

## A SOCIOLOGY OF TRANSNATIONAL CONSTITUTIONS

This book is the second in a series of volumes on the Sociology of Constitutions. This volume focuses on the rise of transnational constitutional laws, primarily created by the interaction between national and international courts and by the domestic transformation of international law. Through detailed analysis of patterns of institutional formation at key historical junctures in a number of national societies, it examines the social processes that have locked national states into an increasingly transnational constitutional order, and it explains how the growth of global constitutional norms has provided a stabilizing framework for the functions of state institutions.

The book adopts a distinctive historical–sociological approach to these questions, examining the deep continuities between national constitutional law and contemporary models of global law. The volume makes an important contribution to the sociology of constitutional law, to the sociology of post-national legal processes and to the sociology of human rights law.

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# A SOCIOLOGY OF TRANSNATIONAL CONSTITUTIONS

Social Foundations of the  
Post-National Legal Structure

*Chris Thornhill*



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*For Atina, and for Grace and John*

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## INTRODUCTION

### BASIC CONCEPTS AND STRUCTURE OF THE BOOK

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

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

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

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

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

## INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>4</sup> For the classical formulation of this view see Schmitt (1928: 21).



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

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

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

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

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

<sup>5</sup> For the provenance of this approach see Luhmann (1965: 16; 2000: 319–71).

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

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