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POUVOIR CONSTITUANT AND *POUVOIR IRRITANT* IN THE POSTNATIONAL ORDER

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Pouvoir Constituant and *Pouvoir Irritant* in the Postnational Order

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Abstract

Constituent power is a key concept of the modern constitutional tradition, yet it encounters serious difficulties when transposed into today's globalized world. Its radical promise sits uneasily with a social and political context that seems out of reach and impossible to 'constitute'. Yet the idea of constituent power continues to animate people in their efforts to reclaim agency and self-government in a landscape shaped largely by others. This paper traces key challenges to the continuing force of constituent power, both in the domestic and the global contexts, and it offers an account in which constituent power in the postnational order survives only in part, as a mere irritant of existing institutional structures. This reduced role points to the limitations of a 'global constitutionalism' which is typically confined to providing liberal checks while marginalizing strong aspirations of self-government.

Political concepts are bound up with their social and ideological context, and not all of them travel easily across time and space. At times, they seem utterly out of place when we try to use them in a different setting, or they appear as making demands on the world that can no longer count on societal circumstances favourable to their realization.

'Constituent power' is one such concept. Having matured in the Enlightenment, intimately tied to modernity's hope for reason and agency in social life, it encounters difficulties when transposed into today's globalized world. Its radical promise, characteristic for the modern, foundational tradition of constitutionalism, sits uneasily with a social and political context that seems out of reach, impossible to shape for any one subject, albeit a collective one. Even if its underlying premise, popular sovereignty, may

still be influential, the hope that it could effect comprehensive legal, political and social change in a similar way as was traditionally associated with the idea of constituent power will often seem mistaken or, at best, naive.

Yet the classical idea of constituent power always had something utopian to it; it embodied an aspiration that could always become reality only in part. And likewise, it is today not simply outmoded; it continues to animate people that seek to shape their circumstances, despite the obvious obstacles they face. Still, it has to confront a number of challenges which are of recent origin, or at least have grown recently in importance, and are often connected to the rise of postnational structures of governance. In this paper, I focus on three such challenges. In Part I, I inquire into the continuing place of constituent power in the domestic context for which a number of observers have diagnosed a decay, or even an abandonment, of the concept as a political and legal force. In Part II, I inquire into the particular challenges arising from the rise of postnational law and politics, focusing on the consequences of a multiplication of potential collective subjects as the bearers of constituent power and the fragmented institutional landscape in the postnational realm. In Part III, I analyze recent attempts to render the concept of constituent power useful in these circumstances and offer an own account in which constituent power survives in the postnational constellation yet operates merely as an ‘irritant’ of an order which, in its normal operation, leaves little room for popular sovereignty, or even political agency. This transformation highlights the limitations of a ‘global constitutionalism’, yet it also keeps present the (unrealized, unrealizable) ambition of the constitutional project in the global sphere.

I. The Transformations of Constituent Power

Constituent power has always been a revolutionary concept. Granting the people the right to make and remake government – and, yet more broadly, society – gave it licence to radically undo structures grown over centuries, settled through conventions or representing an established balance of forces. This radicalism – already visible but still limited in the 17th century in Lawson and Locke – gained its full force in the late 18th century revolutions in America and France and was expressed most cogently in the writings of the Abbé de

Sieyès.¹ It rested on the modern idea that government and society were subject to intervention and human agency – something the turn to absolute monarchy had already sought to put into practice in Europe – and concentrated the claim to agency in the people, the ‘nation’. All bodies of government were henceforth understood as merely constituted, as put in place by the constituent power through the vehicle of the constitution. Yet the power to constitute, and to reconstitute whenever and however it was deemed fit, was seen to lie in the people and could not be taken away from them.² The breadth of this power is well reflected in the insistence of the American Declaration of Independence on ‘the Right of the People to alter or to abolish [Government], and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness’.³

Constituent power, as brought to the fore in these revolutions, has been a mainstay of political and constitutional theory and practice ever since.⁴ Contemporary constitutions cannot do without a reference to their grounding in a decision by ‘the people’, even if their creation may not actually have involved the people in a meaningful role.⁵ Theory and practice may be equivocal about the place of constituent power outside situations of exceptional crisis – in some contexts, a continuing impact is recognized, for example through particular ‘constitutional moments’; in others, constituent power is granted less space.⁶ Yet even where constitutional amendments are explicitly or implicitly subjected to significant constraints, the theoretical prerogative of the *pouvoir constituant* to establish a new constitution is typically not touched.⁷

Despite this far-reaching impact, the role of constituent power has increasingly been subject to doubts. This is not only because an important strand of constitutionalism, the

¹ See Andreas Kalyvas, *Popular Sovereignty, Democracy, and the Constituent Power*, 12 CONST. 223 (2005).

² EMMANUEL JOSEPH SIEYÈS, QU’EST-CE QUE LE TIERS ÉTAT? ([1789] 2002).

³ American Declaration of Independence (1776), at http://www.archives.gov/exhibits/charters/declaration_transcript.html.

⁴ See, e.g., Kalyvas, *supra* note 1; CARL SCHMITT, VERFASSUNGSLEHRE, 75-87 ([1928] 2003); Ernst-Wolfgang Böckenförde, *Die verfassunggebende Gewalt des Volkes – Ein Grenzbegriff des Verfassungsrechts*, in ERNST-WOLFGANG BÖCKENFÖRDE, STAAT, VERFASSUNG, DEMOKRATIE 90 (1992); Martin Loughlin, *The Concept of Constituent Power*, 13 EUR. J. POL. TH. 218 (2014).

⁵ On actual processes of constitution-making, see Tom Ginsburg, Zachary Elkins & Justin Blount, *Does the Process of Constitution-Making Matter?*, 5 ANNU. REV. LAW SOC. SCI. 201 (2009); Richard S. Kay, *Constituent Authority*, 59 AM. J. COMP. L. 715, 743-55 (2011).

⁶ See, e.g., JOEL COLÓN-RIÓS, WEAK CONSTITUTIONALISM: DEMOCRATIC LEGITIMACY AND THE QUESTION OF CONSTITUENT POWER (2012).

⁷ See Kay, *supra* note 5, 722-735.

British one, has continued to operate without a recognition of constituent power.⁸ It is also because in constitutional practice, the salience of constituent power tends to fade over time, especially when constitutions are adapted through interpretation by constitutional courts.⁹ Moreover, in an ever more complex social environment, the formative power of constitutions – and with them the influence of their creators – has been seen as declining due to an ever more complex social environment.¹⁰

Theoretically, the most significant challenge to the concept of constituent power stems from the difficulty of identifying its subject. The ‘people’ has never actually produced a constitution, and from early on, critique has focused on the fact that a ‘people’ could never act itself and always needed representation. Problems only grew once metaphysical notions of a nation as in Sieyès, or organic reformulations such as in Carl Schmitt, had ceased to be persuasive.¹¹ As a consequence, constituent power is today widely seen as referring not to a preexisting actor or an actual historical force but instead to a subject which is only constituted by an act allegedly performed on its behalf.¹² It operates through the – retroactive – attribution of acts to a socially constructed collective self. The conditions under which such an attribution can be successful, and especially the degree of homogeneity required, are likely to vary across societies.¹³ Yet with a growing recognition of diversity and difference in liberal societies, the imagery of personification may give way to one that sees constituent power as a *process* in which a multiplicity of actors are granted voice.¹⁴ This would correspond to normative accounts in which popular sovereignty is “no longer embodied in a visibly identifiable gathering of autonomous citizens. It pulls back into the, as it were, ‘subjectless’ forms of communication circulating through forums and legislative bodies. ... In the constitution-making acts of a legally

⁸ Martin Loughlin, *Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice*, in THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 27 (Martin Loughlin & Neil Walker, eds., 2007).

