



CAMBRIDGE STUDIES IN LAW AND SOCIETY

# A Sociology of Constitutions

Constitutions and State Legitimacy  
in Historical-Sociological Perspective

CHRIS THORNHILL

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CAMBRIDGE  
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS  
Cambridge, New York, Melbourne, Madrid, Cape Town,  
Singapore, São Paulo, Delhi, Tokyo, Mexico City

Cambridge University Press  
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org  
Information on this title: www.cambridge.org/9780521116213

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First published 2011

Printed in the United Kingdom at the University Press, Cambridge

*A catalogue record for this publication is available from the British Library*

*Library of Congress Cataloging in Publication data*  
Thornhill, C. J. (Christopher J.), 1966–

A Sociology of Constitutions : Constitutions and State Legitimacy in Historical-Sociological  
Perspective / Chris Thornhill.

p. cm. – (Cambridge Studies in Law and Society)

Includes bibliographical references and index.

ISBN 978-0-521-11621-3 (hardback)

1. Constitutional history. 2. Constitutional law – Social aspects. I. Title. II. Series.

K3161.T486 2011

342.02'9–dc22

2010051564

ISBN 978-0-521-11621-3 (hardback)

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## A SOCIOLOGY OF CONSTITUTIONS

Using a methodology that both analyses particular constitutional texts and theories and reconstructs their historical evolution, Chris Thornhill examines the social role and legitimating status of constitutions from the first quasi-constitutional documents of medieval Europe, through the classical period of revolutionary constitutionalism, to recent processes of constitutional transition. *A Sociology of Constitutions* explores the reasons why modern societies require constitutions and constitutional norms, and presents a distinctive socio-normative analysis of the constitutional preconditions of political legitimacy.

CHRIS THORNHILL is Professor of European Political Thought and Head of Politics at the University of Glasgow, where his research focuses both on the relations between legal and political theory and legal and political sociology and on processes of state formation and constitution writing in different European societies.

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*A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective*

Chris Thornhill

## ACKNOWLEDGEMENTS

While writing this book I found myself in the company of a number of brilliant scholars, academics and intellectuals who either shaped my thinking in a general manner or offered advice or stimulation on particular points of fact and interpretation. In particular, I would like to mention Samantha Ashenden, Hauke Brunkhorst, Jean Clam, Emiliós Christodoulidis, Daniel Chernilo, Photini Danou, Robert Fine, Poul Kjaer, Mikael Rask Madsen, William Outhwaite, Inger-Johanne Sand, Darrow Schecter, Irene Stolzi, Gunther Teubner, Adam Tomkins, Johan van der Walt and Stephen White. Most especially, however, I would like to thank Chris Berry and Gianfranco Poggi, who exceeded all normal bounds of collegiality in reading long sections of the book in its earlier stages and offering very helpful comments and suggestions. Of course, I do not expect that any of these people will agree with what I have written here, but (for better or for worse) I would not have written it without my intellectual exchanges with them. I would also like very warmly to thank Finola O'Sullivan at Cambridge University Press for encouraging me throughout this project.

Vital to the writing of this book were two research trips to the Max-Planck-Institut für Europäische Rechtsgeschichte in Frankfurt am Main. I found the Institute a magnificent place to work, and I am grateful to all its employees, albeit most especially to Frau Ursula Pohl, for their assistance in finding books and manuscripts for me during my sojourns there. I owe a similar debt of gratitude to the staff in the Rare Books Room at the British Library and in the Special Collections Library at the University of Glasgow.

In addition, I would like to express my gratitude to my students in politics at Glasgow University, in particular to those who have taken my courses on the history of political thought, fascism, and political legitimacy, for the fact that they have so consistently and intelligently challenged my preconceptions and forced me to consider and reflect



on my ideas in new ways. I have found it a great privilege over the last five years to teach the young men and women studying in Glasgow, and much of my work has been thought out – either immediately or through more indirect engagement – in the company of students at Glasgow.

## A NOTE ON TEXTS AND TRANSLATIONS

This book examines texts written originally in a number of languages, spanning many centuries, some of which have been translated into English and some of which have not. To guarantee some degree of uniformity in referencing, I have decided to refer to all works in original editions, and all translations of these editions are my own. I accept all responsibility for whatever shortcomings these translations might have.

