INTRODUCTION

BASIC CONCEPTS AND STRUCTURE OF THE BOOK

This book is the second in a series of volumes intended to provide a broad sociological analysis of the foundations of constitutional law. The first volume in this series was primarily concerned with the historical formation of constitutional law in different national societies, mainly in the early constitutional heartlands of Europe. In contrast, this book examines the constitutional form of contemporary society as a whole. It seeks sociologically to elucidate emerging constitutional norms, as society's political order expands beyond the historical limits of national jurisdictions and territorially organized public law, and as national sources of normative agency and authority lose their ability to produce legitimacy for some legal and political functions. In particular, the book is an attempt to isolate the structural pressures that have shaped the constitutional norms on which contemporary society relies, and it aims to account for the deep-lying social origins of prevailing, increasingly post-national, patterns of constitutional law.

To explain the constitutional form of contemporary society, this book proceeds from the claim that, to an increasing degree, modern society is in the process of evolving a global political system. To be entirely clear, this political system is not centred around global institutions, and it surely does not take the form of a world polity based on clearly constructed centres of authority, standing above national states, which is envisioned, critically or affirmatively, by some literature on

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global politics.[1] However, in contemporary society, only few political exchanges, at any societal location, are without some global dimension, and there are few interactions in any part of society which do not raise normative questions or presuppose principles of normative order that reach beyond their immediate territorial context. As a result, national political authority is only rarely the exclusive point of regress in the justification of political decisions, in the resolution of political conflicts or in the validation of laws, and national political decisions and national legislative processes are usually circumscribed by, or proportioned to, legal norms of extra-national origin. Most decisions in society are backed, however obliquely, by legal norms whose provenance is not solely national, and most acts of legislation are supported by multiple authorities, located both inside and outside national polities. In consequence, modern society has evolved an encompassing although highly variable and diffuse political system, which incorporates both the distinct political systems of national societies and institutions, mainly of a judicial nature, operating above and across national jurisdictions. This political system has a distinctive *transnational* character: that is, it performs basic political functions – it generates authority, it produces decisions, and it circulates, and obtains compliance for, laws – on foundations that are constructed across the boundaries between historically separated political units. Different components of the global political system authorize laws and decisions in contingent fashion, and they are not supported by identical, simply hierarchical laws or sources of legitimacy. However, different components of the political system are densely interlocked, and the functions of national political systems are not easily separable from the global political system as a whole. The global political system cannot be identified as a set of institutions standing outside national societies. On the contrary, the global political system is formed through a thick interpenetration between national and international legal structures, which, although separate in some respects, cannot be normatively disentangled from each other. As will be discussed, in fact, international elements of the global political system often have their origins in national societies.

On this basis, this book proceeds from the second claim that contemporary society is in the process of developing a distinct constitutional order, and the global political system increasingly relies on normative

[1] For this argument see Held (1996: 354); Shaw (2000: 216–8, 255); Wendt (2003: 525); Chimni (2004: 5); Archibugi (2008: 97, 110).

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premises for decisions and acts of law which cannot be solely derived from classical patterns of constitutional authority and legitimation. Quite evidently, contemporary society as a whole still relies on strictly national constitutional laws to provide legitimacy for some political decisions. However, contemporary society is rapidly acquiring a recognizably *transnational constitutional order*, and, in different components of the political system, the political exchanges of contemporary society are increasingly ordered in a normative form that amalgamates national and extra-national norms and procedures. The global political system possesses a transnational constitutional order insofar as it is primarily focused on exchanges within national contexts. As components of a global political system, national societies increasingly support and organize their inner political processes by assimilating norms of international or transnational origin, which they reconfigure and adapt to address their own distinct sociological pressures. Even within national societies it is often difficult to make a very sharp distinction between laws of national, laws of supranational and laws of international character, and norms originating at different locations in the global political system fuse in a rather informal, spontaneous manner to establish legal structures on which national societies constitutionally depend. Further, the global political system possesses a transnational constitutional order insofar as it reaches above national domains, into the international or the supranational dimensions of social interaction. In its extra-national extension, the global political system presupposes a particular normative structure, often combining national and international elements, to facilitate and underpin its exchanges. At both levels, a transnational constitutional order is evolving to provide normative cohesion for the global political system, which organizes its interactions by combining principles extracted from national, international and supranational legal environments. It remains possible to separate the global political system into notionally distinct spheres – the national, the supranational and the international – and it remains possible to observe some normative structures that are particular to each of these spheres. But the global political system as a whole integrates and fuses each of these domains, and in each of these domains the legal elements that sustain political functions usually possess, in part, a transnational composition.

This book attempts to propose a sociological analysis of the rise of the global political system and global constitutional norms, and it endeavours to explain both the social foundations of the global political system and the social foundations of the constitutional norms by means of

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which this system stabilizes itself. In proposing this analysis, this book employs both a distinctive definition of a political system and a distinctive definition of a constitution.

First, a political system is defined here, not as a distinctly mandated set of directive institutions, but as *the mass of institutional interactions in society by means of which society produces, justifies and enforces decisions with some claim to inclusive and collectively binding applicability*. The exchanges belonging to the political system naturally include the actions of national governments, governmental agencies and other public bodies. They also include the acts of organizations, national and extra-national, inter-governmental and non-governmental, to which collective decision-making functions have been assigned, and which national institutions presuppose for the formalization of decisions beyond their boundaries. Additionally, however, the exchanges pertaining to the political system incorporate acts of institutions with legal or norm-setting functions, such as courts, commissions, quasi-judicial bodies, organizations with jurisdictional responsibilities, all of which make decisions with binding effect across society, both globally and nationally. As discussed below, in fact, in global society the political system coalesces closely with institutions usually seen as pertaining to the legal system, and global law and global politics are not easily separated. A political system, thus, is construed quite generally as a *system of inclusion*: its function is to absorb the demands for political decisions and legal regulation in a society at any given juncture, to authorize the *consistent generalization of collectively binding acts* across the environments that society contains and to serve as a final point of regress for collectively binding acts across society in its entirety.[2] Every functionally and geographically extensive society necessarily possesses an inclusive political system. All such societies need to make decisions that are not based on personal acts of coercion, that appeal to principles that are not exhaustively articulated in single areas of social practice and that can be inclusively and *iterably* transplanted and replicated across different parts of society.

This definition of the political system as a system of inclusion does not imply that political systems necessarily perform their inclusionary functions in a smoothly consensual fashion. It is indubitably the case that, in the emergence of political systems, the boundaries of political

[2] This concept of a political system is derived from Luhmann's political sociology (1970: 159; 1984: 40; 1988: 34; 1991: 201).