⁹ See, e.g., Stephen M. Griffin, *Constituent Power and Constitutional Change in American Constitutionalism*, in THE PARADOX OF CONSTITUTIONALISM, supra note 8, 49.

¹⁰ See Dieter Grimm, *Die Zukunft der Verfassung*, in DIETER GRIMM, DIE ZUKUNFT DER VERFASSUNG 399 (1994).

¹¹ See Hans Lindahl, *Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood*, in THE PARADOX OF CONSTITUTIONALISM, supra note 8, 9; Lior Barshack, *Constituent Power as Body: Outline of a Constitutional Theology*, 56 U. TORONTO L. J. 185 (2006). But see also ANTONIO NEGRI, *INSURGENCIES: CONSTITUENT POWER AND THE MODERN STATE* (1999).

¹² See Lindahl, *ibid.*; Kay, supra note 5.

¹³ Kay, supra note 5, 738-743.

¹⁴ Simone Chambers, *Democracy, Popular Sovereignty, and Constitutional Legitimacy*, 11 CONSTELLATIONS 153 (2004).

binding interpretation of the system of rights, citizens make an originary use of a civic autonomy that thereby constitutes itself in a self-referential manner.”¹⁵

Such a reinterpretation vindicates a vision of democracy in which the place of the king is left empty¹⁶, one of a process of legitimation in which the representation of ‘the people’ can always only be partial and perspectival.¹⁷ Constituent power is then understood as a discursive structure, a structure of legitimation, through which acts are attributed to normatively demanding processes. The political force of such a reflexive account, however, becomes precarious: if the idea of constituent power had initially been imagined as referring to a tangible act – the act of will of an identifiable actor – it is now heavily diluted.

Some observers, encouraged by this dilution as well as changing constitutional practices, have further downplayed the role of constituent power or have dropped it entirely from the armoury of constitutional theory. Understanding law as a practice geared towards realizing a set of substantive values, such as the rule of law or the government of free and equals, they see the act of constitution-making as only one among many acts that, in the light of normative reasons, count for the authority of law.¹⁸ Turning normativist, such approaches accord only limited value to the actual social or political processes through which common norms are defined. They see their position reflected in the practice of constitutional courts that have ample recourse to moral-style argument – rather than arguments from social facts – to interpret constitutional norms.¹⁹ And they feel confirmed by the fact, noted above, that constitutional change in many countries is effected by *constituted* powers (constitutional courts and prescribed amendment procedures), with little space for constituent power as such.

This position underestimates the continuing role of constituent power, largely because it looks at it through a narrow lens. Constituent power enters constitutional theory and practice in different dimensions²⁰ – normative (who should have the power to

¹⁵ JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 136, 128 (1998).

¹⁶ See CLAUDE LEFORT, DEMOCRACY AND POLITICAL THEORY (1989).

¹⁷ Andrew Arato, *Multi-Track Constitutionalism Beyond Carl Schmitt*, 18 CONST. 324, 340 (2011).

¹⁸ See David Dyzenhaus, *Constitutionalism in an Old Key: Legality and Constituent Power*, 1 GLOBAL CONSTITUTIONALISM 229 (2012).

¹⁹ See also RONALD DWORKIN, LAW'S EMPIRE ch 10 (1986).

²⁰ See also the useful categorization in Markus Patberg, *Constituent Power beyond the State: An Emerging Debate in International Political Theory*, 42 MILL. 224, 231-2 (2013).

constitute? when is there a duty to obey?), sociological (what structure of legitimation underpins a particular constitutional order?), and legal (is a constitution ‘law’? how should we interpret it?) – and in most of these, it continues to play an important role.

Normatively, we need an account of constituent power to know under what circumstances an act of constitution-making (or constitutional change) outside the existing legal order can be a justified or legitimate exercise of authority. Sociologically, we cannot make sense of the place of constitutions in contemporary political orders without a reference to constituent power: a reference to ‘we, the people’ as the source of authority is indispensable in constitutional orders today; a mere invocation of substantive values would hardly be sufficient to ground the existence of a ‘higher law’ or to legitimate constitutional review over parliamentary legislation.²¹ The particular role of constituent power becomes apparent in contests between different potential constitutions: in transitions from authoritarianism, for example, the alleged link of a new constitution to the constituent power of the people – however tenuous it might be in reality – is central for establishing its superiority over the old regime.

Also from a legal perspective constituent power remains a key concept, though one that is often neglected because the status of the constitution is taken for granted in everyday legal practice. Yet constituent power is central to establishing the place of a particular constitution in the legal system.²² For positivists, it can provide a *Grundnorm* or rule of recognition that allows to ground the primacy of the constitution²³; for non-positivists, it provides the reason why a particular constitutional document – with all the political choices and arbitrary elements it contains – may be accepted as valid. And the importance of the *pouvoir constituant* becomes yet more visible when we are faced with situations of constitutional change and contestation in which we need to decide which practices and norms – which elements of ‘fit’, in Ronald Dworkin’s parlance²⁴ – should be recognized among different competing ones.

Constituent power can no longer be seen as the untrammelled act of will of an identifiable people or nation, as in the decisionist accounts of Sieyès or Schmitt. It denotes,

²¹ See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* ch. 1 (1993).

²² See also the depiction of constituent power as a ‘boundary concept’ of law in Böckenförde, *supra* note 4.

²³ But see Loughlin, *Concept*, *supra* note 4, at 221-3, for a discussion of the difficulties of the concept from a Kelsenian standpoint.

²⁴ See DWORKIN, *supra* note 19.

normatively, the power of actors to create, under certain conditions, a new constitution (or new constitutional norms outside an existing constitution's framework), and it contributes to the reasons for which a constitution deserves obedience. Sociologically, it is the successful ascription of actual acts of constitution-making to a plausible conception of how and by whom a new constitution can be authored, thereby providing legitimacy to the constitution and potentially co-constituting the collective subject (or process) to which the ascription is made. This makes the notion of constituent power more complex than it may have been at its inception, and it renders it more thorny as a focal point for political mobilization. Yet in an ideological context in which popular sovereignty still features centrally, constituent power and its emphasis on collective agency remain crucial for any account of why a particular constitution is in force, why it can claim primacy over parliamentary legislation, and why it ought to be obeyed by individuals.

II. Challenges of the Postnational Order

The original idea of constituent power treated the nation as quasi-omnipotent, as a continuation of absolutist powers (or even of God) in an age of popular sovereignty.²⁵ Yet constituent power was, of course, never alone – it always needed to work out its relations to *other* countries and their constituent powers. In the late 18th century, when the concept arose, the American states – and soon the United States – were still weak and eager to gain a place on the international scene, and they sought to honour the international commitments entered into by the British before independence.²⁶ The French revolution was more radical, also in its claims towards the international sphere. On the basis of its newfound *pouvoir constituant*, France called into question existing treaties and rules of international law if they did not accord with perceived French interests.²⁷ Later revolutionaries advanced similar claims.

International law, however, has typically rejected such claims to break free from international obligations. The idea of a 'clean slate' of obligations, advanced at times in revolutionary contexts, found resonance in the 20th century mainly for newly independent states which sought to free themselves from the constraints imposed by treaties of the

²⁵ See SIEYÈS, *supra* note 2; HANNAH ARENDT, ON REVOLUTION 161-4 (1963).

²⁶ See DAVID ARMSTRONG, REVOLUTION AND WORLD ORDER: THE REVOLUTIONARY STATE IN INTERNATIONAL SOCIETY 219-25 (1993).

