Historical sociology and the antinomies of constitutional democracy

Notes on a revised approach

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Introduction

This article is intended to fulfil two functions, one of a methodological, one of a more substantive nature, both of which are focused on the use of historical-sociological approaches in the context of legal research.

First, this article outlines ways in which the use of historical-sociological methods can be productively extended in legal inquiry, especially in the analysis of constitutional law. To be sure, sociological approaches are not unknown in the field of constitutional law, and sociological methods have played an important role in different avenues of reflection in public-legal inquiry. On one hand, constitutional theorists have deployed sociological methods to explain the normatively binding force of constitutional law. For example, Carl Schmitt and Hermann Heller both invoked a sociological method as a central element in their critique of formal legal positivism, arguing that the foundation of constitutional law in social processes and motivations form an essential source of its normative authority (Schmitt 1923, 45; Heller 1971, 49). Léon Duguit pursued his inquiries into the organic associational realities underlying legal phenomena as an endeavor to write a sociology of public law, and he also implied that the authority of constitutional law is inseparable from its social substructure (Duguit 1889, 502). More recently, Gunther Teubner has argued that contemporary global society is shaped by multiple patterns of constitutional norm formation, and legal norms created by sectorally localized modes of social agency, outside classical processes of public-legal norm construction, have acquired particular normative power (Teubner 2012). On the other hand,

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historians and sociologists have used sociological methods to elucidate the broad contextual foundations of constitutional law. Some important sociologists have adopted a cultural-historical approach when analyzing the rise of constitutionalism, explaining how the growth of constitutionalism is linked to variable patterns of citizenship practice in different national societies (Münch 1984, 311). Of course, elements of a historical-sociological approach to constitutional norms can be found in some of the historical research that has emanated from Bielefeld. In particular, exponents of *Begriffsgeschichte* have observed both that the basic norms in which constitutional expectations are formulated need to be viewed as embedded historical constructs, and that society, of itself, evolves a distinctive constitutional order which cannot be interpreted in solely legal categories (see Koselleck 2006, 370). Moreover, historical-sociological accounts of constitutional norms are visible in lines of systems-theoretical analysis, also pioneered in Bielefeld, in which Niklas Luhmann, centrally, explained the reality of constitutional norms as articulations of evolutionary processes in society (Luhmann 1990). This article builds on foundations set, diversely, in Bielefeld, and it is designed further to substantiate the claim that historical-sociological method can clarify principal questions of constitutional law.

Alongside this, second, this article responds critically to other sociological accounts of constitutional law, and it pursues a historical argument to show that many such accounts have only insufficiently reflected the social origins of the norms incorporated in constitutional law. Despite their sociological emphasis, most such analyses of constitutionalism have, at least implicitly, replicated aspects of more classical legalistic theories, against which they intentionally reacted, and in so doing they have greatly simplified the legitimational functions of the constitution. Central to classical legal analyses of the constitution is the postulation of a simple binary relation between the legal system and the political system of society, and the constitution is envisaged as a textual document that stabilizes a legal order for the political system, creating a medial order of formal norms to simplify the general acceptance of political power by actors in

society.[1] In this process, the constitution acquires legitimational importance as a text that imprints a legal-normative form on political power, and it constructs a condition of interaction between law and politics in which each system frames the authority of the other. In many respects, this binary textual model of the constitution has been carried over into sociological inquiry. Sociological research has widely internalized the idea that the medial translation of political decisions into legal form is a feature of all complex societies, and that modern societies have shown distinctive reliance, historically, on the evolution of constitutions as legal-textual orders that enshrine the procedures for the transposition of power into law, such that, through this transposition, power becomes publicly constructed and symbolically endorsed. On such accounts, the constitution is constructed a priori as a text that performs quite specific functions, in predictable fashion, which are commonly inherent in the inter-systemic relation between politics and law. Indeed, such constitutional analysis is often implicitly underpinned by the presumption that modern society has a fixed propensity to organize this inner-systemic relation in constitutional form. The material sociological emergence of the constitution, however, is not deeply reflected.

