

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.



CAMBRIDGE STUDIES IN LAW AND SOCIETY

Cambridge Studies in Law and Society aims to publish the best scholarly work on legal discourse and practice in its social and institutional contexts, combining theoretical insights and empirical research.

The fields that it covers are: studies of law in action; the sociology of law; the anthropology of law; cultural studies of law, including the role of legal discourses in social formations; law and economics; law and politics; and studies of governance. The books consider all forms of legal discourse across societies, rather than being limited to lawyers' discourses alone.

The series editors come from a range of disciplines: academic law, socio-legal studies, sociology, and anthropology. All have been actively involved in teaching and writing about law in context.

Series editors

Chris Arup Monash University, Victoria

Martin Chanock La Trobe University, Melbourne
Pat O'Malley University of Sydney
Sally Engle Merry New York University

Susan Silbey Massachusetts Institute of Technology

Books in the series

Diseases of the Will

Mariana Valverde

The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-apartheid State

Richard A. Wilson

Modernism and the Grounds of Law

Peter Fitzpatrick

Unemployment and Government: Genealogies of the Social

William Walters

Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States

Yash Ghai

Constituting Democracy: Law, Globalism and South Africa's Political

Reconstruction

Heinz Klug

The Ritual of Rights in Japan: Law, Society, and Health Policy

Eric A. Feldman

The Invention of the Passport: Surveillance, Citizenship and the State

John Torpey

Governing Morals: A Social History of Moral Regulation

Alan Hunt



Cambridge University Press

978-1-107-61056-9 - A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective

Chris Thornhill

Frontmatter

More information

The Colonies of Law: Colonialism, Zionism and Law in Early Mandate

Palestine

Ronen Shamir

Law and Nature

David Delanev

Social Citizenship and Workfare in the United States and Western Europe:

The Paradox of Inclusion

Joel F. Handler

Law, Anthropology and the Constitution of the Social: Making Persons and Things

Edited by Alain Pottage and Martha Mundy

Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives

Edited by Marc Hertogh and Simon Halliday

Immigrants at the Margins: Law, Race, and Exclusion in Southern Europe Kitty Calavita

Lawyers and Regulation: The Politics of the Administrative Process

Patrick Schmidt

Law and Globalization from Below: Toward a Cosmopolitan Legality Edited by Boaventura de Sousa Santos and Cesar A. Rodriguez-Garavito

Public Accountability: Designs, Dilemmas and Experiences

Edited by Michael W. Dowdle

Law, Violence and Sovereignty among West Bank Palestinians

Tobias Kelly

Legal Reform and Administrative Detention Powers in China

Sarah Biddulph

The Practice of Human Rights: Tracking Law Between the Global and the Local

Edited by Mark Goodale and Sally Engle Merry

Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile Lisa Hilbink

Paths to International Justice: Social and Legal Perspectives

Edited by Marie-Bénédicte Dembour and Tobias Kelly

Law and Society in Vietnam: The Transition from Socialism in Comparative Perspective

Mark Sidel

Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise

David Schneiderman

The New World Trade Organization Knowledge Agreements: 2nd Edition Christopher Arup



> Justice and Reconciliation in Post-Apartheid South Africa Edited by François du Bois and Antje du Bois-Pedain

Militarization and Violence against Women in Conflict Zones in the

Middle East: A Palestinian Case Study

Nadera Shalhoub-Kevorkian

Child Pornography and Sexual Grooming: Legal and Societal Responses Suzanne Ost

Darfur and the Crime of Genocide

John Hagan and Wenona Rymond-Richmond

Planted Flags: Trees, Land, and Law in Israel/Palestine

Irus Braverman

Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa

Kamari Maxine Clarke

Conducting Law and Society Research: Reflections on Methods and Practices

Simon Halliday and Patrick Schmidt

Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone

Tim Kelsall

The Gacaca Courts and Post-genocide Justice and Reconciliation in Rwanda: Justice without Lawyers

Phil Clark

Water on Tap: Rights and Regulation in the Transnational Governance of Urban Water Services

Bronwen Morgan

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

Chris Thornhill



A SOCIOLOGY OF CONSTITUTIONS

Constitutions and State Legitimacy in Historical-Sociological Perspective

CHRIS THORNHILL





CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, 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/9781107610569

© Chris Thornhill 2011

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2011 Paperback edition 2013

Printed and bound in the United Kingdom by the MPG Books Group

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

3161.T486 201 342.02'9-dc22 2010051564

ISBN 978-0-521-11621-3 Hardback ISBN 978-1-107-61056-9 Paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication, and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.



For Grace and John





CONTENTS

	Acknowledgements	page xi
	A note on texts and translations	xiii
	Introduction	1
	Why a sociology of constitutions?	1
	What is a constitution?	8
	A note on method and central concepts	12
1	Medieval constitutions	20
	The social origins of modern constitutions	20
	Legal order in the church	25
	Church law, the state and feudal transformation	32
	Patterns of early statehood	40
	Constitutions and the formation of early states	55
	Early states and constitutions	61
2	Constitutions and early modernity	77
	Constitutions and the rule of law at the end of the Middle Ages	77
	The Reformation and the differentiation of state power	88
	Positive law and the idea of the constitution	96
	Constitutions and fundamental law	103
	Early modern constitutional conflicts	110
	The constitution and the function of constitutional right	ts 153



X CONTENTS

3	States, rights and the revolutionary form of power	158
	Constitutional crisis and failed state formation	168
	Constitutional revolutions and the form of political power	181
	After the rights revolutions I: the Bonapartist temptation	219
	After the rights revolutions II: monarchy limited and intensified	228
	Constitutions and social design: 1848	240
4	Constitutions from empire to fascism	252
	Constitutions after 1848	252
	Constitutions in the imperial era	257
	The First World War and the tragedy of the modern state	275
	The failure of expansive democracy	293
	Rights and the Constitution of Fascism	310
5	Constitutions and democratic transitions	327
	The first wave of transition: constitutional re-foundation after 1945	327
	The second wave of transition: constitutional re-foundation in the 1970s	341
	The third wave of transition: constitutional transformation in the 1990s	355
	Conclusion	372
	Bibliography Index	377 425



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, Emilios 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



xii

ACKNOWLEDGEMENTS

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.