²⁷ *Ibid.*, 208-19.

former colonial powers.²⁸ A certain discontinuity of treaty obligations was also accepted in some cases of secession.²⁹ But exercises of popular sovereignty in *existing* states – whether through electing new governments or establishing new constitutions – were generally not seen as affecting international commitments.³⁰

From the perspective of the international legal order, constituent power was thus mostly regarded as unexceptional. Claims to remake international obligations were treated like other attempts of countries to renegotiate their commitments within the existing framework of international law. As this framework was based on the consent of states, such renegotiations were often possible, and if nothing else worked, countries typically had the option of withdrawing from treaties (if not from customary international law) or of violating obligations without having to fear serious consequences in a largely uninstitutionalized, ‘primitive’ international legal order.

The Multiplication of Constituent Powers³¹

Today’s global context is not only institutionally more dense, rendering withdrawal increasingly difficult and non-compliance more consequential, but it also provides a set of other challenges for the notion of constituent power. One of them is the multiplication of potential constituent subjects. To be sure, such multiplicity is not new in itself. The ‘nation’, or even the people, have not always been uncontested candidates for constituent power; the 19th century, for example, saw a prolonged competition with monarchical claims.³² Moreover, *which* people was the rightful bearer of constituent power was often contested in clashes between national and subnational claims in multinational states. Even in the American case, the contest between those that saw one people and those that saw the multiple peoples of the thirteen states as constituent remained unresolved well into the 19th century.³³

²⁸ See Vienna Convention on Succession of States in Respect of Treaties, Article 16 (1978); see also MATTHEW CRAVEN, *THE DECOLONIZATION OF INTERNATIONAL LAW: STATE SUCCESSION AND THE LAW OF TREATIES* ch. 2 (2007).

²⁹ See the discussion in CRAVEN, *ibid.*, ch. 3.

³⁰ See ARMSTRONG, *supra* note 26, ch. 6.

³¹ This section draws, in part, on NICO KRISCH, *BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW* ch. 3 (2010).

³² See SCHMITT, *supra* note 4, 80-1.

³³ See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L. J.* 1425, 1429-66 (1987).

Such competition is not necessarily problematic for the idea of constituent power. From a normative point of view, one may find one of the competing position to be superior; other claims will then appear as simply unjustified. Sociologically, too, despite such competition, one claim to constituent power may be successful in imposing itself. In the US, this occurred as a result of the civil war; in France, through a long and deliberate process of nation-building (often involving forcible means³⁴), which consolidated the 'nation' as the primary reference point for constitution-making.

Greater problems arise when the competition between different claims for constituent power remains (or becomes) unsettled. In plurinational states, in which constitutions often involve contractual elements, the locus of constituent power (in fact, its very existence) may be subject to doubt.³⁵ Claims for constituent power on behalf of either the national or subnational level are typically resisted – if constituent power is claimed to lie in the whole, sub-groups will fear being overwhelmed by a potential new constitution which they have no power to shape or prevent. If constituent power is claimed by the sub-groups, the broader entity remains entirely at their mercy and the common constitution takes on the character of a treaty which the sub-groups may terminate at will. This quandary is often avoided by suppressing constituent power and focusing on constituted power instead – constitutional change is then confined to the forms prescribed by the common constitution. Alternatively, in a federated model, constituent power is seen as dual in nature: as 'composite' or 'compound', located on both levels at the same time.³⁶ Practically, constituent power then hangs in the balance, or it retreats into practices of negotiation between the different actors and levels in which no group can bring about change through its own decision.³⁷ This may appear to many as a significant retreat and possibly as a negation of constituent power itself, yet it continues on the path, sketched above, towards a reflexive, proceduralized vision of constituent power.

The situation in the global context resembles that of such plurinational entities in that, on a normative plane, different conceptions of the right scope of decision-making (and thus the shape and extent of potential constituent power) compete with one another. In this

³⁴ See Walker Connor, *Nation-Building or Nation-Destroying?*, 24 *WORLD POL.* 319 (1972).

³⁵ Stephen Tierney, *'We the Peoples': Constituent Power and Constitutionalism in Plurinational States*, in *THE PARADOX OF CONSTITUTIONALISM*, supra note 8, 229.

³⁶ OLIVIER BEAUD, *THÉORIE DE LA FÉDÉRATION* 340-1 (2007).

³⁷ On the political contest over such questions see, e.g., Sujit Choudhry, *Old Imperial Dilemmas and the New Nation-Building: Constitutive Constitutional Politics in Multinational Polities*, 37 *CONN. L. REV.* 933 (2005).

competition, different collectives – *subnational, national, regional, or global* – have a strong initial case for decision-making powers, based on culture, nationalism, cosmopolitanism etc, but they all come with serious deficits as well. Subnational and national constituencies are limited in that they cannot fully respond to the needs and interests of those outsiders that are affected by their decisions.³⁸ The global polity is not capable of instituting structures of democratic participation nearly as thick and effective as those possible on the national level. It is too far removed from individuals, and intergovernmental negotiations do not come with the deliberative structures necessary for effective public involvement; moreover, we face serious limits of communication across cultural, linguistic, and political boundaries.³⁹ Regional levels typically combine the advantages, but also the problems of the lower and higher levels – they are not fully inclusive and their democratic structures are not sufficiently deep.

It might be tempting to see these tensions simply as a reflection of competing approaches in political theory. If multiculturalists would favour subnational decision-making, liberal nationalists would emphasize the national level, deliberative democrats may allow for fundamental decision-making of a regional scope but not beyond, and cosmopolitans would probably locate the relevant collective on a relatively high level.⁴⁰ This list could easily be extended (and would deserve greater nuance), but the details of the various approaches matter less than the broader point that the difficulties in the determination of the right level of decision-making may boil down to a need to choose between theoretical frameworks.

Yet the solution may not be so easy. Iris Young has pointed out that abstract principles, such as the inclusion of all those affected by a decision, often stand in tension with the actual allegiances of individuals and that any institutional structure has to reflect those countervailing concerns.⁴¹ This can be redescribed as a tension in the liberal project between two directions of autonomy: one insisting on the individual's right to co-determine whatever decision has an effect on her, the other emphasizing the importance for autonomy of the individual's (cultural, social) particularity that should be reflected in the

³⁸ See, e.g., IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 246-51 (2000).

³⁹ See, e.g., Jürgen Habermas, *Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?*, in JÜRGEN HABERMAS, DER GESPALTENE WESTEN 113, 137-42 (2004).

⁴⁰ For different approaches, see, e.g., WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995); DAVID MILLER, NATIONAL RESPONSIBILITY AND GLOBAL JUSTICE (2007); Habermas, *supra* note 39; DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER (1995).

⁴¹ YOUNG, *supra* note 38, ch. 7.

decision-making framework. Here lurks, in James Bohman's words, 'the fundamental tension between universality and particularity that is built into the constitutions of modern states'.⁴² This tension between the scope of communities and that of affected individuals was often contained in the context of the nation-state, but in the postnational context the gap is too big for a similar containment to work. A normatively satisfactory conception of the scope of the relevant collective for decision-making – and thus of the locus of constituent power – needs to reflect this tension and may thus regard constituent power (just as we have seen it for certain plurinational states) as hanging in the balance, or as proceduralized in the interaction between actors from different collectives.

This normative complexity may not, however, be mirrored in social and political practices. Politically, the competing visions of constituent power in the postnational sphere all represent potential frames for ascription – actors with a claim to remake the global order can link their efforts to them and hope to gain sufficient allegiance and political success for their endeavour. Because of their historical pedigree, nationalist approaches are likely to have the greatest resonance, despite their obvious normative limitations. The sovereigntist challenge to international law in the US, for example, is fuelled by an account of popular sovereignty which is – largely unreflectively – nationalist in character.⁴³ The insistence of European constitutional courts on their ultimate power to define the limits of EU competences likewise has recourse to an idea of constituent power wedded to the national *demos*.⁴⁴ Resistance against regional human rights adjudication in Latin America takes a similar form. The Constitutional Chamber of the Venezuelan Supreme Court of Justice, for example, when asserting the superiority of the national constitution over findings of supranational human rights bodies, referred to the 'unwaivable rights of the nation', such as independence, sovereignty and national self-determination.⁴⁵

⁴² JAMES BOHMAN, *DEMOCRACY ACROSS BORDERS* 29 (2007); see also Seyla Benhabib, *Reclaiming Universalism: Negotiating Republican Self-Determination and Cosmopolitan Norms*, 25 THE TANNER LECTURES ON HUMAN VALUES 113, 132 (2005) ('The tension between universal human rights claims and particularistic cultural and national identities is constitutive of democratic legitimacy').