We can find examples of such sociological replication of conventional legal constructions of the constitution in the works of Durkheim (1950, 92) and Parsons (1969, 339), to each of whom the constitution appeared as a document that internally stabilizes the legitimacy of the political system and promotes processes of normatively secure legal inclusion through society. For Habermas, similarly, the constitution needs to be observed as the cornerstone of a procedural order in which political power is placed on normatively acceptable legal foundations (Habermas 1992, 362–65). Paradigmatic for this approach, however, is the systemic analysis of constitutional law proposed by Luhmann. Luhmann interpreted the historical formation of constitutional law as the textual articulation of a *structural coupling* between the legal system and the political system of

1 See classical variants on this theory in Kant ([1795] 1976, 205); Kelsen (1920, 12).

modern society. On this account, law and politics exist as social systems, which are formally differentiated from each other and from other systems, and constitutional law has the function that it stabilizes communications in both law and politics as it allows each system to reduce its inner legitimational insecurity by transporting principles from the other system into its exchanges (Luhmann 1993, 478). In a constitutionally ordered polity, thus, the legal system is able to support its communications by describing its authority as supported and vindicated by politically formulated, collective decisions. At the same time, the political system is able to envision its authority as legitimated by the fact that political power has obtained legal sanction, and it is underscored by legal norms of a foundational nature. On this analysis, the textual form of the constitution brings the great systemic benefit to modern society that it dramatically elevates the degree of contingency at which the systems of law and politics can conduct their communications, and it insulates each system against direct exposure to its own contingency—it expresses a paradoxical moment of self-authorization for both systems (Luhmann 1990, 202; 1993, 478–79). On this analysis, further, the constitution allows the political system to translate its raw power into legal form, so that resistance to power becomes less probable, and power can be circulated evenly, and progressively extended in its reach, throughout society.[2] In Luhmann's description of this process, the constitutional structuring of exchanges between law and politics occurs very smoothly, as a necessary evolutionary occurrence. He explains this through use of the term *Zweitcodierung*, which suggests that the law necessarily imprints its medial form on political power in order to facilitate the societal transmission of power, and the constitution assumes a core role in fulfilling this goal (Luhmann 1997, 357). Importantly, in outlining his theory of *Zweitcodierung*, Luhmann indicated that the degree of interpenetration between law and politics is greater than that between other systems, and that political power is structurally reliant on legal form for its construction as »effective power« (Luhmann 1984, 40): that is, as

2 See early discussion of this in Luhmann (1969).

power that can be circulated in a form proportioned to, and easily generalized across, the complex interfaces of a modern society.[3]

Against this background, this article argues that existing sociological models of the constitution are undermined by the fact that they adopt an overgeneralized model of constitutional formation, which both simplifies the linkage between politics and law and interprets the functions of the constitution in excessively literal, textual fashion. To some degree, of course, the broader sociological claim that the constitution creates conditions for the generalized legitimation and distribution of political power can be, in part, historically verified. For example, we can observe that the historical growth of constitutional law in the eighteenth century had the manifest societal outcome that it promoted the elaboration of the political system as a relatively free-standing, formally differentiated set of institutions, authorized to apply power across society, in legal form, above the local organizations and corporations that had claimed legal and political authority in pre-modern societies.[4] The fact that constitutional law instilled a series of founding or higher-order norms within the political system meant that acts of legislation could be distinctively authorized through reference to such norms, so that the emergent constitutional state could explain its legislative functions as having primacy over rival legal sources, thus solidifying the position of the political system as a center of societal power. In addition, we can observe that, as it became founded in higher-order legal norms, the constitutionally formed political system was able to penetrate more deeply into society, and it was able to include persons at different societal locations in a legal order centered around formal public institutions. In principle, the fact

3 In contrast to the welfare state, Luhmann described the constitutional state as a »shining example of theory which has become practice« (Luhmann 2009, 109).