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## Introduction

### Why a sociology of constitutions?

During the emergence of sociology as an academic discipline the questions about the origins, status and functions of constitutions were widely posed. Indeed, for both thematic and methodological reasons, the analysis of constitutions was a central aspect of early sociology. Sociology developed, however ambiguously, as a critical intellectual response to the theories and achievements of the Enlightenment in the eighteenth century, the political dimension of which was centrally focused on the theory and practice of constitutional rule. In its very origins, in fact, sociology might be seen as a counter-movement to the political ideals of the Enlightenment, which rejected the (alleged) normative deductivism of Enlightenment theorists. In this respect, in particular, early sociology was deeply concerned with theories of political legitimacy in the Enlightenment, and it translated the revolutionary analysis of legitimacy in the Enlightenment, focused on the normative claim that singular rights and rationally generalized principles of legal validity were the constitutional basis for legitimate statehood, into an account of legitimacy which observed political orders as obtaining legitimacy through internalistically complex, historically contingent and multi-levelled processes of legal formation and societal motivation and cohesion.<sup>1</sup> This is not to suggest that there existed a strict and unbridgeable dichotomy between the Enlightenment, construed as a body of normative philosophy, and proto-sociological inquiry, defined as a body of descriptive interpretation. Clearly, some theories commonly associated with the Enlightenment pursued an evolutionary line of social reconstruction, and they rejected the idea that political legitimacy could be produced by singular acts of theoretical intelligence. Some theorists associated with the Enlightenment also specifically analysed constitutions in a proto-sociological perspective, and

<sup>1</sup> This culminated in Weber's famous account of legitimacy (1921: 122–30).

they accentuated the relativistic contingency of normative political forms.<sup>2</sup> However, if the political centre of the Enlightenment lay in the belief that political institutions obtain legitimacy if they enshrine constitutional laws translating abstract notions of justice and personal dignity into legal and normative constraints for the use of public and private power, sociology was first formed as a diffuse and politically pluralistic body of literature that opposed this belief. Sociology first evolved as a discipline that sought to promote reflection on the legitimacy of socio-political orders by elucidating the ways in which societies produce inner reserves of cohesion, obligation and legitimacy, without accepting the simplified view that these reserves were generated, and could be reliably authorized, by spontaneous external acts of reason. Formative for early sociology was thus a socially internalistic critique of the revolutionary constitutions and their catalogues of rights that, resulting from the Enlightenment, were established in the 1770s, 1780s and 1790s. Moreover, inquiry into constitutions might be seen as the defining element of early political sociology: it was in analysing constitutions and their functions that sociology raised its most profound questions regarding both the methodological/analytical methods and the political conclusions that supported the normative doctrines of the Enlightenment.

The rejection of normative constitutionalism was exemplified across the spectrum of pre- or proto-sociological analysis. At the very inception of modern social theory, for example, the works of Burke, De Maistre, Savigny, Bentham and Hegel can be loosely grouped together as – in themselves greatly divergent – endeavours to propose an anti-formalist theory of constitutional law.<sup>3</sup> At the centre of each of these theories was a negation of the principle that states acquire legitimacy from constitutional laws because these laws articulate simple promptings of universal reason to which states, in order to exercise their power in legitimate fashion, automatically owe compliance. Later, the early writings of Marx

<sup>2</sup> The Scottish Enlightenment appears as a forerunner of political sociology. David Hume, for example, argued that the principles around which pacified human societies tend to be organized – that is, the stability of possession, the transference of property by consent and the performance of promises – are not derived from immutable laws or invariably rational ideas of justice, but are in fact elements of social artifice or convention. In particular, Hume derided theorists who sought to calibrate all experiences of legitimate power in simplified or rationalized terms, and he especially denounced the ‘fashionable system of politics’ (1978 [1739–40]: 542). Adam Smith also prefigured later elements of political sociology by claiming that institutions of government, including separated powers, evolved, not through normative stimulus, but through the ‘naturall disposition’ of society (1978 [1762–6]: 347).

<sup>3</sup> This point has often been made. See my recent account in Thornhill (2010a).

also drew impetus from the conviction that the Enlightenment had proposed a misconstrued ideal of constitutional legitimacy. Marx (1958 [1844]) argued that the rationalist assumption that constitutions generate legitimacy for states could only be supported through a sociologically closed – or indeed *ideological* – construction of societal reality. In the first period of classical sociology, subsequently, the attempt to examine constitutions and their legitimizing functions as expressions of wider societal dynamics played a yet more central role. This was reflected in the works of Ferdinand Tönnies, Émile Durkheim and Max Weber, all of which proposed distinctive accounts of constitutional functions, and all of which aimed to observe the origins of constitutional norms, not in deductive prescriptions but in inner-societal and historically elaborated normative structures. At this juncture, sociological analysis of constitutions also began to cross the boundary between sociology and law, and in the period of classical sociology it must have appeared that constitutional sociology would soon establish itself as a distinctive line of jurisprudence. In France, first Léon Duguit and then Maurice Hauriou both accounted for constitutions and their functions in creating legitimacy as pronounced elements of an overarching social order (Duguit 1889: 502; Hauriou 1929 [1923]: 72–3). In Germany, Carl Schmitt later defined his constitutional theory as reflecting a strongly sociological approach to law, which ridiculed purely legalistic reconstructions of constitutional law and its legitimating force (1928: 121). One potent lineage in constitutional theory in the Weimar Republic in fact insisted on the use of sociological analysis of integration through constitutional law and constitutional rights to refute the legal positivist orthodoxy established in the late nineteenth century (Smend 1968 [1928]: 263). By the third decade of the twentieth century, in short, the anti-normative patterns of legal/constitutional analysis in the first wave of post-Enlightenment social theory were widely cemented in social and legal analysis, and the contours of a sociology of constitutions were clearly identifiable.

