and to perform collective functions of inclusion for society in relatively autonomous fashion.

To illustrate these points, first, in revolutionary France, the emergence of the doctrine of constituent power rapidly intensified both the societal abstraction and the inclusionary reach of the national political system. The fact that the constitutional state created after 1789 claimed a foundation in a general will meant that it could easily give validity to new legislation, and it could impose uniform laws across the pluralistic legal design of society under the *ancien régime*. After 1789, therefore, assemblies claiming authorization through constituent power stripped away the remnants of local and seigneurial legislation, and they introduced legal codes to bring uniformity to agrarian customs and relations. In so doing, they brought historically localized spheres of social practice far more comprehensively under the jurisdiction of the national state than had been the case under the

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(purportedly) 'absolutist' system of the *ancien régime* (Sagnac 1898: 36; Markoff 1996: 555). After 1789, moreover, the revolutionaries, claiming authority from constituent power, introduced laws to limit the power of corporations and intermediary organizations, which had traditionally stood between single persons and the state, and obstructed the growth of sharply defined political institutions.

The anti-corporatism of the French Revolution was clearly reflected in the blanket prohibition of economic corporations in the 1791 Constitution, and, most notably, in the *Le Chapelier* law of 1791. This law accused corporations, especially professional and artisanal associations, of splitting national society into pluralistic sectors, and it denounced corporations generally as 'seditious'. This law's author and Chairman of the Constitutional Committee, Le Chapelier, justified it in the following terms: 'There are no corporations in the state; there is only the particular interest of each individual and the general interest. It is not permitted to anyone to inspire intermediary interests in citizens or to separate themselves from the public interest [*la chose publique*] by a spirit of corporation' (Buche and Roux-Lavergne 1834: 194–5). However, the anti-corporatism of the French Revolution had its most significant outcome in the suppression of the *parlements* in 1789/90: *parlements* were the corporate judicial institutions of the *ancien régime*, whose offices had historically been obtained and traded as venal goods, and which had traditionally fractured the unity of the monarchical state by cementing private corporate interests at the core of the public domain.<sup>8</sup> As an alternative, the French revolutionaries created, or attempted to create, a single judicial order, and they invoked the undivided will of the nation to concentrate judicial authority in vertically accountable institutions, in which private monopolization of judicial offices was prohibited. This was spelled out quite clearly in the provisions for judicial power in the 1791 Constitution.

In each of these laws, the concept of constituent power was used by the revolutionaries to eradicate obstructions to the inclusionary force of the state, to link the state more immediately to its societal constituencies and to intensify its penetration across society as a whole. Such inclusionary implications of revolutionary concepts were not lost on other early modern states, which soon borrowed judicial norms and procedures from revolutionary France to cement their institutional

<sup>8</sup> Jaume (1989: 365) argues that the *parlements* acted to 'decentre royal sovereignty'. He also (1989: 5) states that, due to its association with pluralistic rights, the 'term corporation was particularly reviled' in the revolution.