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).

condensed into formal rights, could be definitively illuminated as normative objects became almost unshakably predominant.[5]

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-functionalist 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.[6] 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.[7] The constitution as a legal

[5] 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).

[6] See the argument in Fischer-Lescano and Teubner (2006).

[7] Habermas and Brunkhorst might exemplify the first tendency and Teubner might be a case of the second.

apparatus emerging in, and functionally defined by, its structural integrity with a historically formed state has only rarely been placed at the centre of recent sociological inquiry, and the normative functions of classical state constitutions still assume a withdrawn role in sociology. There is, as yet, no encompassing sociological attempt to explain why states have tended to evolve around constitutions as classical documents of public law, and what exact sociological functions constitutions fulfil for states. Moreover, recent theories addressing the political functions of state constitutions have often tended to step outside the realm of strictly sociological methodology in accounting for the normative status of constitutions and constitutional rights. Specifically, they have often fallen back on the more deductive foundations of Enlightenment theory in their attempts to illuminate the reliance of modern societies on constitutional norms, especially in respect of rights.[8] Exactly which internal forces cause societies to produce constitutions and constitutional rights has not been explained without reliance on residually foundationalist theories of universal human nature or universal human reason. In consequence, we might consider that the founding sociological attempt to enable modern societies internally to comprehend their articulated normative structure has not been concluded. Indeed, modern societies still lack a conclusively sociological vocabulary for explaining their convergence around normatively restricted political systems and for elucidating their relatively uniform dependence on stable patterns of public-legal legitimacy, secured in constitutions.

This book, therefore, contains an attempt to draw together the existing, yet inchoate, threads of the sociology of constitutions, which date back to the very genesis of sociological interpretation. In the first instance, this book attempts further to consolidate the development of constitutional sociology in contemporary debate, and it wishes to contribute, in some measure, to the growing recognition of constitutional sociology as a free-standing field of intellectual inquiry. Naturally, this book is not intended to reflect any presumption that all practitioners of constitutional-sociological analysis will sympathize with the methodological approach adopted here. The book carries the consciously

[8] I have considered this problem elsewhere (Thornhill 2010b). In brief, though, this tendency is illustrated by the fact that Brunkhorst's sociology of constitutions relies on the assertion that the demand for solidarity is a constitutive disposition of human life (2002: 203). See also the neo-foundational approach to rights in Alexander (2006: 34, 69).

deliberated title *A Sociology of Constitutions* (that is to say, it is not called *The Sociology of Constitutions*). This reflects the anticipation that a number of other constitutional sociologies might either oppose or sit alongside this book without undue mutual inconvenience. Yet aspirations of the book are that it might add substance to the current literature addressing constitutions from a sociological standpoint, and that it might establish co-ordinates for the future direction of inquiry in this field.

In seeking to cement sociological analysis of constitutions, however, this book is also shaped by an attempt to re-articulate and reinforce the original ambitions of constitutional sociology. Like its remote precursors, it aims critically to reappraise and reconfigure the classical questions of post-Enlightenment normative political inquiry – that is, questions regarding the normative foundations of political legitimacy and legal validity, the essential content of constitutional laws and constitutional norms, and the reasons for the reliance of political institutions on normatively abstracted legal principles. In so doing, it wishes to account for the structure of political legitimacy without reliance on hypostatic or purely deductive methods, and it seeks to illuminate the fabric of legitimacy using socially internalistic paradigms. At one level, in this respect, unlike much early sociology, this book is not hostile to normative constitutional claims. In fact, this book shares the conventional position unifying most normative political theories arising from the Enlightenment, and it accepts as valid the common normative assumption *that particular political institutions (usually states) acquire legitimacy by means of constitutional documents, and that constitutionally enshrined subjective rights, protecting those subject to political power from non-mandated coercion and recognizing these persons as bearers of immutable claims to dignity, equality and like redress, are probable preconditions for the legitimate exercise of power*. This book, therefore, proposes a definition of political legitimacy which would be acceptable to most normative theories: it defines legitimate political power as *power exercised in accordance with public laws, applied evenly and intelligibly to all members of society (including those factually using power), which are likely to give maximum scope to the pursuit of freedoms that are capable of being generally and equally appreciated by all social actors*.[9] Against the

[9] The classical expression of this view occurs in the writings of Kant. Kant argues that a state with a legitimate 'republican constitution' reflects the formal 'laws of freedom' which human beings deduce as conditions of their autonomy (1976 [1797]: 437). These views now resurface in more contemporary debate in the works of Rawls and Habermas.

methods resulting from the Enlightenment, nonetheless, this book is shaped by the conviction that the constitutional structure of society and the legitimacy of political institutions can be illuminated only weakly by normative analysis. In fact, normative analysis is incapable of illuminating that object which it has made its most common analytical focus: rights-based constitutional legitimacy. In consequence, this book suggests that an encompassing sociological perspective is required to address these questions and to account for the motives underlying the constitutional construction of legitimacy, and it tries to cast light on the legitimating status of constitutions by examining the societal functions and the objective societal exigencies that are reflected in constitutional norms. Primarily, therefore, the book seeks to examine and explain, sociologically, why modern societies have tended, independently and with some consistency across socio-cultural variations, to elaborate constitutions, why societies tend to concentrate their political functions in constitutional form and why constitutions, and the normative reserves that they contain, prove vital to the stability of modern societies and the legitimacy of their political institutions. In this respect, although the book does not engage in great detail with the preconditions of distinct lines of normative analysis, it contains the implicit argument that the original sociological attack on the normative analyses of the Enlightenment needs to be re-initiated. In order for a valid explanation of the normative structure of modern society to be obtained, the constitution needs once more to be constructed as an eminently sociological object – that is, as an object formed by inner-societal forces and explicable through analysis of broad patterns of social formation.