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inclusion are always contested, and acts of inclusion also entail specific *acts of exclusion*. Indeed, this definition of the political system does not fully preclude Marxist or Gramscian constructions of the political system as an arena of hegemonic contest. Yet, complex societies inevitably develop political systems that are inclusive in the sense that they penetrate deeply into society, that they presuppose support amongst a number of social groups and that they are required to produce and justify legislation for most social phenomena – most social phenomena exist in an immediate inclusionary relation to the political system, and few exchanges in society have no relevance for the political system. Indeed, a political system is always likely to evolve to a higher level of generality and to a higher degree of inclusivity as society becomes more complex and as the requirement for decisions in different parts of society increases, that is, as society demands and consumes greater quantities of law. The political system of contemporary society, therefore, is a system of inclusion, through which society attempts to sustain consistent reactions to rapidly escalating demands for law, often extending beyond national domains, and in which normative support for law has to be constructed in accelerated, highly positivized fashion. In contemporary society, as discussed, political institutions are expected to perform functions of inclusion at a national level, and national societies clearly retain their own political systems. However, most national systems are increasingly internalized, in part, within a transnational political system, and each national system interacts closely with other parts of a global political system. The interpenetration of the national and the global political system is typically a precondition for the ability of contemporary society to generate the required volume of binding decisions, and in fact to preserve a distinctively political domain *tout court*.

The political system of any extended, complex society is supported by an underlying *inclusionary structure*, which in fact forms part of the political system. On one hand, the inclusionary structure of the political system is an aggregate of norms that allow political institutions in society to support and to authorize law, and to react to pressures for legislation and regulation. The inclusionary structure of society forms a reservoir of normative legitimacy to facilitate and authorize the rapid production of laws. As such, it insulates the political system against demands for legislation, and it provides normative support for laws as they are applied across society by the political system. To this degree, the inclusionary structure allows the political system to act at a relative level of autonomy and differentiation towards other spheres of

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society, and to produce and distribute law in reasonably independent fashion. On the other hand, the inclusionary structure of the political system is a set of legal provisions, procedures and institutions which connect the political system to society: these institutions enable agents in different parts of society to be drawn into the political system, they extract generalized support and legitimacy for the political system from agents in society and they motivate agents in society to acknowledge decisions of the political system as valid and binding. In both dimensions, the inclusionary structure of the political system is the basis for the effective societal penetration of the political system. The existence of a stable inclusionary structure ensures that political institutions are recognized through society as the legitimate authors of decisions (laws), that decisions made by the political system are collectively accepted, that social actors in different spheres of society receive decisions from the political system in similar fashion and that new laws can be produced that can easily claim authority and presume compliance. In these respects, the inclusionary structure of the political system underpins the distinctively *public* domain in society, and it stores norms which allow society to make decisions, or laws, that can be legitimized at a high level of social generality, or *publicness*.

Every society marked by any degree of geographical and temporal extension and complexity depends on a structure of this kind. Simple societies, marked by low systemic penetration and relatively limited, predictable demands for law making, presuppose only a relatively simple inclusionary structure for the political system. Societies with complex political systems, exposed to highly unpredictable demands for political decision making, however, presuppose complex reserves of legitimacy and complex, adaptable inclusionary structures to authorize decisions. Where a society possesses a robust inclusionary structure, the political system is typically able to operate in relatively autonomous fashion, it is unlikely to be dominated by particular societal interests and organizations and it is likely to produce decisions that have even and equal effect throughout all of society. The more complex a society is, in other words, the more its political system is likely to rely on an intricate and flexible inclusionary structure, from which collectively usable authority can be extracted to meet the demands for legislation that society, in its complexity, produces and encounters. Indeed, the more complex a society is, the more its political system is likely to construct its inclusionary structure at a *relative degree of autonomy*, and the more it is likely to articulate legitimacy for laws and political decisions from within a corpus of

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norms that are relatively stable, whose authority is commonly acceded, and which, to some degree, is independent of particular persons and locations in society.

On this basis, second, this book proposes a definition of a constitution as *the legally articulated form of a society's inclusionary structure*.[3] A constitution is conceived here as a body of legal norms, either derived from identifiable documents or at least projected as reasonably universal and obligatory expectations, which distil higher-order principles to support the exchanges of the political system, which produce basic premises to authorize collective political decisions and which underpin the broad organizational form of society. A constitution expresses a set of norms for the political system that lend authority to secondary laws, that underpin the iteration of political decisions (laws) and that support the relatively stable, inclusive generalization of legislation and decision making across society. In these respects, a constitution establishes a normative structure, in which laws can be produced rapidly and positively, and it allows a political system to perform its functions at a relatively advanced level of autonomy.

To this extent, this book utilizes what is in some respects a neoclassical definition of the constitution.[4] On this definition, even in highly diffuse contemporary societies, the constitution is *inseparable from the political system*, and it contains a set of norms that shape the distinctive political form of society. The constitution can be viewed as the aggregate of primary principles, inscribed in laws of identifiably *fundamental* nature, that enable society to sustain its political acts, even in response to highly uncertain regulatory phenomena. The constitution remains, thus, an inclusionary source of supra-positive norms, quite distinct from other spheres of exchange, which permits society to construct, validate and reproduce its laws on a solid public/political foundation. In fact, every society reaching a certain level of complexity is required to construct certain legal norms as public, as set apart from private interest, and the formation of a constitution is the primary means for achieving this. The construction of constitutional norms

[3] This idea partly has its origins in Luhmann's concept of the constitution as a mechanism for preserving the differentiation of the political system (1965: 23–4). But the role of the constitutional system, and attendant 'judicial agencies', in stabilizing the 'integrative structures of society' was also expressed clearly by Parsons. The general concept of the constitution as part of a 'legitimation subsystem', which binds the political system to wider patterns of normative integration, is identified by both Parsons and Luhmann. For these claims see Parsons (1969: 339).

[4] For the classical formulation of this view see Schmitt (1928: 21).

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is the precondition for the ability of a complex society to evolve an autonomous system of political inclusion.

In proposing this definition of a constitution, however, this book clearly deviates from more classical constitutional theories, and it argues that the inclusionary structure of contemporary society is expressed, not only through nationally binding laws but also through a *global or transnational constitution*. This concept of a transnational constitution is applied in two distinct ways throughout the book. On one hand, it is proposed that national societies now increasingly construct their inclusionary structure through many different processes of norm formation, often located between the national and the extra-national domain. In most cases, national constitutions are formed through complex interactions with the international legal order, and they cannot be tied categorically to one location, to one will, to one form or to one set of norms. Most national constitutions are unthinkable without norms established at international level, many of which of gain effect in national societies and form intrinsic parts of the domestic constitutional fabric. On the other hand, however, global society as a whole, beyond national institutions and political processes, is also developing a distinct transnational constitution. As contemporary society articulates demands for political inclusion that extend beyond classically centred territories, new dynamics of constitutional formation and norm construction – of inclusionary structure building – evolve to insulate society, and its political system, against this process. These two levels of transnational constitutionalism are not fully separate, and, taken together, they form the constitution for the global political system. Overall, the political system of global society is in the process of constructing an interlocking, two-level constitution, and both its dimensions possess a clearly transnational character. In both dimensions, the basic function of this constitution is that it enables the political system of society as a whole to respond to new demands for law, decisions and legal inclusion. As a result, the constitution is itself necessarily subject to change, and it necessarily produces new norms to support societal processes of inclusion.

