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A Sociology of Constitutions

Constitutions and State Legitimacy in Historical-Sociological Perspective

CHRIS THORNHILL

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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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For Grace and John

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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.

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.[1] 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

[1] This culminated in Weber's famous account of legitimacy (1921: 122–30).

they accentuated the relativistic contingency of normative political forms.[2] 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.[3] 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

[2] 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).

[3] 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 misconstructed 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).[4] 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

[4] See my longer discussion of contemporary aspects of constitutional sociology in (2010a).