4 On processes of political centralization under early constitutions see for example Church (1981). To explain this, see Charles Tilly's simple claim: »Strong citizenship depends on direct rule« (1995, 228). This implies—quite accurately—that formal constitutional citizenship necessarily reinforces state power.

that legislative bodies in the political system were able to extract authority from higher-order norms cemented in the text of a constitution meant that acts of law generated by the political system could be distributed at a high degree of reproducibility across society, and law could presuppose authority and recognition in relatively secure and consistent fashion, in different spheres of societal exchange.[5] In consequence, the rise of constitutional law established the political system as the central legitimational focus of society, and this meant, in turn, that the uniformity of society's legal form increased dramatically, and different spheres of legal regulation, including private law, were supported by relatively stable principles (see Grimm 2017, 4).

Nonetheless, the aspect of constitutionalism that consolidates the legitimacy of the legal and political system is always limited. Analyses that accentuate this aspect tend to simplify the legitimational functions of constitutions, and, in particular, they obscure some of the deeply conflictual aspects of constitutional law. As an alternative, this article describes the inherent antinomies in constitutionalism. It then explains, using a modified systems-theoretical pattern of historical sociology, that historical methods bring greatest benefit in constitutional analysis because they allow us to look beyond express constitutional functions, and so to explain the reasons why, in its classical form, constitutionalism *did not* provide simple and reliable foundations for the legitimation of politics and law. Historical analysis of constitutions in fact has particular value in that it brings to light and explains the deep antinomies in constitutional patterns of government, and it illuminates the ways in which constitutionalism often reflect a deeply conflict-laden mode of legitimacy formation. At the core of this analysis is an attempt to question the binary model of the law/politics relation in sociological constitutionalism, implying that, to be fully sociological, such analysis needs to renounce this essentially legal, textual precondition.

5 For example, early constitutionalism usually gave rise, almost immediately, to the codification of civil and criminal law.

The antinomies of constitutional democracy

It is widely argued that constitutionalism in its modern form revolves around a series of core antinomies, and even that constitutionalism is *in essence* an under-evolved doctrine of political legitimacy, which ties the legitimacy of the governmental system to conflicting principles (see Sunstein 1993). If we interpret constitutionalism, broadly, as a legal/political doctrine that defines the basic legal order in which the political system can produce generalized legitimacy for single acts of legislation, so that laws are widely accepted and likely to meet with compliance through society, we can indeed observe that constitutional doctrine is based on a fine balance between sets of principles which, if conceived in radical terms, necessarily conflict with each other. The analysis below aims to pinpoint the core antinomies in constitutional thinking.

The general will or political participation

From the outset, modern constitutional thinking was defined by the fact that it invoked *the will of the people* as the original foundation for the legitimacy of the system of government in society. As a result, constitutional reflection adopted the idea that compliance with the popular will needs to be constructed as the main criterion for measuring whether governmental institutions can, or cannot, claim binding authority in society, and whether laws implemented by such institutions have obligatory force. Across different positions, it was implied that law acquires legitimacy through its general applicability, and the general validity of law results from the fact that it reflects the will of society in its entirety. Despite this basic consensus, however, this idea appeared in marked variations across the outlooks that emerged in different early constitutional theories. In some cases, the construction of the will to underpin the legislative system specifically presupposed that individual citizens actively participated in the production and endorsement of law, so that the general will only became manifest through acts of participation (see Robespierre 1789). In some cases, by contrast, it was presumed that this will cannot be declared through rational patterns of binding legal norm construction, which do not necessarily require the actual engagement of material citizens in the

political process.[6] At the conceptual core of modern constitutionalism, consequently, was a split between interpretations of the popular will which viewed this will as a normative construct, or, in Kantian terms, a regulative idea, and interpretations that viewed it as the *real will* of *real people*. Constitutional theorists diverged in deciding whether the will of the people informing government should be seen as the will of factually existing agents, or as the will of people as they ought to be—as a *pure will*. This antinomy is perennially expressed in the fact that some theorists of constitutionalism view the constitution itself as the primary source of governmental legitimacy, so that the legal order of the constitution forms the point of attribution for legal authority,[7] whereas other theorists of constitutionalism view the constitution as a mechanism for channeling the factual will of the people into acts of legislation.