As an attempt to provide a sociological explanation of the constitutional form of contemporary society, this book places its primary emphasis on examining the pressures that shape and transform the inclusionary structure of the political system. The book is centred on the claim, as mentioned, that constitutional norms serve to abstract and sustain society's functions of political inclusion, permitting the

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political system of society to generate and *normatively to authorize* legislation adequate to the *demands for inclusion* that society produces at a particular historical moment.[5] Constitutional norms are constructed as layers within the evolving inclusionary structure of the political system; new constitutional norms are articulated, progressively, as society's political system is exposed to challenges and demands, which it cannot absorb, and as it requires additional normative complexity to sustain its functions of inclusion. The key to understanding constitutions, in consequence, is to examine constitutional norms as a historically constructed, adaptive apparatus, which is closely correlated with distinct *inclusionary pressures* in society. Accordingly, the key to understanding the contemporary constitutional form is to observe how constitutional norms produced in contemporary society support the autonomy of the political system and stabilize its functions in face of the inclusionary pressures with which it is confronted. On this basis, this book claims that modern society *necessarily* produces a transnational constitutional order, which is located partly within and partly outside national societies; in fact, both the national and the extra-national domains of contemporary society are exposed to distinct, but closely linked inclusionary pressures, and, in both domains, these result in the formation of transnational constitutional norms. The pressures on the inclusionary structure of the political system in contemporary society inevitably give rise to a transnational constitution. This constitution allows the political system to generate normative resources adequate to its complex requirements for legislation, and it upholds the political system in its abstract, differentiated and increasingly diffuse form.

In each chapter, consequently, this book tries to elucidate how constitutional norms have been articulated as a result of pressures on the basic inclusionary structure of the political system. It attempts to capture the rise of transnational constitutional norms by setting out a history of societal inclusion and political-systemic formation and by tracing the adaptive functions performed by different constitutional norms in this context. To achieve this, this book adopts a dual focus. It examines the emergence of transnational constitutional norms both by observing inclusionary pressures within national societies and by observing inclusionary pressures in the international arena. Through this dual focus, this book aims to construe the contemporary transformation of constitutional normativity in a wide sociological

[5] For the provenance of this approach see Luhmann (1965: 16; 2000: 319–71).

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perspective, and it emphasizes how the global political system and global constitutional norms have been shaped both by national and by extra-national pressures and possess both national and extra-national origins and dimensions.

In Chapter 1, this book proceeds by examining the sociological position of classical constitutions and their main conceptual elements, and it explains the historical role played by classical constitutional norms in forming the inclusionary structure of the political system of national societies. This chapter argues that classical constitutions are widely misinterpreted, or construed in excessively *literal* fashion, in conventional constitutional inquiry, and this often prevents nuanced comprehension of global constitutional norms. This book uses a historical–sociological perspective to interpret the importance of constitutional norms for the evolution of the modern political system as a whole, and one implication of this approach is that it stresses the deeper social foundations of contemporary constitutional law and identifies important continuities between classical and contemporary patterns of constitutional norm construction. Throughout, this book argues that a sociologically adequate analysis of classical, national constitutions is a *vital precondition* for an accurate comprehension of current constitutional norms, and it claims that contemporary constitutional norm production is still, to a large degree, determined by the same social pressures that shaped classical constitutions. In fact, this book suggests that the evolution of constitutional norms is always, in part, a recursive process, in which the political system constantly stabilizes its inclusionary structure, often reacting to pressures created or intensified by preceding normative forms. In Chapters 2 and 3, this book analyses the emergence of an international legal order after 1945, which profoundly transformed the constitutional grammar of contemporary society, both in its national and in its international dimensions. These chapters attempt to isolate and explain the social pressures, especially in the *external* functions of states, which led to the re-orientation of constitutional norms at this time. These chapters propose a sociological framework for interpreting the growth of *international* law, and especially of international human rights law, and for understanding the constitutional impact of international human rights, both nationally and outside nation states. In Chapter 4, then, this book assesses the problems inherent in the form of classical, national constitutionalism. This chapter claims that, in most societies, national constitutional law contained intrinsic contradictions: the norms of classical, national constitutions often engendered

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pressures of inclusion which national states could not resolve, they proved incapable of addressing inclusionary expectations in complex modern societies and they often actually obstructed the emergence of effective inclusionary structures and of reliably abstracted political systems. On this basis, Chapter 4 closes by examining the rise of *transnational* constitutional laws in many national societies, and it explains this process as a sociological response to problems inherent in classical constitutional law, enabling national societies to soften the pressures to which their national constitutional laws had exposed them. In Chapters 5 and 6, this book exemplifies this claim by discussing the permeation of international or transnational legal norms, especially regarding human rights, into the fabric of different national societies and national constitutions. Addressing a variety of national constitutional histories, Chapters 5 and 6 analyse the structural and historical reasons that have induced different polities to construct their inclusionary foundations on transnational premises, combining national and international constitutional norms. In particular, these chapters argue that, in incorporating transnational norms, national political systems have often been able to stabilize their inclusionary structures at a level of autonomy that was not possible under solely national constitutional law. In Chapter 7, this book concludes by discussing how present-day global society as a whole increasingly produces the inclusionary structure to support its political functions at a heightened degree of autonomy, and it generates a contingent body of transnational constitutional law, through which it adapts to the multiplication of inclusionary pressures which it experiences. Chapter 7, thus, shows how the contemporary constitutional order has begun independently to stabilize itself, on irreducibly transnational premises, such that constitutional law is now partly severed from national processes of inclusion, and it examines the sociological reasons for this development.

Overall, this book is designed to propose a multi-level sociological interpretation of contemporary public-legal norms. It bases its analysis in a historical reconstruction of the inclusionary pressures that have accompanied the formation of contemporary society and the contemporary political system, both in its national and its extra-national dimensions. It construes constitutional norms as historical products of deep-lying inclusionary pressures, located both within and beyond national societies, and it observes the emergence of transnational constitutional norms both within domestic public law and in the legal order of global society as a whole. In this approach, as mentioned, this book

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posits a deep underlying continuity between classical (national) and contemporary (global) constitutionalism. It argues that different periods of public-legal norm construction are falsely construed if they are viewed as divided by incisive or categorical caesuras. In fact, all constitutional norms – national and extra-national – have evolved, through embedded historical processes, as reactions to the changing pressures of inclusion with which the political system of society is confronted. In particular, constitutional norms are responses to conjunctures in which the political system is exposed to escalating, or increasingly intense, demands for legislation, and they supply autonomous legal structures to absorb such inclusionary demands. All constitutional norms, ranging from the first classical constitutional norms of basic rights and constituent power to the hyper-contingent norms of contemporary transnational law, are formulae that serve to abstract, differentiate and consolidate autonomous inclusionary structures for the political system, and for society as a whole.[6] The task for a sociology of the transnational constitution is to isolate and observe the inclusionary pressures which underlie society's constitutional norms and which have transformed the norms of classical constitutions into the norms of contemporary constitutionalism.

RESEARCH BACKGROUND

This book positions itself distinctively towards a number of fields of research that have assumed prominence in recent years. Naturally, it has not gone unnoticed in current debate that contemporary society is in the process of acquiring a constitutional order that is distinct from the constitutional models prevalent in national states. As a result, there now exists a large body of literature, sub-divided in accordance with emphasis and focus, which is concerned – broadly – with the emergence of global patterns of constitutionalism.

On one hand, some literature concerned with global constitutionalism proceeds from a classical *legalist* or *internationalist* position, and it argues that the constitutional order of contemporary society is defined by the fact that the norms of international law now acquire constitutional force, located above, but binding on, national states. Accordingly, this literature tends to examine the growth of global

[6] For claims regarding the symmetry between domestic and international rights see Cappelletti (1981: 653); Gardbaum (2008: 750).