⁴³ See, e.g., Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971 (2004); see also the discussion in Michael Goodhart & Stacy Bondanella Taninchev, *The New Sovereigntist Challenge for Global Governance: Democracy without Sovereignty*, 55 INT. STUD. QU. 1047 (2011).

⁴⁴ On the German court in particular, see Joseph H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 EUR. L. J. 219 (1995); Daniel Halberstam & Christoph Möllers, *The German Constitutional Court says "Ja zu Deutschland"*, 10 GERMAN L. J. 1241 (2009).

⁴⁵ See the Judgment of 15 July 2003, at <http://www.tsj.gov.ve/decisiones/scon/julio/1942-150703-01-0415.htm>. For an English translation, see the Note of the Government of Venezuela denouncing the Inter-American Convention on Human Rights, at http://www.oas.org/dil/Nota_Rep%C3%ABlica_Bolivariana_Venezuela_to_SG.English.pdf.

The international responses to such challenges do not, on the whole, advance alternative visions of a regional or global constituent power. For example, the eventual Venezuelan denunciation of the American Convention on Human Rights, in 2012, provoked criticism because it diminished human rights protection in substance, but international bodies did not question Venezuela's right to take this step.⁴⁶ Even in the very consolidated context of the EU, European institutions, when faced with the challenge of national constitutional courts, did not claim a higher legitimacy or legality, grounded in the idea of a European constituent power. Even the draft European constitutional treaty did not invoke a constituent power on the European level but retained the form of a treaty, with some meek references to the 'will of citizens'.⁴⁷ The 2007 Lisbon Treaty, in turn, did not leave any doubt about its character as an international treaty and even provided for an explicit right of member states to exit from the Union unilaterally.⁴⁸ And the fact that treaty amendments now require the participation of the European Parliament may tell us something about the shape of *constituted* powers, but cannot (at least not directly) be understood as an indication that the *pouvoir constituant* is now shared between the national and European levels.⁴⁹ Such a duality may be attractive on a normative level, yet it seems to find little direct reflection in societal and political practices, even in Europe.

On the global level too, even where international law imposes immediate constraints on national constituent power, these are not normally based on alternative constituent claims.⁵⁰ A good example concerns the possibility of states to terminate their international obligations. Such rights had traditionally acted as a safety valve for domestic constitutional

⁴⁶ See, eg, the statements of the Inter-American Commission on Human Rights, https://www.oas.org/en/iachr/media_center/PReleases/2013/064.asp; and of the UN High Commissioner for Human Rights, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12500&LangID=E>. On the context see Diego Germán Mejía-Lemos, *Venezuela's Denunciation of the American Convention on Human Rights*, 17 ASIL INSIGHT No 1 (2013), <http://www.asil.org/insights/volume/17/issue/1/venezuelas-denunciacion-american-convention-human-rights>.

⁴⁷ See Treaty Establishing a Constitution for Europe, Article 1 (2004), OFF.J. E.U. 2004, C-310; also Neil Walker, *Post-Constituent Constitutionalism? The Case of the European Union*, in THE PARADOX OF CONSTITUTIONALISM, supra note 8, 247.

⁴⁸ Treaty on European Union, Article 50.

⁴⁹ For the latter view, see Jürgen Habermas, *Die Krise der Europäischen Union im Lichte einer Konstitutionalisierung des Völkerrechts – Ein Essay zur Verfassung Europas*, 72 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1, 18-23 (2012).

⁵⁰ This appears to be the case even when international institutions and foreign actors have, as a factual matter, been key to the drafting of new national constitutions. See, e.g., Philipp Dann & Zaid al Ali, *The Internationalized Pouvoir Constituant – Constitution-Making Under External Influence In Iraq, Sudan and East Timor*, 10 MAX PLANCK U.N.Y.B. 423 (2006); Zoran Oklopcic, *Constitutional (Re)Vision: Sovereign Peoples, New Constituent Powers, and the Formation of Constitutional Orders in the Balkans*, 19 CONST. 81 (2012).

change, yet in recent times they have increasingly been subject to limitations. For example, as a result of political and constitutional change, several Latin American countries have recently sought to end their commitments under bilateral investment treaties (BITs) and their exposure to international investment arbitration. While referring to national sovereignty and the right of their peoples to ‘decide on the strategic direction of the economic and social life of the nation’⁵¹, their attempts at withdrawal have had to confront the fact that BITs often contain ‘survival clauses’ which keep the substantive obligations in place for ten or more years after countries have terminated a treaty.⁵² Withdrawal from treaties in general has become more difficult since the 1960s, when a default rule against withdrawal was included in the Vienna Convention on the Law of Treaties.⁵³ The effect of this shift became most obvious when, in response to a North Korean attempt to exit the International Covenant on Civil and Political Rights in the 1990s, the UN Human Rights Committee found withdrawal from the Covenant to be impossible.⁵⁴ Likewise, as regards customary international law, despite some recent efforts to argue the contrary, unilateral withdrawal continues to be widely seen as inconsequential.⁵⁵ Such constraints are far-reaching and tie countries into the international legal order without much space for change through expressions of (national) constituent power. Yet the discourse around them remains largely technical and does not advance alternative visions of an extended constituent power. The limitations are presented rather as flowing from the legal rules as they have been accepted by states or, in the case of custom, as they have developed over centuries – as flowing from *constituted* power.

At times, an alternative vision of constituent power is seen in references to the ‘international community’, which became quite frequent in international law in the 1990s. Yet such references serve primarily to illuminate the purpose, beneficiaries and moral value of particular rules, not to designate the jurisgenerative power behind them.⁵⁶ The

⁵¹ Government of Venezuela, Note on the withdrawal from ICSID, 25 January 2012, http://www.mre.gov.ve/index.php?option=com_content&view=article&id=18939:mppre&catid=3:comunicados&Itemid=108. A translation can be found at <http://internationallawnotepad.wordpress.com/2012/02/18/venezuela-withdraws-icsid-2012/>.

⁵² See Federico M. Lavopa, Lucas E. Barreiros & M. Victoria Bruno, *How to Kill a BIT and not Die Trying: Legal and Political Challenges of Denouncing or Renegotiating Bilateral Investment Treaties*, 16 J. INT’L ECON. L. 869 (2013).

⁵³ Vienna Convention on the Law of Treaties, Art 56. See also Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005).

⁵⁴ Human Rights Committee, General Comment No. 26 (1997).

⁵⁵ Curtis Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L. J. 202 (2010).

⁵⁶ See ANDREAS PAULUS, DIE INTERNATIONALE GEMEINSCHAFT IM VÖLKERRECHT (2001).

notion of ‘humanity’ has been invoked in a similar way, for example by international criminal tribunals.⁵⁷ The UN Security Council, which on some occasions has shed traditional bounds of delegation to create new law – and is sometimes seen as an example for a new claim to global constituent power⁵⁸ – has not made such a claim either. It has justified its steps as a purposive interpretation of existing law, thus affirming in principle that it is operating within the bounds of delegation from states.⁵⁹ It might have had recourse to the ambitious invocation of a constituent power in the preamble of the UN Charter – ‘we the peoples of the United Nations’ – but it did not do so and instead remained in an intergovernmental framework. In current international legal discourse, the idea of a constituent power as a constituting force is at best submerged, at worst absent; change is tamed and regarded as impossible outside the rules laid down.