Popular sovereignty or representative government

This original constitutional antinomy is further reflected in the fact that the earliest theories of modern constitutionalism were sharply divided between theories of legitimacy based on pure popular sovereignty, which aimed at institutionalizing a close connection between citizens and government, and theories that viewed constitutional rule as a model of delegated or representative government, in which governmental authority was bestowed on persons with a merely delegated mandate. This antinomy was reflected in the early period of constitution-making in revolutionary America. In this setting, the insistence on full popular sovereignty was initially declared as a principle of revolutionary legitimacy, embodied in the emphasis placed on legislative authority in early state constitutions,

6 See for one example Kant's theory of the constitutional contract in Kant ([1793] 1976, 153).

7 This view became axiomatic in the USA in the jurisprudence of John Marshall, who argued that the constitution was a superior, paramount law for the American nation, and that on this basis the Supreme Court was authorized to speak for the »original and supreme will« of the people (Hobson and Teute 1990, 182). For the classical theoretical version of this view see Kelsen (1922, 93–94).

but it became attenuated through the revolutionary period (Lutz 1980, 68). This antinomy was also expressed in revolutionary France, where different factions in the revolutionary order were separated by the extent to which they favored either popular or representative government.[8] At the core of this antinomy is a debate regarding the factual location of sovereignty and the factual source of legitimacy in the constitutional polity. Perspectives on different sides of this antinomy view the legitimacy of the state as emanating either from the sovereign people or from the electoral people. In the longer wake of the revolutionary *époque*, of course, constitutional democracy became almost synonymous with representative democracy (see Rosanvallon 1998). In its origins, however, constitutionalism was not clearly separable from a radical doctrine of popular sovereignty.

Liberalism and republicanism

In each of these respects, constitutional thinking moves on the line that separates liberalism from republicanism, and it expresses an, at times, rather awkward fusion of principles derived from both theoretical outlooks.[9] On one hand, constitutionalism expresses a classical republican approach to the construction and legitimation of the political system. This is reflected in the fact that it views a legitimate polity as one that, if it is actively formed by citizens, is able to embody conditions of relative freedom for all actors in society, and even to foster conditions of good life throughout society. In this respect, constitutionalism can be seen as a doctrine that is committed, in classical republican fashion, to an emphatically politico-centric worldview, in which human life reaches its highest fulfilment in political actions, which, through their concentration in the government, resonate through, and generate liberties for people in, society in its entirety. On the other hand, constitutionalism is deeply bound by

8 In contrast to Robespierre, Emmanuel-Joseph Sieyès argued that only those with »active rights« (rights of property) were allowed to play a role in political will formation (1789, 19, 21). Eventually, in 1795, he also proposed the establishment of a constitutional jury, to oversee conformity of statutes with the original norms of the constitution.