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constitutional norms as an analogue to the *hierarchical* authority of classical constitutional laws, in their literal construction. This literature observes global constitutional law as a body of laws, which are imposed externally on national political institutions and which ensure that these institutions exercise their power in a manner proportioned to commonly accepted higher norms.[7] Of particular importance for such *internationalist* research on post-national constitutionalism is the claim that after 1945 international law progressively lost its foundation in interstate diplomacy, and it became increasingly centred around human rights instruments, possessing autonomous peremptory force. This line of inquiry can in fact be traced to an early stage in the legal analysis of contemporary society, and its basic preconceptions had been articulated before 1939 (see Scelle 1932: 13). After 1945, however, it became more common for legal observers to perceive international conventions, human rights charters and increasingly hard principles of international law as elements of a legal order with force close to that of classical constitutional norms.[8] More recent exponents of this view often perceive international human rights law in particular as a normative framework in which national states are transformed into simple subjects of law, similar to single persons within classically constituted jurisdictions (Kadelbach 1992: 320; Klabbers, Peters and Ulfstein 2009: 154, 179).

On the other hand, some literature focused on global constitutional norms breaks with classical lines of constitutional analysis, and it accentuates the essential *pluralism* of the constitutional features of global society. This *pluralist* or more avowedly *transnationalist* literature on constitutionalism opposes the strict normative implications of internationalist constitutional analysis, and it rejects the assumption that modern society has simply transferred its classical constitutional

[7] For a representative statement of this view see van der Vyver (1991a: 426). This view runs through much of the literature, whatever its methodological emphasis. For an early realist version of this view see Keeton and Schwarzenberger (1946: 146). For other prominent assertions of this claim see Jessup (1947a: 406), Falk (1970: xiii), Delbrück (1982: 572), Henkin (1995: 38) and Koh (1998: 1410). For a distillation of this account of human rights see Rosas (1995: 75) and Milewicz (2008: 422, 432).

[8] The most extreme version of this view suggests that there exists a hierarchy of international laws, close in structure and force to the hierarchy of classical public law. As a result, national states are perceived as constituted subjects in a constitution of international law, and they cannot exercise powers exceeding this status (Franck 1992: 50). For a general cross section of the global-constitutionalist literature, see Kadelbach (1992: 32), Dupuy (1997), Henkin (1995: 39), Ackerman (1997: 777), Fassbender (1998) and Kadelbach and Kleinlein (2007). For a nuanced approach, see Petersmann (2001: 22), Helfer (2003: 237), Kumm (2004), Peters (2005), Habermas (2008: 369) and Stone Sweet (2009: 637). For an overview, see chapter 1 in Schwöbel (2011).

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hierarchies to the realm of global politics. Some positions in this literature are sceptical as to whether conventional discourses of constitutionalism can be applied to today's society (Berman 2002: 491; Krisch 2010: 17; Kingsbury 2012: 210–2). Other positions in this field accept the diagnosis of society's irreducible pluralism, yet they attempt to discern patterns of constitutional formation within society's pluralistic form (Zumbansen 2002: 432; 2006: 747; Fischer-Lescano 2003: 751; Teubner 2012: 59–72). Distinctively, pluralistic approaches that still ascribe a constitutional form to contemporary society tend to renounce the classical assumption that constitutional law pertains solely to the realm of public law, or even that it pertains distinctively to the political system. Instead, they identify ways in which activities traditionally pertaining to private law generate, and are in turn framed by, norms with public, de facto constitutional standing.[9] Equally distinctively, transnationalist approaches to global constitutional law reject the residually dualist perspectives of constitutional analysis based on international law, and they view transnational law as part of a hybrid legal system, formed, spontaneously, across the jurisdictional borders of national states (Zumbansen 2012: 48).

Both these bodies of constitutionalist literature share common ground with a further rapidly expanding quantity of research, which is concerned with the growing constitutional power of international or transnational judicial bodies. As will be discussed below, one salient feature of the emergent constitutional form of global society is that courts and other judicial institutions play an increasingly vital role in binding norm construction.[10] In particular, courts now obtain a quasi-constitutional position as institutions that interact with each other in the interpretation of international instruments and conventions, and that apply and transmit norms, usually distilled from international human rights agreements, across the boundaries between national societies. This means that courts have central importance in defining the legal parameters in which national states operate. This applies to courts

[9] See Teubner (2006: 328; 2016) and Viellechner (2013: 155). For alternatives see Hamann and Fabri (2008: 487) and Calliess and Zumbansen (2010: 75, 166–8, 243).

[10] This was already identified in Jessup (1959: 63). For a basic sample of the now vast literature on this topic, see Hirschl (2000: 104), Baudenbacher (2003: 397), Commaille and Dumoulin (2009) and Teitel (2011: 216). See the classic account in Tate (1995: 27). On judicial checks on legislative production of statutes in established democracies, see the account of the final 'painless death' of parliamentary sovereignty in France, its traditional heartland, in Stone Sweet (2008). On the UK, see Kavanagh (2009: 275). For a more general picture, see Lasser (2009: 24).

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located outside national domains, which interpret international or supranational law for national judiciaries and legislatures. But this also applies to courts within national jurisdictions. In particular, this applies to national Constitutional Courts with authority to conduct review of statutes, which, owing to their close cooperation with international courts, have recently seen a general expansion of their role in producing norms, mainly within, but also beyond national societies. The fact that national Constitutional Courts review domestic laws in light of international norms means that they are widely able to maximize their power within domestic political systems, often transforming classical separation-of-powers provisions in domestic systems of public law.

This expansion of transnational judicial authority in recent decades has produced a great quantity of influential research, addressing the authority of courts as part of a rising global constitution. Literature in this field includes analyses of national polities, considering reasons, strategic or structural, why these polities allow judiciaries to rise above their traditional role as repositories of neutral power (Moravczik 1994: 2, 3; Garrett 1995: 172–3; Stone Sweet 2000: 3). This literature also includes analyses that address transformations in traditional state institutions caused by lateral interactions between national judicial actors and members of transnational judicial communities (Slaughter 2004: 66). Further, this literature includes important analyses that seek causal explanations for the growing imposition of transnational judicial power and transnational human rights law (Hirschl 2004: 50–99). Of course, not all interpreters of these processes view the proliferation of international courts as uniformly constitutional, and some observers see the global extension of judicial power as a process that fractures legal unity in global society.[11] Despite these variations, however, a large body of contemporary research has developed that examines how courts contribute to the construction of a normative order that inserts states into an overarching legal system, such that, through judicial rulings, international or transnational law places clear constitutional constraints on the typical acts of national states (Nollkaemper 2009: 539).

This book shares common ground with all these fields of research. Clearly, like the lines of research considered above, this book is centred

[11] See Nico Krisch's assertion (2010: 17) that in 'postnational governance' the 'classical forms' of constitutionalism are not sustainable. For an account of international courts as creating jurisprudential 'cacophony', see Spelliscy (2001: 152). For further reflections, with different levels of emphasis, on dissonance between international courts, see Koskenniemi and Leino (2002: 555), Shany (2003: 273), Koskenniemi (2004: 202) and Kingsbury (2012: 210–23).