As a result, the normative complexity of integrating multiple levels of decision-making does not find much expression in social and legal practices, in which only national (and at times, subnational) visions of constituent power have gained a certain traction. In many ways, this reflects the limited societal resonance of claims that rely on broader (regional or global) collectives as entitled to constitute the global order. Poll findings on views about the right level of decision-making point in this direction, even if they are not entirely clear-cut. Even in the (politically closely integrated and socially relatively homogeneous) EU context, individuals identify to a much larger extent with their national polity than with a European one.⁶⁰ Yet these primary allegiances are no longer the only ones: more than half of the citizens in Europe see themselves not solely as ‘nationals’ but also as citizens of the European Union.⁶¹ In the US, a 1999 poll found that 73% of respondents regarded themselves as ‘citizens of the world’ as well as as citizens of the United States.⁶² Global polling data points into a similar direction. In a survey conducted between 2005 and 2008, majorities in 43 out of 46 countries said they saw themselves as ‘world citizens’. However,

⁵⁷ See RUTI TEITEL, *HUMANITY’S LAW* (2011).

⁵⁸ See JEAN L. COHEN, *GLOBALIZATION AND SOVEREIGNTY: RETHINKING LEGALITY, LEGITIMACY, AND CONSTITUTIONALISM* 281 (2012).

⁵⁹ See Nico Krisch, *Chapter VII: The General Framework and Article 39*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 1237, 1272 (Bruno Simma et al, eds., 3rd ed., 2012).

⁶⁰ See NEIL FLIGSTEIN, *EUROCLASH: THE EU, EUROPEAN IDENTITY, AND THE FUTURE OF EUROPE* ch. 5 (2008); James A Caporaso & Min-hyung Kim, *The Dual Nature of European Identity: Subjective Awareness and Coherence*, 16 J. EUR. PUB. POL’Y 19, 23-30 (2009).

⁶¹ See *ibid.* See also the European Union’s Eurobarometer of Autumn 2013, according to which 59 per cent of those polled felt they were ‘definitely’ or ‘to some extent’ citizens of the EU: http://ec.europa.eu/public_opinion/archives/eb/eb80/eb80_first_en.pdf.

⁶² See the report, *Americans and the World, ‘Globalization’*, www.americans-world.org/digest/global_issues/globalization/values.cfm.

in a 2008 survey of 21 countries, majorities in 17 of them said they were mostly citizens of their own country – on average, 66 per cent of those polled were of this view, while 10 per cent felt mostly like citizens of the world, and 20 per cent said they were both equally.⁶³

We should not read too much into these data⁶⁴, but they do suggest that the nation-state remains the primary, though no longer the sole, focus of political loyalties. We can observe the emergence of a multiplicity of overlapping, sometimes conflicting identities and loyalties, of varying acceptances of different political structures depending on the issue and the situation at hand.⁶⁵ This is closely linked to the diagnosis of a multiplication of ‘publics’, of structures of communication and identification, both in domestic and transnational relations.⁶⁶ This process may not have been pervasive enough to allow actors to successfully claim a power of regional or global collectives to bring about, or ground, the postnational order. Yet it may have had a destabilizing effect on claims to a merely national constituent power. As Peter Katzenstein and Jeffrey Checkel note for the European context:

“The number of unambiguously committed Europeans (10–15% of the total population) is simply too small for the emergence of a strong cultural European sense of belonging. The number of committed nationalists (40–50% of the total) is also too small for a hegemonic reassertion of nationalist sentiments. The remaining part of the population (35–40% of the total) holds to primarily national identifications that also permit an element of European identification.”⁶⁷

In such a context, identification may thus be so dispersed that, as a matter of social practice, the locus of constituent power – as an ascription of a collective’s right to constitute – is too undefined for the concept to have much traction at all. The retreat to positions of constituted power, as we have observed it in international law, may then be a natural response.

⁶³ Council on Foreign Relations, *Public Opinion on Global Issues*, 16 December 2011, 22, available at <http://americans-world.org/>.

⁶⁴ On problems with the Eurobarometer polls, see Caporaso & Kim, *supra* note 60, 23.

⁶⁵ For a similar description, see, e.g., MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT* 350 (1996).

⁶⁶ See JOHN DRYZEK, *DELIBERATIVE GLOBAL POLITICS: DISCOURSE AND DEMOCRACY IN A DIVIDED WORLD* (2006).

⁶⁷ Peter J. Katzenstein & Jeffrey T. Checkel, *Conclusion – European Identity in Context* in *EUROPEAN IDENTITY* 213, 215-6 (Jeffrey T. Checkel & Peter J. Katzenstein, eds., 2009). For a very similar assessment, see FLIGSTEIN, *supra* note 60, 250

Institutional Fragmentation

The notion of constituent power arose in opposition to that of constituted power, but these two poles do not, of course, exhaust the institutional or social universe. In 18th century constitutionalism both notions, constituent as well as constituted power, emerged from an imagery in which public institutions had moved to the core of political and social life. Especially in the French case, the rise of these notions – just as the rise of modern, foundational constitutionalism in general – followed in the tracks of a consolidation of monarchical power that had established public power at the centre of the political system and had allowed it a significant influence on social affairs as well.⁶⁸ Absolutism was never ‘absolute’ in the original sense of the term and it was always struggling to impose itself against powerful social forces, but it marked a concentration of powers in the hands of public institutions which a few centuries earlier had been hardly imaginable. Capturing these institutions for the people, rather than the monarch or the aristocracy, promised ‘constituent power’ a significant political and societal impact.

This promise continued as state power expanded, now often in the name of popular sovereignty and enhanced by this foundation. Yet it always faced challenges, and as society and politics grew ever more complex, doubts about the prospect of modern constitutionalism rose to greater salience. As the limits of government became more obvious, the impact of the constitution – which relied, after all, on structuring government to shape society – appeared to decline. Postmodernists were among those most ready to reformulate the constitutional project in much more modest terms, in which the revolutionary claims of original constituent power hardly figured at all.⁶⁹ Social theorists who, like Niklas Luhmann, had long diagnosed a very limited ability of the political system to influence other social systems came to redescribe ‘constitution’ in a much less agentic image as merely providing the ‘structural coupling’ through which different systems interacted.⁷⁰ Doubts arose also among mainstream constitutional scholars. Dieter Grimm, for example, concerned about the decreasing ability of constitutional provisions to effect

⁶⁸ See, e.g., PERRY ANDERSON, *LINEAGES OF THE ABSOLUTIST STATE* (1974).

⁶⁹ See Karl-Heinz Ladeur, *Postmoderne Verfassungstheorie*, in *ZUM BEGRIFF DER VERFASSUNG* 304 (Ulrich K. Preuß, ed., 1994). For a somewhat different approach, see Jack M. Balkin, *What is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966 (1992).

⁷⁰ See NIKLAS LUHMANN, *DAS RECHT DER GESELLSCHAFT* ch. 10 (1993).

political and social change, came to call the ‘future of the constitution’ into question already in the early 1990s.⁷¹

If these doubts were already widespread in national political contexts, they have only been exacerbated in the postnational constellation in which constituent power has not only suffered from multiplication but has also been confined to ever smaller spaces of potential influence. The strong and distinctly public institutions that had lent focus to the original constitutional project are hardly available in global governance where authority is elusive and dispersed.⁷² A number of aspects characterize the authority structure in this realm:

Weak institutions, soft tools. Apart from the European Union, institutions with strong formal powers are largely absent from the postnational realm, and this absence has given particular force to the turn to governance.⁷³ This turn – to non-hierarchical, ideational, and cooperative forms of administration and regulation – has long been diagnosed for the domestic realm.⁷⁴ Domestically it was, however, embedded in a context of classical state institutions that could (at times) operate in a traditional command-and-control mode and provide a ‘shadow of hierarchy’.⁷⁵ Transnational settings operate without such a framework; ‘governing’ in them, whether in formal international institutions or their more informal counterparts, relies heavily – sometimes exclusively – on the use of information and cooperation in order to achieve regulatory results. Standard-setting, best practices, indicators and ‘compacts’ are its characteristic tools.⁷⁶ Yet this has diminished the distance between institutions and their addressees, and it severely conditions what public power can achieve. As a result, there is today on the global level no firm set of institutions which constituent power could capture in order to shape politics and society.