9 See for discussion Bellamy (2011).

liberal constructions of political liberty, reflecting a far more cautious and skeptical analysis of the political system and the position of political institutions in society more widely. This skepticism is seen in the most basic feature of constitutionalism—namely, that it is designed to balance powers within the state, to offset tendencies toward the concentration of power at one point in the political order, and to separate power from personal monopolies. To this degree, constitutionalism expresses an essential endeavor to control state power. Indeed, it is fundamental to constitutionalism that it is inclined to place prior limits even on the exercise of power by political majorities elected through democratic procedures, and it clearly negates simple democracy. This skepticism is also evident in the fact that much, although not all, constitutional theory attaches elevated importance to institutional provisions for the protection of constitutional rights, which are usually seen as normative institutions requiring particularly strong legal guarantees in the constitutional order. Constitutional rights typically assume the function that they elevate some normative principles to such a high degree that they determine the inner content of all acts of legislation. In this respect, constitutionalism clearly aims at the entrenchment of pre-commitments, external to the political system itself, by which the legitimacy of the political system is subject to prior construction and circumscription. Constitutional rights also assume the broader sociological function that they provide protection for liberties that are primarily exercised outside the state, and they designate such liberties—perhaps of an economic, confessional, communicative, or scientific nature—as immune to encroachment, except for proportionately justifiable reasons, by persons acting in public office. In this respect, constitutionalism subscribes to the core liberal precondition that many key freedoms in society are not of an eminently political nature, and such freedoms are commonly imperiled by political institutions. Constitutionalism thus reposes on a partly squared circle, in which highly political patterns of will formation and societal centration sit alongside deeply anti-political sentiments. This implicitly means that, in constitutional theory, the political system is perceived as a threat to the liberties that, at the same time, it is intended to guarantee.

Constituent power and constituted power

These ambiguities are distilled in the core model of institutional formation at the center of classical constitutionalism—namely, in the doctrine of constituent power. Following this distinction, it is fundamental to a legitimate constitution that it is willed into effect by the people acting in the capacity of an original *pouvoir constituant*, whose decisions establish the highest norms of the polity and form a point of normative regress, by which subsequent acts of law-making, within the constitutional polity, are originally legitimated. In recent years, the concept of the *pouvoir constituant* has become rather diluted, and it is sometimes used as a short-hand term to describe quite broad processes of democratic norm construction, giving rise to legal-legitimational ideals shared by members of the polity (see Habermas 2014; Patberg 2017). Strictly, however, the exercise of constituent power is an original act in which a national will is expressed that defines the highest normative provisions in the constitution of state, of which all other political functions and subsequent procedures are the necessary corollaries.[10] On this foundation, it is central to a legitimate constitution that most day-to-day functions of the state are exercised by bodies whose powers are defined as *pouvoirs constitués*: that is, which perform responsibilities allocated to them by the constitution, and whose proper legitimation is not reliant on constant or immediate authorization by the will of the people. As a result, in the constitutional polity, most political functions are carried out by agents and institutions whose connection to the original will of the people is highly mediated, and most institutions are legitimated simply by the fact that they do not act outside the scope of the powers originally accorded to them under the constitution. In this respect, constitutionalism balances an intensely politicized construction of legitimacy—reflecting the original force of the constituent power—with a more attenuated or mediated concept of legitimacy, enabling constituted institutions to assume a high degree of autonomy in relation

10 In this theory, Sieyès defined the nation (people) as »the origin of everything […] the law itself« ([1789] 1839, 79). Dieter Grimm (2012, 223) observes the »distinction between *pouvoir constituant* and *pouvoir constitué*« as »constitutive« of modern constitutionalism.

to the original will of the people. On this basis, governmental legitimacy can inevitably be claimed by institutions that assume a simple representative mandate, and the origin of delegated powers is remote from actors exercising such powers.

The two faces of rights

Owing to the above conceptual conflicts, the basic subject of constitutional democracy appears in two quite distinct ways within the political system, and this subject brings legitimacy to the political system on two quite separate foundations. Vitally, these two forms of legitimational subjectivity are connected with the content of different sets of constitutional rights, so that different models of subject construction are reflected in variations between provisions for different rights. On one hand, the basic subject of the constitutional polity is envisioned as a subject that holds rights of a formal-legal nature, which protect this subject, in certain activities, from the depredatory acts of other parties, in particular of parties using the authority of the state itself. In this regard, the essential subject of the constitutional polity is configured as a relatively static subject with certain core predetermined entitlements, and this subject confers legitimacy upon the state to the extent that these entitlements are not violated. In some ways, this subject is positioned *at the end of the law*—a government acquires legitimacy to the extent that its laws are proportioned to the normative form of this subject, and to the freedoms claimed on a priori grounds by this subject. It is essential to the quality of this political subject that its existence is pre- or extra-political, and the rights that it claims make it possible to evaluate the legitimacy of the state because of their essentially static and immutable nature.[11] On the other hand, the basic subject of the constitutional state is construed as a holder of rights of an eminently political nature, such that it constructs the legitimacy of the state by exercising participatory rights, which allow it to shape the form of the state and actively to influence the content of individual laws. In this respect, the subject of constitutional democracy generates legitimacy insofar as it