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on the claim that contemporary society is witness to the emergence of a new constitutional structure. Moreover, much of this book explains how international laws and international judicial bodies have transformed the constitution of global society. At the same time, however, this book provides a sociological reconstruction of the constitutional processes that are usually described more literally, or more positivistically, in other fields of literature. For this reason, this book takes up a position that is clearly distinct from other approaches to the rise of global or transnational constitutional norms.

In relation to the more classical *internationalist* analyses of global constitutional norms, first, the position of this book can be summarized quite simply. This book endorses many objective principles of the internationalist literature on global constitutionalism. In particular, it accepts the view that national constitutional norms are now commonly overwritten by international norms, especially those reflecting human rights instruments, and it concurs with the claim that, in some spheres, domestic constitutions assume secondary importance next to principles declared in the international legal system. As discussed, however, internationalist accounts of global constitutional norms tend to operate within rather conventional legalist paradigms, and they do not typically endeavour to give a sociological account of international legal norms. By contrast, this book promotes a decidedly sociological approach to the rise of international legal norms. It tries to elucidate the deeper societal conjunctures which underpin the growing intersection between international law and national public law, and it attempts to explain the social foundations for the growing prominence of *inter*national or *trans*national constitutional law in modern society. In this respect, this book uses the concept of *transnational law* in a deliberately broad sociological fashion. The understanding of transnational law advanced here differs slightly from the sense used by other theorists of such law, who normally use this term to account for the spontaneous inter-systemic creation of legal norms in global society, usually in the form of contracts among non-state actors (Viellechner 2013: 181), and who distinguish transnational law quite sharply from international law (Scott 2009: 873–4). In contrast to such usage, this book proposes a twofold definition of transnational law. On one level, it accepts the more standard definition, which it employs in Chapter 7. However, it also subscribes to a wider construction of transnational law. It defines transnational law as law which originates outside the strict confines of national

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jurisdictions, yet which takes effect in national societies, and whose domestic application is intrinsically propelled and defined by forces particular to national societies: in many cases, *transnational law is law that is configured through the domestic absorption of international norms in reaction to processes usually seen as exclusively national*. On this basis, this book argues against a strict separation of transnational law and international law. In particular, it claims that, in many settings, legal norms of *international* provenance are profoundly reconstructed as they are interpreted and applied by judiciaries situated in *national* society. These norms acquire distinctive implications as they allow domestic societies to address historically embedded, highly localized pressures, and as they are applied to resolve problems that lie deep in the historical structure of national societies. As a result of their domestic application, these norms often lose their distinctive quality and functions as *international* law. Much law of *international* origin is translated into *transnational* law as it is filtered into *national* jurisdictions and deployed within domestic settings for purposes resulting – often – from quite specific historical/sociological conflicts. Through this process, law, remotely derived from the international domain, produces structural results that are very far removed from the motives that shaped its promotion by actors in international situations. The constitutional impact of international law, thus, needs to be seen, in part, not as an external framing of national institutions, but as the result of an intrinsically transnational process, in which the domestic internalization of international law performs distinct functions for national societies: the global political system, in fact, has its basis in the inclusionary interaction between national social forces and international law. This second conception of transnational law runs through Chapters 5 and 6, which examine how, in different societies, international law is consolidated in domestic constitutional law as an instrument for resolving specific inner-societal problems. Generally, the book is an attempt to understand the structural forces, within national societies, which lead to the construction of constitutional norms of transnational nature. Transnational law is formed, to some degree, as international law assumes force and gains autonomy within national societies, and it is created as a reaction to the structural pressures that shaped the historical formation of these societies.

In these respects, some of the analysis in this book may be viewed as a contribution to the *sociology of international law*, and it entails an inquiry into the inner-societal motivations which have stimulated the

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recent expansion of international law.[12] In particular, parts of this book can be viewed as a contribution to the sociology of human rights law, a notable growth area in recent sociological inquiry.[13] In this respect, although generally favourable to human rights, the claims in this book are not intended to offer moral advocacy of human rights. Instead, this book is concerned, above all, with offering a sociological explanation of that part of international law concentrated around human rights norms and of the processes through which such law acquires constitutional status, both nationally and beyond national jurisdictions. Notably, this book contributes to the sociology of human rights law by examining the causes of the increasing interpenetration between domestic public law and international human rights law, and it aims to uncover the structural benefits for national states resulting from the domestic assimilation of international human rights law. In this regard, the book also

[12] Classically, sociology was very sceptical about international law, which, owing to its detachment from common patterns of social action, it saw as essentially formalistic and *asocial*. Famously, for instance, Weber (1921: 18) refused to accept international law as law. Geiger (1964 [1947]: 221) described international law as a system of merely 'purported legal norms'. See similar claims in Ehrlich (1989 [1913]: 19). In the 1960s, no lesser authorities than McDougal, Lasswell and Reisman argued (1968: 261, 266–7) that the 'founders of modern sociology [. . .] rarely engaged in critical examination of international law. The early sociological jurists manifested a similar tendency.' They added to this criticism the important observation that perhaps 'the most striking and recurring feature of sociological approaches is the non-sociological quality of what has been done in its name'. This criticism was a little reductive. Before the 1960s, there had been notable attempts to construct a sociology of international law (see Starke 1965: 121). For example, there had been some realist attempts to establish a sociological approach to international law (Huber 1928; Morgenthau 1940). In the USA in the 1920s, Roscoe Pound had also called for a sociological re-orientation in international law. Pound claimed that international law must deal with the 'concrete claims of concrete human beings', putting aside its conventional attempt to deduce legal norms from 'the perfect abstract state' and the 'perfect abstract man' (Liang 1948: 375). Other American jurists suggested that 'the future of the law of nations' should be built around influences from other disciplines – 'from history, from political science, from economics, from sociology and from social psychology' (Hudson 1925: 434). Some interwar European theorists of international law also used very general sociological principles (see Scelle 1932: 1–2; Politis 1927: 13–4). Moreover, some recent publications have endeavoured to outline a sociology of international law based on the analysis of elite interactions (Dezalay and Madsen 2012: 442). There are also recent sociologically oriented accounts of motives for states to accept constraint through international human rights norms (see Wotipka and Tsutsui 2008: 725, 737). For a very important macro-sociological account of international law, see Brunkhorst (2014: 415–31). For a general survey of sociological research on international law, see Hirsch (2005). Despite these innovations, however, it is surely the case that there is only a very small body of research addressing the sociology of international law; as a result, we still lack an encompassing theory that examines the structural forces within national societies that shape the rise of international law. This chapter endeavours to elaborate a perspective of this kind.

[13] For evidence of this, see the recent programmatic collections: Blau and Frezzo (2012) and Madsen and Verschraegen (2013). See also notable contributions in Anleu (1999: 198), Sjoberg, Gill and Williams (2005: 12) and Gregg (2012: 213, 222). For other selected examples, see Turner (1993), Barbalet (1998: 140) and Alexander (2006: 34, 69).