Dispersed authority. This effect is exacerbated by the dispersion of authority. In most issue areas of global governance, decision-making is far from concentrated; it takes place through the interaction of a multiplicity of actors and institutions, often set up by very

⁷¹ Grimm, *supra* note 10.

⁷² See also Dieter Grimm, *The Achievement of Constitutionalism and its Prospects in a Changed World*, in THE TWILIGHT OF CONSTITUTIONALISM? 3, 18-20 (Petra Dobner & Martin Loughlin, eds., 2010).

⁷³ Just see GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS (James N. Rosenau & Ernst-Otto Czempiel, eds., 1992).

⁷⁴ See, e.g., THE OXFORD HANDBOOK OF GOVERNANCE (David Levi-Faur, ed., 2012).

⁷⁵ See Tanja A. Börzel & Thomas Risse, *Governance without a State: Can it work?*, 4 REG. & GOV. 113 (2010).

⁷⁶ See, e.g., WHO GOVERNS THE GLOBE? (Deborah D. Avant, Martha Finnemore & Susan K. Sell, eds., 2010); GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH QUANTIFICATION AND RANKINGS (Kevin E. Davis et al., eds., 2012).

different principals in 'regime complexes' without established relations of hierarchy.⁷⁷ For example, in financial regulation, the G-8, G-20, the Financial Stability Board, the Basel Committee on Banking Regulation, the International Organization of Securities Commissions and the International Monetary Fund interrelate in the development of global standards, always aware of implementation challenges and thus watchful of other standard-setters, domestic rules and procedures and the position of influential market actors.⁷⁸ In other areas, such as intellectual property, the relation of institutions such as WIPO and the WTO is characterized yet more by an unstructured competition.⁷⁹ Even determining who contributes how much to regulatory outcomes in these networks is a difficult task; rather than following a rational script, the structure of governance is the result of multiple interacting moves, organic growth and choices of powerful actors. The lack of a centre in this constellation makes it much more difficult to relate to a single legitimating subject or process, as in constituent power.

Private regulation. Yet less easily subject to public constitution is the ever increasing number of private authorities in global governance.⁸⁰ Set up by individuals, companies or NGOs, they fill the gaps left by a fragmented public governance structure and often serve to advance particular normative projects – frequently in conflict with other private authorities. Here, too, competition is often a key factor behind regulatory outcomes and institutional structures. An example is the governance of sustainable forestry, the result of a struggle between the NGO-driven Forest Stewardship Council and industry-driven alternatives, enhanced by choices of individual governments and, of course, market dynamics.⁸¹ In this conglomerate, in which concentrated power is largely absent, constituent power can hardly get hold of an object through which social and political change can be made to occur.

Rival forms of legitimation. Constituent power also faces obstacles from the emergence of rival forms of legitimation, especially technocratic ones. Such rival forms,

⁷⁷ See Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORG. 277 (2004).

⁷⁸ For overviews, see Howard Davies & David Green, GLOBAL FINANCIAL REGULATION: THE ESSENTIAL GUIDE (2013); David Zaring, *Finding Legal Principle in Global Financial Regulation*, 52 VA. J. INT'L L. 683 (2012).

⁷⁹ See Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1 (2004).

⁸⁰ See, e.g., PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS (A. Claire Cutler, Virginia Haufler & Tony Porter, eds., 1999); David Vogel, *Private Global Business Regulation*, 11 ANN. REV. POL. SCI. 261 (2008).

⁸¹ See Steve Bernstein & Benjamin Cashore, *Complex global governance and domestic policies: four pathways of influence*, 88 INT'L AFF. 585 (2012).

again, are not unique to the postnational sphere – in the domestic context, ‘outcomes’ have come to play an increasing role in legitimating institutions such as central banks or constitutional courts. Yet these institutions were embedded in a broader framework and their powers were typically traceable to constitutional or parliamentary delegation. In the global sphere, technocratic arguments play a much more central role, if only because procedural, input-oriented mechanisms of legitimation are often weak or not available at all. Intergovernmental networks, for example, often have little basis in delegation (as regards third countries in particular, no basis at all). Private authority is often bootstrapped and mixes an emphasis on outcomes with certain elements of procedure by which a few key stakeholders are brought in. ‘Comparative benefit’ becomes a key criterion for assessing the legitimacy of an institution⁸²; pragmatic problem-solving becomes a dominant rationality; and the need to relate institutions back to a legitimating process or ‘constitution’ diminishes.⁸³

This structure of authority represents a serious challenge for the successful invocation of constituent power. Without strong, unified institutions, there is no object which constituent power could shape and through which it could effect societal change. The dispersed nature of authority, an ‘assemblage’ with multiple origins, sites and actors⁸⁴, resists the idea of a single constituting act. In this setting, constitutional rules would most likely result from a convergence of practices and resemble a common law constitution more than a foundational one⁸⁵; instances of constituent power would only be fragmented and site-specific. Given the often unstructured interaction of many institutions in a regime complex, such fragmented constituent power will typically not be able to ‘constitute’ the structure of politics – it may only affect a part of a broader political process which, as a whole, eludes its impact. Moreover, given the weakness of transnational institutions and the relative strength of globalized markets, even capturing the *political* institutions will not normally grant constituent power the social and political effect it seeks. In many ways, this

⁸² See Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT’L AFF. 405 (2006); Robert O. Keohane, *Global Governance and Legitimacy*, 18 REV. INT’L POL. ECON. 99 (2011).

⁸³ See also Alexander Somek, *Constituent Power in National and Transnational Contexts*, 3 TRANSNAT’L LEG. TH. 31 (2012).

⁸⁴ See SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES (2008).

⁸⁵ See ANDREW HURRELL, ON GLOBAL ORDER 53 (2007); Jan Klabbers, *Setting the Scene*, in JAN KLABBERS, ANNE PETERS & GEIR ULFSTEIN, THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 1, 23 (2009); see also GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION 131 (2012).

simply reflects the widespread view that in the postnational context, the idea of popular sovereignty – with its promise of agency in shaping a political and social structure – may find little place. From the perspective of most individuals, and even of that of most ‘peoples’, the postnational sphere is a sphere of fate, not of constitution.

III. From Constituent Power to *Pouvoir Irritant*

Recasting Constituent Power

This diagnosis may lead to a posture of resignation – a posture that resigns itself to the structural constraints of the transnational realm and accepts the absence of constituent power. Or it upholds the presence of constituent power at the cost of voiding it of some of its key elements. In this latter vein, Alexander Somek reinterprets constituent power as ‘interpassive conventionality’ in which both agency and public autonomy give way to the mere acceptance of the existing landscape of transnational institutions.⁸⁶ This shift reflects considerable pessimism, but it makes plain that in certain circumstances a strong idea of constituent power – one that ‘signifies the capacity to make a new beginning’⁸⁷ – will not find fertile ground.