11 This idea of course originates in the work of Locke.

acts through and within the state, and it shapes the content of government from inside. The rights claimed by this subject are naturally variable, dependent on circumstance, and they add content to laws in contingent fashion. Most importantly, this subject is positioned *at the beginning of the law*, and the government acquires legitimacy by translating the changing requirements of this subject into legal form. Overall, the constitutional state is configured by two sets of rights, which are formative of the law in diametrically opposed ways, and which raise conflicting legitimational expectations. Clearly, the rights exercised by the participatory political subject can easily give rise to claims that militate against the effective exercise of rights claimed by the formal, static subject.

Individual and collective subjects

Of fundamental significance in this regard is the fact that these divergent sets of rights stimulate patterns of subject formation which vary in respect of the degree to which they claim rights of a singular or of a collective nature. To some degree, the subject of the constitutional polity is always a collective subject, or at least it reflects the compression of all societal actors into an aggregated subjective form, able to simplify the complex production of legitimacy into the form of one actor. However, it is a feature of the constitutional subject in its extra-political construction that it tends to acquire a distinctively individualized form, and it confers legitimacy on political institutions insofar as these recognize and protect rights of singular subjects. In principle, this subject need not present itself to the political system as a real collective actor, and the legitimacy extracted from this subject merely presupposes that laws passed by the state recognize certain rights that inhere in all individual persons, simply in their capacity as singular repositories of human subjectivity. In practical terms, rights attached to this subject are usually rights exercised by persons in distinction from other persons, and they sanction practices and liberties that do not presuppose human association. As mentioned, rights of free inquiry, movement, contractual exchange, labor, and investment might be seen as core examples of such rights. By contrast, it is particular to the constitutional subject in its more active, political/participatory construction that it tends to enter concrete organizations and associations in order to

establish rights; indeed, the enactment of participatory rights often presupposes that many particular subjects combine their actions to shape the content of laws. In attaching its legitimacy to this construction of the subject, the constitutional polity necessarily incorporates other organizational forms, and it derives legitimacy from secondary political associations, such as representative bodies, political parties, trade unions, and social movements. Insofar as social agents act as subjects at the beginning of the law, they tend to appear in associational form, and the rights claimed in this regard are almost invariably rights oriented toward the production of law to be applied to collective material subjects.

Overall, the legitimational structure of the modern constitutional polity is ordered around a set of norms that sit uncomfortably beside each other. In particular, constitutionalism is a doctrine marked by a clear unease in the relation between *legal* processes of norm production and *political* processes of societal engagement.[12]

This unease is clearly manifest at the level of first principle. In each of the above sets of antinomies, norms arising from one construction of legitimacy can easily enter into conflict with one or more norms arising from an alternative construction of legitimacy. For instance, expressions of the popular will can be blocked by representative institutions; demands for constituent power can be offset by actors exercising constituted power; laws constructed through participation can conflict with laws proportioned to formally acceded rights; rights of collective subjects can run counter to rights attached to singular legal personalities. When such legitimational conflicts arise, they need to be resolved through an act of adjudication that privileges one or other element of constitutionalism.