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shares thematic ground with research that considers the incentives for states to comply with international human rights norms.[14] The distinctive sociological outlook of this book, however, lies in the fact that it examines how states create and constitutionally enshrine international human rights norms, not for deliberated interests or motives, but because of functional pressures within national societies, caused by systemic demands for inclusion. Even the most sociologically refined inquiries into international law observe domestic law and international law as originally separate entities (see Benhabib 2009: 695; Brunkhorst 2014: 416). This book, by contrast, argues that domestic laws of sovereign states and international human rights law do not have distinct origins. Unlike other sociological approaches to international human rights norms, it claims that international human rights are generated by inner-societal pressures and claims for inclusion, and, once internalized in domestic legal systems, they greatly enhance the inclusionary structure of domestic societies, allowing national political institutions to function more autonomously and more effectively. As such, the book advances the theory that, in many cases, international human rights ought to be viewed – more accurately – as transnational rights, as their origins lie deep in the formative history of national societies, they gain constitutional purchase in different societies for different internal reasons, and they are always simplified if viewed as abstract elements of the inter-state legal domain. To give weight to these claims, the book utilizes and expands classical–sociological theories of rights, which also observe rights as institutions that reflect underlying demands for societal inclusion.[15]

The position which this book assumes in relation to the growing body of *transnationalist* literature on global constitutionalism is somewhat more complex. Notably, much transnational-constitutionalist inquiry locates itself expressly at the sociological end of the spectrum of legal research. Unlike the internationalist research on global constitutionalism, therefore, it evidently cannot be accused of legal formalism.[16]

[14] See Henkin (1979a: 48), Franck (1995: 30–46), Koh (1997: 2659), Chayes and Chayes (1998: 4), Risse and Sikkink (1999: 37) and Goodman and Jinks (2004: 630–56).

[15] The idea that rights act as *instruments of inclusion* has a long history in sociology and in the sociological margins of constitutional theory. It was expressed, diversely, in Durkheim (1950), Smend (1965 [1928]: 265), Parsons (1965), Luhmann (1965) and Marshall (1992 [1950]: 28). However, the idea advanced here that international human rights perform specific functions of inclusion for and within national societies is new.

[16] The emergence of a 'sociology of transnational law' was originally announced twenty years ago (Friedman 1996).

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Moreover, the major theorist of transnational constitutional law, Gunther Teubner, must be regarded as one of the world's leading legal sociologists, and this book has not even the slightest desire to devalue the importance of his work. However, for a number of reasons, this book distances itself from established pluralist or private-legal constructions of transnational constitutional law.

First, the argument in this book runs counter to much analysis of transnational constitutionalism because it defines constitutions as normative constructions whose primary role is to frame the use of political power, as a determinately *public* phenomenon, such that constitutions are distinctively related to the political system. To be sure, this book accepts transnational pluralism as a defining fact of contemporary legal order, and it acknowledges that constitutional norms now derive force from multiple sources, located in and beyond national environments. As mentioned, we can observe the formation of constitutional law at very different points in the political system of global society – constitutional norms are formed in national societies, in the interstate domain, and in more uncertainly defined transnational interactions. However, this book specifically disputes the claim that in global society constitutions are no longer primarily defined by their focus on the political system, and that they have lost their more classical characteristic of publicness. Instead, it seeks to show that, even in the pluralistically decentred conditions of global society, constitutional norms (perhaps more than ever) remain oriented towards the construction of political power as a recognizably public phenomenon, and society preserves a requirement for constitutional norms precisely because it relies on the abstraction of certain political functions and certain political decisions as relatively autonomous and determinately public. Constitutional norms, even in their most fragmented form, still provide support for a political system, and they make it possible for society to perform acts of inclusion at a certain degree of public generality. Quite essentially, in fact, the formation of transnational constitutional law often leads to a *thickening* of the public/political domain, and it commonly extends the penetration of public law into society.[17] One primary task of the sociology of transnational constitutional law, therefore, is to discern the processes through which, despite the weakening of classical constitutional law, some laws define themselves across society as categorically public and

[17] See especially Chapter 7 below.

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to examine how social demands for inclusion create new patterns of public law to support new modes of political-systemic formation.

The position which this book assumes toward research on the changing role of judicial power in contemporary society is also not simple. In proposing a sociological explanation of the changing order of constitutional norms, this book necessarily addresses the rising standing of judicial institutions. In particular, this book devotes much space to examining ways in which inter-judicial interactions form binding, effectively constitutional, norms for national societies, and indeed for global society a large. However, this book claims a certain distinction in the rapidly expanding mass of research on global judicial practice because of its use of a sociological method to understand transnational judicial exchanges. Self-evidently, this book is not alone in approaching these phenomena sociologically; other current research on judicial power also contains an important sociological dimension. For example, some commentators on recent patterns of judicial transformation have observed the growing constitutional force of international judiciaries and international human rights law as the result of hegemonic monetary interests (Hirschl 2007: 223; Schneiderman 2008: 4). Such literature builds on the classical critical view of judicial power as shaped by counter-majoritarian interests, but it expands this view, sociologically, by arguing that judiciaries apply human rights law within domestic settings in order to stabilize neoliberal legal forms, against embedded traditions of solidarity-based democracy. Moreover, research on courts and inter-judicial engagement already possesses a quite pronounced sociological dimension (see Vauchez 2008; Commaille and Dumoulin 2009; Madsen 2010: 22–31).[18] In contrast to other research on judicial institutions, however, this book tries to set out a more comprehensive sociology of transnational judicial power, which is based on a broader historical construction of different national societies. It addresses ways in which court-driven law production relates to structural forces within national societies, and it observes the reasons for the interlocking between national and international judiciaries as part of the formative history of national institutions. Above all, it assesses the significance of courts and judiciaries as powerful transnational norm providers as a consequence of changing demands for legal and political inclusion, impacting, primarily, on the inclusionary structure of national societies.

[18] For an overview see Madsen (2013).

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THE RISE OF THE INTERNATIONAL AND THE RESULTANT RISE OF THE NATIONAL

This book, in short, responds to a number of bodies of recent research, and it reacts in a distinctive fashion to all of them. In one respect, however, this book reacts to these separate lines of inquiry in the same way. What connects all (or virtually all) contemporary views on transnational constitutional law is that, almost unthinkingly, they account for the growth of transnational law as a process that occurs externally to national societies and national political institutions, and that takes place after the consolidation of national societies.[19] In particular, different lines of literature addressing the constitution of global law are connected by the fact that, with variations, their exponents tend to identify the emergence of global law as a development that marks a break with processes of law production in national societies. The defining perspectives in these different lines of inquiry all presuppose that the rise of the global law brings to an end, or at least very dramatically transforms, the national domain of legal construction. Moreover, with variations, all accounts of transnational constitutional law follow wider conceptions of globalization as socio-political process,[20] and they suggest that such law forms a countervailing force to institutions created in national processes of formation, applying potent normative constraints on national states and their powers of national sovereign autonomy. In different ways, across these fields of research, it is difficult to identify positions that do not, however remotely and implicitly, articulate an account of global law which re-iterates the original positivist view of international law: namely, that global law forms an antinomy to the classical terrain of national society.[21] This view is quite explicit in internationalist examinations of global constitutional law.[22] It is also quite central to accounts of the changing position of judicial bodies, which stresses the growing force of transnational legal limits on national democratic self-determination (Hirschl 2004: 46). However, much literature on transnational constitutional law also replicates some aspects of classical theories of international law, which still

[19] One exception to this is Kjaer (2015: 22). One important book with similar, although only remotely related, implications is of course Milward (2000).