Such pessimism is not universally shared, and efforts at recasting constituent power in the global context are underway.⁸⁸ A number of global constitutionalists take the opposite approach to Somek’s and, rather than resigning themselves to existing social and institutional limitations, propose to create a structure in which the ‘capacity to make a new beginning’ may re-emerge. To achieve a constitution on the global level, they thus advocate a recentralization of political power. This is, indeed, what many global constitutionalists defend. In Jan Klabbers’s words,

“constitutionalization ... offers the response of centralization. A constitutional world order is one which has a centre of authority ... ; in a constitutional global order, it is clear who can issue what norms and standards, and what the effect of such standards will be.”⁸⁹

Such an approach seeks to recreate the classical constitutionalist model on a global scale, and it may offer an optimistic alternative to Somek’s stance. Jürgen Habermas is

⁸⁶ Somek, *supra* note 83, 52.

⁸⁷ *Ibid.*, 1; see also ARENDT, *supra* note 25, 204-14.

⁸⁸ See also the review by Patberg, *supra* note 20.

⁸⁹ Klabbers, *supra* note 85, 18.

among the most prominent defenders of such a model, which would see ‘state citizens’ (via their governments) and ‘world citizens’ as equal parts of a *pouvoir constituant mixte* and seeks to realize their impact on the global level through the establishment of a world parliament, equipped with strong powers especially on issues of peace and security.⁹⁰ This recreates a federal structure and takes further the account of constituent power in plurinational states, which I have sketched above. Yet as much as this proposal may be normatively appealing, it may to date have limited societal resonance and – as all proposals built around recentralization – is quite obviously beset by implementation problems.

Also driven by constitutionalist sensitivities, but more attuned to the intricacies of global politics, Jean Cohen proposes a model of federation without sovereignty in which constituent power, as in Habermas, appears as dual – as residing both in the national *demos* and in the compound *demos* in which the national *demos* participate as co-equals.⁹¹ Yet Cohen does not seek to recreate unity and hierarchy but instead develops her account for a legal pluralist world in which different levels stand in a heterarchical relation to one another – not one order is created, but many. Cohen acknowledges that such an approach ‘de-dramatizes and de-substantializes’ the concept of constituent power.⁹² This would not, in and of itself, constitute a problem – as we have seen, decisionist accounts along the lines of Sieyès or Schmitt are less convincing today than a more reflexive, proceduralized version. The difficulty with Cohen’s approach is that it proceeds from an imagination of the global space that, by and large, extends the social and institutional structure of the European Union. It hardly responds to a societal context in which the purchase of identifications with ‘humanity’ at large is significantly weaker than is the case for identifications with Europe in the EU framework. And because of its focus on the UN system and especially the Security Council, it does not really register the impact of institutional fragmentation.⁹³ Even if Cohen’s account is more federated than federal, it still has difficulties coping with the particular social and institutional setting of the global sphere.

⁹⁰ Habermas, *Krise*, *supra* note 49, 33-44.

⁹¹ COHEN, *supra* note 58, 146, 153, 318. Cohen at times seems to attribute constituent power to ‘member states’ of international institutions (see p 318), but I interpret this as meaning the *demos* of these states, in line with her theoretical exposition earlier in the book.

⁹² *Ibid.*, 153.

⁹³ See the remark *ibid.*, 321.

Other approaches salvage the notion of constituent power for the more rugged transnational context, but, like Somek's, they typically do so at a considerable cost. Two recent proposals with a background in sociological systems theory are exemplary here. Chris Thornhill acknowledges that constituent power is being weakened and eroded, in part because of the influence of transnational (human rights) norms and of external (especially judicial) actors.⁹⁴ He interprets this as a turn to a multi-constituent order in which constituent power is entrusted to a variety of actors, among them different kinds of courts.⁹⁵ For Thornhill, this is not a contrast with but rather a continuation of the classical role of constituent power. He revisits the history of constituent power from a functionalist angle and understands the concept as referring to a source of legitimacy internal to the political system rather than one external to it, and as one that was always interwoven with the idea of rights. Constituent power in this reading is primarily a resource for augmenting the power of the system through enhanced legitimation.⁹⁶ Yet Thornhill's emphasis on function (and on the weak role the 'people' has actually played in historical instantiations of constitution-making) misunderstands the social role of constituent power. It cannot grasp its discursive importance as a structure of justification, the strength of which derives from its particular content – the historically novel claim for a constitution to derive its legitimacy from the people and the right of the people to make a new one when it saw fit. Much less than the abstract legitimation function, this concrete content finds little continuation in the practices of transnational judiciaries Thornhill focuses on – and even less so in the structures of transnational governance I have sketched above.

Gunther Teubner, too, embarks on a sociological reinterpretation of constituent power, but he emphasizes the discursive power of the concept as a 'communicative potential, as social energy'.⁹⁷ Yet he limits its reach by confining it to the political system, which in his systems-theoretical framework is only one among many social systems, and one that has no privileged access to the others. The other social systems follow different logics and legitimating rationales and potentially produce other (societal) 'constitutions', which operate without recourse to the notion of constituent power.⁹⁸ While this may hold important insights into the actual operation of constituent power and its societal limitations,

⁹⁴ Chris Thornhill, *Contemporary Constitutionalism and the Dialectic of Constituent Power*, 1 GLOB. CON. 369 (2012).

⁹⁵ *Ibid.*, 374.

⁹⁶ *Ibid.*, 377.

⁹⁷ TEUBNER, *supra* note 85, 63.

⁹⁸ *Ibid.*, 63-66.

it underrates the holistic nature of constituent power's ambition. Constituent power historically came with the claim to be able to remake the political system and, through its centrality in society, achieve proper self-government.⁹⁹ Whether or not this was ever actually possible, it provided a discursive resource which, as Thornhill rightly observes, helped to augment the power of the political system beyond its traditional boundaries. Without regard for this holistic ambition, we cannot account for the communicative strength of this claim in political and social discourses. And without this ambition, we can also not understand the limitations faced by attempts to transfer the concept into the fragmented and pluralist world of the transnational.

The Pouvoir Irritant

Reclaiming constituent power for the postnational constellation faces serious difficulties. It has to cope with the multiplication of potential holders, and it has to face an institutional order which, because of its weakness and fragmentation, hardly lends itself to being 'constituted' or constitutionalized. And as we have just seen, attempts at breathing life into the concept in the global sphere either engage in a (rather illusory) recentralization of political power; or they flatten the concept in such a way as to largely void it of the symbolic, political appeal it has historically had.

Yet this does not mean that we need to resign ourselves to the complete absence of constituent power in the postnational space. To be sure, we will not be able to identify an actual constituent power behind current transnational institutional structures in the same way as we may have done (in however an idealized or mythical fashion) for national governments and constitutions. But, first, this does not eliminate the *normative case* for constituent power. If we retain the public autonomy of individuals as an aspiration, the power to constitute the political and legal order continues to be a central element – one that would, if effectively realized, allow public autonomy to realize its full potential. The notion of constituent power may today be more complicated than it was in the past, yet even in an inhospitable political and legal environment, in which properly 'constituting' may

⁹⁹ On the holistic ambition of the constitutional project, see Neil Walker, *Beyond the Holistic Constitution?*, in *THE TWILIGHT OF CONSTITUTIONALISM?*, *supra* note 72, 291.

remain illusory for some time to come, the aspiration of constituent power can have force as a 'critical sting' for current structures of global governance.¹⁰⁰

On a *societal level*, most claims to found the legitimacy of existing inter- and transnational institutions in constituent power are likely to fail – too far is the institutional reality from the idea of rational constitution, and too far is the social reality from a sufficient resonance for such claims. Yet this does not mean that constituent power does not have any purchase at all in this order, only that it will largely operate as a challenge to institutional action, as an *irritant*.¹⁰¹ Claims to constituent power retain the aspiration of a holistic constitution but they are too weak to actually bring it about, to shape institutions in such a way that a plausible link to meaningful public autonomy could be established. Nevertheless, such claims (if they have societal resonance) can serve to destabilize the existing order – to strengthen some of its parts, to weaken others, and thus potentially to provoke institutional adjustment over time. They arise not only in extreme crises that call for a wholesale remaking of the global order, but play a role in the day-to-day operation of the postnational order whenever its internal tensions become too strong to be contained.