After 1945, however, the impetus of constitutional sociology decelerated, and in the longer wake of the Second World War more formally normative theories assumed central status in both constitutional theory and constitutional practice. In the practical domain, formal-normative constitutional methods and ideals assumed great importance during the push for constitutional order in the later 1940s and 1950s, at which time constitutions were widely deployed as instruments for consolidating Western-style democracy and obviating renewed collapse into political authoritarianism: relativistic and societally contingent attitudes to

constitutional law were perceived as obstructing this objective. In the successive waves of post-authoritarian constitutional-democratic transition, in the 1940s, 1970s and 1990s, the model of the constitution as an institution guaranteeing basic rights and a separation of powers, and usually subjecting both executive and legislature procedures to statutory compliance with prior non-derogable norms, was widely adopted as a necessary construct whose normative validity and general functional utility were beyond question. To be sure, constitutional sociology did not entirely disappear after 1945. In Germany, elements of a functionalist sociology of constitutions were present first in the works of Helmut Schelsky (1965 [1949]) and then in the writings of Niklas Luhmann (1965; 1973; 1991). Jürgen Habermas's early analysis of constitutional legitimacy also contains a tentative and often revised sociological approach to the functions of constitutional law (1990 [1962]: 326–42). Constitutional formation assumes vital status in Richard Münch's sociology of modern political culture (1984: 311). In the United States, moreover, Talcott Parsons gave an important, although marginal, role to the constitution and the rights contained in it, which he saw as sources of far-reaching inclusion and structural stabilization (1969: 339).<sup>4</sup> Generally, however, the attempt to construct the rule of law and the public-legal regulation of governmental power as expressions of societal, rather than deductive/prescriptive, norms lost intellectual momentum in the later twentieth century. Indeed, for all their practical/political advantages and utility in stabilizing democratic regimes, the preponderance of normative principles in post-1945 constitutional discourse and practice weakened sociological understanding of the motives which lead societies to produce, and habitually to articulate, their grammar of legitimacy in constitutional laws. The fact that constitutional order has been promoted as a general ideal of legitimacy in post-1945 politics has tended to obstruct sociological inquiry into the deep-lying normative structure of society, and the increasing reliance of modern societies on relatively uniform patterns of constitutional organization has not been reflected in a consonant growth of society's self-comprehension in respect of its normative political foundations. In fact, it is arguable that in the later twentieth century the original and formative post-Enlightenment dichotomy between normative and sociological inquiries into constitutions and constitutional legitimacy reproduced and reconsolidated itself. In this process, the assumption that constitutional principles, especially those

<sup>4</sup> See my longer discussion of contemporary aspects of constitutional sociology in (2010a).



condensed into formal rights, could be definitively illuminated as normative objects became almost unshakably predominant.<sup>5</sup>

This situation, it needs to be noted, has begun to change in very recent years, and it is now possible to identify a number of theorists and researchers, working across the disciplinary distinctions between politics, law and sociology, who employ sociological or socio-theoretical methods to illuminate constitutions. This can be seen in the neo-functional legal sociology of David Sciulli (1992). It is evident in the quasi-ethnographic approach to constitutional formation in the writings of Kim Lane Scheppele. It is apparent more recently in the post-Luhmannian school of legal analysis, centred around Gunther Teubner, which, although largely focused on the changing sources of private law, has provided an outstandingly complex account of the pluralistic constitutional structures of modern society.<sup>6</sup> This is also manifest in the post-Habermasian constitutional analyses set out by Andrew Arato and, in particular, by Hauke Brunkhorst, who has developed a far-reaching model of constitutional formation that seeks to account for both the societal/evolutionary and the normative dimensions of constitutions and their legitimating intentions (2000: 55; 2002: 136). On this basis it is plausible to suggest that the sociology of constitutions, in different expressions, is gradually resuming its former importance in social theory. Indeed, it can be observed that, despite the prevalence of formal-normative orthodoxy in constitutional analysis in modern societies, the transformations in the constitutional design of Western societies in the last fifty or so years are slowly becoming objects of adequately sociological interpretation.

Despite this, however, it is also fair to say that, to date, the recent attempts at sociological constitutionalism, although often comprising research of the highest theoretical importance, have not succeeded in re-establishing constitutional sociology as a sub-discipline of law, politics or sociology. This is the case for two reasons. On one hand, recent sociological interpretations of constitutions have tended to focus on one particular aspect of constitutional formation – that is, habitually, either on the rights dimension of constitutions, or on the changing functions of constitutions in increasingly internationalized societies or societies with post-traditional political structures.<sup>7</sup> The constitution as a legal

<sup>5</sup> The most extreme case of this might be the theory of Dworkin, who argues that it is imperative to isolate 'the problem of rights against the state', and so pushes the case for a 'fusion of constitutional law and moral theory' (1977: 149).

<sup>6</sup> See the argument in Fischer-Lescano and Teubner (2006).

<sup>7</sup> Habermas and Brunkhorst might exemplify the first tendency and Teubner might be a case of the second.