[20] In most standard accounts of globalization, it is seen as a process that substantially diminishes the sovereign power of state institutions. See Held (1997: 261), Beck (1997: 13, 183), Shaw (2000: 186) and Archibugi (2008: 98).

[21] Though for a notable exception see Nicolaidis and Shaffer (2005: 314).

[22] See pp. 12–13 above.

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operated within the dualism/monism distinction of the positivist canon.[23] In particular, although intended as a radical critique of dualistic theories, the transnationalist literature insistently repeats the classical claim that transnational law develops outside national societies, and it diminishes the power of states to dictate consistent legal hierarchies for their populations (Zumbansen 2006: 744; Viellechner 2013: 99). Most theorists of transnational constitutionalism approach current legal conditions through residually positivist categories, identifying global society as a legal order in which 'nation-state sovereignty' is fundamentally 'called into question' and replaced by multiple centres of law-giving agency (Hamann and Fabri 2008: 482–3). It is common ground in much of this literature that transnational law results from and is configured by, 'ongoing changes of traditional forms of statehood' (Zumbansen 2002: 410), as a result of which classically defined powers of sovereign states are superseded.

One central sociological claim in this book, by contrast, is that, if we wish to appreciate the emergent shape of the global constitution, we need to abandon the idea that this is a legal form that results from a socially external process, or that it in some way restricts the existing power of political institutions in domestic societies. This book argues that the norms of global constitutional law originate in pressures on the inclusionary structure of national states, both in their external dimensions and, still more importantly, in their internal dimensions: in both dimensions, the rise of global constitutional norms enhances the power of states.

Of course, at a very superficial level, it would be rather absurd to suggest that the constitutional force of extra-national laws did not curtail certain competences of national states. This is an almost universal source of controversy – whether we look at controversies over compliance with the American Convention on Human Rights (ACHR) in Venezuela, whether we consider reticence over ratification of human rights instruments in China, whether we examine the hostility to the 1998 Human Rights Act (HRA) amongst some political groups in the UK or whether we think of the impact of directives of the World Trade Organization (WTO) on national jurisdictions. At the level of everyday politics, therefore, it is undeniably the case that there exists a tension between international law and state sovereignty.

[23] See the classical theory of dualism, stating that 'international law and national law' are categorically defined as 'two distinct legal orders', in Triepel (1899: 156). For a paradigmatic distillation of this view see Kahn (2000: 2, 5, 18).

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If we look further into the sociological bases of legal formation, however, the converse often appears to be the case: the transnational constitution of the global political system has often provided structurally vital support for national political systems. In many cases, the rise of global law, refracted into national jurisdictions, resulted from weaknesses inherent in national societies, and it formed the effective inclusionary precondition for the consolidation of national law and national political institutions. In many cases, it was only as global law penetrated national societies that these societies were in a position to establish an autonomous legal structure, able to generate discernibly national patterns of public law and to support national patterns of political inclusion and organization. Accordingly, it was only as political institutions were constructed on a transnational basis that they were able to solidify their position, nationally, as stable centres of political sovereignty. Generally, in fact, the rise of *inter-* or *trans*national law can be explained, sociologically, not as the *external cause*, but as the *internal result*, of a deep and widespread crisis of national states and their institutions. The literal approach to international or transnational law, claiming that such law emanates from an abstracted, external social domain, simply replicates early positivist preconceptions, and it obstructs full sociological comprehension of global law. Instead of persisting in late positivist thinking, we need to renounce the presumption that national societies and their political institutions were in some way fully formed or that they had reached a fully evolved inclusionary condition, prior to the rise of global law or the global political system. Moreover, we need to relinquish the claim that the origins of global law were shaped in a legal domain outside the realm of national jurisdictions. This book is shaped throughout by the assertion that the relation between national and global law should be examined through a lens that is sensitive to the dialectical interpenetration of these legal domains, and that observes national public law and transnational public law as, in many cases, *reciprocally formative*. Many elements of transnational or global law, it is claimed here, have evolved precisely because they facilitate the completion of trajectories of public-legal structure building and institutional formation, which were originally fundamental to the fabric of national societies. Indeed, the fusion of domestic and international law in the global political system has often produced a transnational basis for the inclusionary structure of national societies, and transnational constitutional law has often formed an indispensable precondition for the

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stabilization of national systems of public law and national political systems more widely.

At the centre of this book is the argument that national societies produce demands for legal and political inclusion, which, often, their political systems cannot fulfil. As discussed in Chapters 2 and 3, this is clearly reflected in the *external* dimensions of national societies; as soon as national statehood became common, national societies began to rely externally on global legal norms. But this is equally evident in the *internal* dimensions of national societies. National societies first evolved towards their contemporary form as different societal interactions spilled beyond the segmented local boundaries of early modern social order, and as political institutions were expected to construct and generalize legislation for these interactions across the widening spaces which these societies contained. Paradoxically, however, in most cases, nations, and national institutions have proven incapable of completing the inclusionary processes that originally defined them. The original expansion of societies as nations initiated pressures of inclusion that could not be absorbed by nations, and national political institutions, alone. On this account, the national state was always an *interim* evolutionary form, and it inevitably produced, and it was in turn exposed to, inclusionary pressures which, using normative resources exclusive to national society and national legal and political institutions, it could not resolve. The pressures created inherently by *nations* inevitably necessitated *transnational* legal solutions; it was only by incorporating and internally reconfiguring extra-national legal norms that national societies were able gradually to adjust to the inclusionary pressures, which, at their origins, they released. The transnational constitutional form of contemporary society becomes explicable, sociologically, on that basis. The constitutional order of contemporary society has developed, not through a breach with national legal trajectories, but as one tier within a multi-layered structure of legal inclusion whose formation commenced with the beginning of national societies, but which could not be sustained by national laws alone. To this extent, the transnational constitutional order usually reinforces the powers of national states, and it helps to stabilize the basic inclusionary structures on which states depend, both in their international functions and in their domestic actions. The global political system as a whole, therefore, is produced by pressures on the inclusionary structures of national societies, and transnational constitutional norms evolve spontaneously

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as national political systems struggle to preserve inner stability in face of the embedded pressures and antagonisms which they engender and encounter.

On this basis, the book claims that, for inner, sociological reasons, national societies have engendered a transnational legal order – especially in the domain of constitutional law. This is mainly due to the fact that national constitutions, over a longer period of time, were unable to support an adequate inclusionary structure for political systems in national societies, and they did not allow national political systems to react adequately, at a sustainable level of differentiation, to the demands for legal inclusion and legislation, which national societies generated. National political systems thus increasingly presuppose transnational legal norms to elaborate an adequate inclusionary structure, and as a result, they increasingly constitute a global political system. Naturally, the reliance of national states on extra-national law is clearest in their inter-state interactions: international law provides a vital inclusionary structure for states in their external dimension. In many cases, however, states have also assimilated international law in their legal systems because this has allowed them to cement an inclusionary structure for their domestic functions: transnational law provides a vital inclusionary medium for states in their internal dimensions. In particular, transnational law has assumed a structure-building role in national societies because it has helped political institutions to insulate themselves against traditionally destabilizing pressures, and above all, to consolidate their inclusionary autonomy in relation to powerful domestic actors, which traditionally vied for, and weakened, the power of the national state.