Such an irritating force is most likely to arise from claims to national (sometimes also subnational) constituent power, as the societal base for such claims is – as we have seen above – firmest. It will express itself typically in instances of resistance to postnational governance and may be called upon by different actors. The protagonists may be courts, as in the challenges to European Union law waged by constitutional courts.¹⁰² They may be governments and parliaments, as in the Latin American challenges to international rules on investment protection and regional human rights norms.¹⁰³ They may be civil society associations, as in the social movement for 'food sovereignty'¹⁰⁴ or in local commons movements acting as 'an oppositional force to the process of economic constitutionalism imposed by international economic institutions'.¹⁰⁵ In such instances, the supposed constituent power (the national or local 'people') does not enter the stage itself.

¹⁰⁰ See Christoph Möllers, *Verfassunggebende Gewalt – Verfassung – Konstitutionalisierung*, in *EUROPÄISCHES VERFASSUNGSRECHT* 227, 255 (Armin von Bogdandy & Jürgen Bast, eds., 2nd ed, 2009).

¹⁰¹ Compare Teubner's somewhat different account of constituent power as an 'irritant' of constituted powers; TEUBNER, *supra* note 85, 62.

¹⁰² See *supra* text at note 44.

¹⁰³ See *supra* text at notes 45, 51-52.

¹⁰⁴ See *FOOD SOVEREIGNTY: RECONNECTING FOOD, NATURE & COMMUNITY* (Annette Aurélie Desmarais, Nettie Wiebe & Hannah Wittman, eds., 2010).

¹⁰⁵ Saki Bailey & Ugo Mattei, *Social Movements as Constituent Power: The Italian Struggle for the Commons*, 20 *IND. J. GLOB. LEG. ST.* 965, 1012 (2013).

As always, it operates through representation or ascription; here it is invoked to destabilize the claims of constituted powers and to justify resistance against them. Constituent power enters the scene a discursive resource which, if it can count on societal resonance, helps to legitimate political action against an institutional order which cannot rely on a similarly strong legitimacy basis.

If constituent power in the postnational constellation makes an appearance only as a *pouvoir irritant*, its continuing force stems from its broader, holistic aspiration – however impractical, perhaps utopian that aspiration may be at present. In the postnational space as it is currently structured, constituent power survives in claims and ascriptions in pockets of the overall order; its broader aspiration is merely latent and it remains to be seen whether, at some point in the future, it enters the realm of the socially and politically possible. Yet acting as an irritant may still be an important role. It may help to disturb the institutionalization of the world along merely technocratic, power-driven lines, and it may also help to keep the idea of agency present in the postnational space. In this role, the *pouvoir irritant* would provide an opening – a ‘placeholder’¹⁰⁶ – for the aspiration, so cogently formulated by Alexander Hamilton in the *Federalist*, that societies should establish their constitutions ‘from reflection and choice’ even in a context such as the postnational which, to many, appears more as a domain of ‘accident and force’.¹⁰⁷

IV. Conclusion

Constituent power is among the key elements of the modern, foundational tradition of constitutionalism, yet it is also among those that face the greatest difficulties in the transition to the postnational constellation. In a fragmented, complex order, in which institutions are manifold and follow a host of different rationales, the idea of a ‘founding’ that could be ascribed to a constituent power is bound to have little resonance, even as a myth. The attempt to create such a myth in the UN Charter, relying on ‘we the peoples of the United Nations’, has done little to unseat its ascription to inter-state negotiations – and it concerns, in any event, only a small part of the broader panoply of global governance

¹⁰⁶ The term is borrowed from Walker, *Holistic Constitution*, *supra* note 99, 307; see also Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. REV. 1, 30 (2007).

¹⁰⁷ Alexander Hamilton, *The Federalist*, 1, in ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST PAPERS 11 ([1787-88] Lawrence Goldman, ed., 2008).

institutions. On the other hand, national constitutions with their typical grounding in national constituent power increasingly lack controlling force in the face of globalizing markets and governance. What is more, the locus of constituent power itself is subject to doubt. Whether it should be conceived as subnational, national, regional, or global (or a combination of these, depending on the circumstances) is contested, normatively as well as in social practice.

If constituent power survives in this order, it does so in a curtailed fashion – as merely an irritant. Constituent power provides a structure of justification which helps to legitimize resistance on behalf of (mostly local or national) collectives for which the claim to constitute finds sufficient societal resonance. Its invocation may destabilize global institutions that typically cannot count on a strong legitimacy basis but have to defend themselves largely on grounds of functional gains or superior expertise. While such an irritant invocation of constituent power is usually difficult, the leap towards a constitutional moment that would allow to successfully ascribe the *creation* of institutions to a *pouvoir constituant* is currently out of reach, even in the relatively hospitable context of the European Union.

The limitations of constituent power in the postnational constellation are a healthy reminder of how difficult it is to transfer the domestic constitutionalist framework beyond the state.¹⁰⁸ Some elements of it – typically the liberal, power-limiting ones – travel better than others, even if they hardly ever arrive unchanged. However, many core aspects of modern, foundational constitutionalism – those that express the aspiration to democratic agency and self-government – face high hurdles. As a result, translating constitutionalism to the postnational sphere is likely to alter its appearance significantly, ushering in fragmented reconceptualizations¹⁰⁹ or at least tilting the balance in favour of a liberal model that emphasizes the rule of law over democratic concerns.¹¹⁰ This may continue a trend already noticeable in the domestic context¹¹¹, yet this trend is bound to be radicalized in the postnational sphere.

¹⁰⁸ For a general argument to this effect, see also KRISCH, *supra* note 31, ch. 2.

¹⁰⁹ See, e.g., TEUBNER, *supra* note 85.

¹¹⁰ See, e.g., Erika de Wet, *The International Constitutional Order*, 55 INT'L & COMP. L. QU. 51 (2006); Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State*, in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 258 (Jeffrey L. Dunoff & Joel P. Trachtman, eds., 2009).

¹¹¹ See James Tully, *The Unfreedom of the Moderns in Comparison to their Ideals of Democracy*, 65 MOD. L. REV. 204 (2002).

Such a diagnosis is, of course, subject to revision as political and societal circumstances change. We may at some point observe greater institutional unity, making global governance more amenable to being ‘constituted’. We may also observe social change that would pave the way for a more successful invocation of constituent power on behalf of transnational or cosmopolitan collectives. And we may find ways to realize democratic ideals in a global context that go beyond ‘democratic minimums’ or mere ‘democratic-striving’.¹¹² Until that point, the structure of legitimation in postnational governance will differ considerably from the one we typically associate with domestic institutions. It is likely to emphasize technocratic elements – output, expertise – and combine them with liberal constraints – the rule of law and individual rights – as well as certain forms of broader input through mechanisms of participation and accountability.¹¹³ This is a fragile grounding, and it may become unstable as contestation grows and the need for stronger forms of legitimation arises; calls for a revitalization of public autonomy are then likely to become more vocal. Constituent power is, of course, only one way among many in which public autonomy may find expression, yet it is a particularly radical one in its ambition to a comprehensive founding through self-government. If it has always been difficult to realize this ambition in more than lip-service in the domestic context, it may well remain impossible in the postnational setting. The distance between ambition and reality, however, can feed a *pouvoir irritant* that reminds us of what we have lost.

¹¹² See BOHMAN, *supra* note 42; Gráinne de Búrca, *Developing Democracy Beyond the State*, 46 COL. J. TRANSNAT’L L. 101 (2008).

¹¹³ See also Neil Walker, *Postnational Constitutionalism and Postnational Public Law: A Tale of Two Neologisms*, 3 TRANSNAT’L LEG. TH. 61 (2012).