What is a constitution?

One question necessarily and invariably faced by sociological inquiry into constitutional law is the question, *what is a constitution?* Indeed, this question has recurrently punctuated and stimulated the development of inquiries into public law that employ a sociological perspective. This question obtained central importance in the first aftermath of the French Revolution and its processes of constitutional formation in 1789/91: at this time, the definition of a constitution of itself separated theorists pursuing a normative orientation from theorists adopting a more sociologically oriented interpretive disposition. The Enlightenment in general was marked by a specific conception of political modernity, and it widely pressed the claim that the possession of a

formally prescribed and written political constitution was a hallmark of progressively realized or *enlightened* modern societies. The first self-designated theorists of modern constitutionalism in fact tended flatly to deny that societies without single written constitutions possessed constitutions at all, and they saw societies without such documents as archaically structured and residually despotic.[10] This view, then, has been diversely reflected in conceptual-historical literature on constitutionalism, which often implicitly replicates the strict distinction between societies that possess and societies that do not possess constitutions – or at least between societies marked by modern and societies marked by pre-modern constitutionalism.[11] The earliest proto-sociological theories of the constitution, in contrast, were driven by a critical response to such clear distinctions, and they promoted a more nuanced, and historically variable, sense of a society's constitutionality and of the historical sources of its normative structure. Many theorists whose work anticipated the first emergence of legal sociology reacted to the constitutionalism of the French revolutionaries by denouncing as reductive the insistence that a constitution could only take the form of a single written document or a single catalogue of rights,[12] and they argued that all societies incorporate a particular, organically evolved legal order and a factual constitution.[13] More elaborated sociological analyses of the constitution subsequently also tended to dismiss the claim that there existed a clear distinction between societies with a written constitution and societies without a written constitution, and they viewed elements of constitutional order – rights, separated powers and so on – as evolving elements of society's inherent ethical structure.[14] More recent sociological interpreters have also usually accepted latitude in the definition of the constitution (Luhmann 1991: 179).

The concept of the constitution proposed in this book builds on earlier sociological taxonomies. It suggests that, long before the advent of

[10] Art. 16 of the French Declaration of Rights (1789) stated simply, 'A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.'

[11] See McIlwain (1947: 81). It is claimed in further important literature that the concept of the constitution was an innovation specific to early modernity (Stourzh 1977: 304).

[12] This was exemplified by Bentham (2002) and Burke (1910 [1790]).

[13] See Savigny's claim that the 'production of law' reflects a process of natural-historical self-interpretation, in which the 'natural whole' or the integral spirit of the people externalizes its defining characteristics and its specific rationality in the form of law (1840: 21–2).

[14] This is implicit in Durkheim (1950: 92–3).

formally written constitutions, it was customary for societies to comprehend themselves as possessing a distinctively normative constitutional shape, which could not be exclusively reduced to a single body of written precepts. The strictly constrained account of the constitution is thus seen here as a projection of normative analysis, which revolves around a highly controlled construction of its object and its legitimating functions. A sociological approach to the constitution, in contrast, needs to resist the suggestion that there occurred a radical caesura between early modern and modern constitutions.[15] Indeed, it is fundamental to sociological examination of constitutions that, in perceiving constitutions as documents reacting to conditions within a broad inner-societal environment, it opposes purely textual definitions of constitutionality, and it is prepared to recognize societies as possessing a multiple and diffuse constitutional apparatus. For normative analysis, it is clear that a constitution comprises a body of norms that (either adequately or inadequately) prescribes legal conditions for the public use of power and forms a focus for normative debate about the self-conception of society as a whole. For sociological inquiry, however, it is always possible that a society might have a normative constitution that evades simple forms of prescription and cannot easily serve as a singular focus for society's self-reflection or normative self-construction. Indeed, a sociological approach might observe constitutions as evolving through multi-levelled historical/functional processes, and it might identify the suggestion that categorical disjunctures occur in the formation of constitutions as revolving around a simplification of society's functional structure.

In consequence, this book proceeds from a definition of constitutions that denies that (for example) 1689, 1787–9 or 1789/1791 formed points of categorical discontinuity in the legal-normative history of modern society. For this reason, the book observes pre-modern and early modern societies as possessing documents or legal arrangements that can clearly be classified as constitutions and that pre-empt, and respond to the same functional and general societal pressures as, post-Enlightenment constitutions. On the account offered here, in sum, a constitution has the following features. It is a legal order impacting on the exercise of political power that (a) contains an effectively established presumption of public rule in accordance with principles or conventions, expressed as law, that

[15] It has recently been argued that in pre-1789 France the view was common that, although France lacked a written constitution, the 'basic structure of society' could be viewed as possessing an informal constitutional force (Vergne 2006: 127).