Of course, it is notoriously difficult to assess the autonomy of political institutions, and there are many measures of the institutional autonomy of a national political system.[24] However, it is proposed here that there are *four* key indicators of the autonomy of a national political system in its domestic environment. *One* is that the political system can produce

[24] Some theories identify the state's autonomy in its directiveness (Gurr, Jaggers and Moore 1990: 88). There are theories which link the state's autonomy to its independent capacity (Barkey and Parikh 1991: 526). Some theories associate the state's autonomy with its capacity for mobilization and transformation of society (Gurr 1988: 45; Davidheiser 1992: 464). Other theories see infrastructural power as a sign of state autonomy (Mann 1984). My view is that we need to see the political system, not solely the state, as part of a system of inclusion, and the autonomy of this system is measured by the extent to which, from within its own resources, it can *positively* produce and distribute law across society. This is likely to occur where the national political system interlocks closely with an extra-national legal order.

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authority for legislation, if necessary, in independence of potent organizations standing outside itself, exercising influence in society at large. A *second* is that the political system can penetrate deeply and inclusively into society, and its legislative acts reach into the local, regional and familial structure of society, in relatively even fashion, without extreme variations caused by the social or regional positions of persons addressed by law. A *third* is that the political system is recognized through society as a primary addressee in the regulation of social conflicts, and social actors show some confidence in the political system as a provider of decisions, superior to local and sectoral sources of authority. A *fourth* is that the political system can easily accelerate its production of laws, and, where required, it can use internal normative principles to satisfy the escalating demands for legal inclusion in complexly structured societies. On each point, the autonomy of a national political system is primarily expressed in its capacities for *effective legislative inclusion*: in its ability independently to produce, to distribute and to gain compliance for law, across different parts of society and different social groups. On each point, the national political system presupposes a relatively autonomous inclusionary structure, through which it can authorize and reproduce law through society.

On each count, it is proposed throughout this book that the ability of a national political system to act autonomously commonly depends on the existence of constitutional norms constructed through the interaction between national and international laws. Typically, the authority of national political systems is contingent on their assimilation of international norms and on their recognition of some international norms as having higher-order normative force within domestic constitutional law. Most notably, the filtration of international law into domestic constitutional law tends to have the following beneficial consequences for national political systems: (a) it allows national political systems to support their functions across society, establishing standard procedures and principles of legitimacy for new acts of legislation and standard procedures and principles for judicial rulings; (b) it provides an internal legitimational grammar in which national political institutions are able to reduce the intensity of social conflicts, in which conflicts with potential to drain the legitimacy of the political systems are partly neutralized, and in which many conflicts can be stabilized outside the political system; (c) it unifies the legal system of a society in its entirety, often bringing local regions and actors into a closer relation to the political centre; (d) it produces a rise in litigation, both public and private,

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which allows central organizations to scrutinize local institutions, and it places citizens, as litigants, in more immediate relation to organs of central states. In each of these respects, deepening interpenetration between national and international law typically creates an inclusionary structure for national political systems, which substantially raises their autonomy and their capacities for law making and general inclusionary power. For this reason, the rise of global constitutional law and a global political system is deeply rooted in the fundamental structure of national society, and one reason why national states lock themselves into a global political system, and into a set of global constitutional norms, is because this constitutionally consolidates their functions as national states, in national societies.

It is often argued that constitutions derive force, energy and legitimacy because they embody a specific *sovereign national will*, or even enact a national constituent power, such that constitutionalism loses meaning when transferred beyond the horizon of the nation state (see Grimm 1991: 31; Loughlin 2009; Rabkin 2007: 70). From the perspective set out above, however, this claim can be fundamentally disputed. If we approach constitutions more sociologically, we can observe that constitutions were not in the first instance formed as texts that gave articulation to the will of a given national people. Instead, constitutions evolved as vital parts of an inclusionary structure, which supported the rise of a relatively autonomous political system, able to legislate, positively and inclusively, for society as a whole. If observed in this way, the correlation between constitutions and nationhood need not be seen as a definitive aspect of constitutionalism, and it need not imply that constitutions are fundamentally defined by a particular national location or by a particular national will. On the contrary, as discussed below, national constitutions originally expressed a formula that was adapted to the inclusionary demands of modern society at a particular point in its evolution, and it supported the abstraction of an inclusionary structure for the political system as society reached a certain stage of geographical and temporal extension. This was an adequate form, at a particular historical juncture, for the abstracted and inclusive circulation of power and law across society. National constitutions, however, were always *essentially transient* structures of inclusion, and they merely stabilized society's political system at a certain point in its increasing social expansion, as demands for legislation exceeded the capacities of local authorities and personal legitimacy, but had not yet reached a level of intensified complexity. Quite inevitably, however,

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national constitutions, and the legal norms that they contain, must eventually become redundant, or at least subsidiary elements of inclusionary structure. Overall, the association of constitutions with nations and nation states contradicts the deep inclusionary function of constitutionalism, and it rather unreflectingly links constitutional functions to social and historical preconditions which they are in fact internally bound to exceed. At one level, most classical/national constitutions were not very effective in producing a reliable inclusionary form for the political system, and most national political systems only evolved an inclusionary structure as national law was increasingly underpinned by international law. At a different level, contemporary society gives rise to endlessly multiplying claims for legal inclusion, which are not anchored in geographically identifiable persons, locations or demands, and it encounters pressures for legislation, which arise in highly unpredictable, geographically dislocated fashion. The contemporary constitution is thus increasingly required to address demands for autonomous inclusion that states alone cannot regulate, and by which their adaptive apparatus is overstretched. In both respects, the contemporary form of the constitution is necessarily severed from the original form of the nation, and the constitution of the contemporary political system depends on norms which are not defined by national populations, and whose inclusionary functions are not restricted to a national society. This constitution, however, does not mark a break with classical constitutional law. On the contrary, it transfers the inclusionary functions of classical constitutions onto new societal realities.

The internal logic of constitutional law can be most adequately captured if we interpret constitutions as essentially formative, neither of states nor of nations, but of *political systems*. Constitutions first evolved as inclusionary structures, abstracted in relatively autonomous legal form, which allowed early modern societies to abstract a differentiated political system, enabling society to produce and normatively to authorize political power across widening social terrains. The national state can be seen as an early form of the differentiated political system, supported in its inclusionary functions by classical principles of constitutional law. But the national state need not be seen as the final form of the political system. In fact, as mentioned, the national state is – necessarily – an interim construction of the political system. In contemporary society, constitutions still act to stabilize and differentiate a distinct political arena. They extract norms from multiple sources in order to preserve an autonomous inclusionary structure for the political system,

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in face of a range of varied, contingent and often unsettling inclusionary challenges. However, they preserve an inclusionary structure for a political system which is no longer homologous with a national society, and whose centration on a national society and a national population was always precarious, and always temporary. Observed in this way, we can see that the recent transformation of constitutional law reflects a deep functional continuity with earlier patterns of constitutional norm formation. Constitutional law always condenses an inclusionary structure for the political system of society. But the inclusionary pressures to which the political system is now exposed necessitate legal norms that cannot be explained through reference to a single national will. As discussed, the task for sociological analysis of constitutions is to interpret the changing form of constitutional law as a refraction of changing pressures for inclusion, and to observe constitutional law as a set of norms that are adaptively produced, under particular circumstances, by society's need to preserve a distinctive political domain.

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