This unease is also manifest in different historical patterns of constitutional practice. In some historical settings, the political/participatory or mobilizational aspect of constitutionalism has deeply unsettled the formal normative aspect of constitutionalism. In many settings, for example, the establishment of a system of constitutional rule has released processes of

12 See diverse analysis in Schmitt (1928); Bellamy (2007); Loughlin (2010).

mass-political mobilization which the formal constitutional order has not been able to withstand. Where this has occurred, typically, the political system has experienced institutional collapse, defined either by mass sabotage of the governance system or (more commonly) by eventual reactionary clampdown by potent elites against mobilized social groups.[13] In other historical settings, alternatively, constitutional government has created a polity in which sitting elites have been able to monopolize the application of constitutional rules to avert, or at least strictly control, the incorporation of mass-political subjects in governmental functions. In such cases, the legal aspect of constitutionalism has impeded full expression of the participatory aspect of constitutionalism. Until quite recently, of course, constitutional law was commonly used as an effective instrument, selectively to withhold full rights of political engagement from certain societal constituencies, and thus politically to immobilize particular groups—especially where such groups contested the stability of singular rights otherwise guaranteed under the constitutional system. Until relatively recently, most constitutional systems merely institutionalized a pattern of selective or partial democratization in which participatory subject formation was curtailed, and some societal sectors were routinely excluded from participation on grounds of ethnicity, class affiliation, or gender.[14]

Both at a conceptual-normative level and at a practical-organizational level, therefore, the basic structure of constitutional law has not produced

13 The key examples of this are European democracies created through processes of mass mobilization after 1918, most of which had, owing to elite retrenchment, collapsed by the early 1930s. Other examples of this are democratic experiments in Latin America from 1945 onward, most of which ended in elite retrenchment.

14 Most constitutional polities excluded, or gave only reduced recognition to, some socio-economic groups until 1945. More importantly, it was only in the 1960s that exclusion of social groups from the exercise of electoral rights on ethnic grounds was generally seen as illegitimate. Such exclusion was terminated in Australia, Canada, and the USA in the first half of the 1960s. Of course, it persisted much longer, formally, in South Africa and Rhodesia, and, informally, in some African and Latin American societies.

a reliable model for the legitimation of political systems in societies marked by high levels of legal/political inclusion. Constitutionalism tends to create political systems in which either one side of the normative system prevails or in which the possibility of factual legitimational crisis remains high and deeply unsettling. This is underlined, most emphatically, by the fact that few societies developed enduring constitutional democracies until after 1945. After 1945, democracy was widely promoted and sustained by the fact that, either directly or indirectly, global human rights norms penetrated into national constitutional systems, which altered the classical relation between the different principles of constitutional rule. In most cases, the domestic assimilation of global human rights law after 1945 had the effect that it projected a set of norms that were hyper-entrenched against the momentary will of national democratic actors, and it constructed legitimacy for laws on the basis of externally projected normative premises. In other words, national constitutionalism only became an enduring reality through the fact that national constitutions were joined to a global normative order. This process brought stability to domestic constitutional systems because it softened the contradiction between the antinomies inherent in national constitutional law. Most importantly, the inner-societal hyper-entrenchment of global human rights limited the extent to which the participation of factual political subjects defined the basic principles of governmental legitimacy, and, at the same time, it limited the extent to which elite actors could close off constitutional participation to minority subjects.[15] National constitutionalism thus only evaded its own inner antinomies as it was placed on premises originating outside national constitutional law.[16]

15 Indicatively, consider the impact of global rights on the end of the de facto apartheid regime in the USA in 1964–65. See discussion in Skrentny (1998).

16 It is not accurate to claim, as does Habermas, that all constitutions before the formation of the EU were based in national patterns of self-legislation styled on the constitution-making events in the USA and France in the 1780s (Habermas 2014). This paradigm had been thoroughly revised after 1945, by which time it was not the *primary activation*, but the *material*

On balance, the classical assumption that the constitution forms a simple system of normative conversion between law and politics is hard to sustain. The capacity of constitutions for generating universally accepted norms for national political systems is far weaker than commonly imagined, in both legal and sociological inquiry. Rather than converting political power to secure and generalized legal-normative form, constitutions have typically established deeply conflictual articulations between the systems of law and politics.

Historical foundations of constitutional crisis: Law and war

On this basis, the remainder of this article is designed to show that, if applied to constitutional law, historical-sociological analysis can help us to understand, specifically, why constitutional law has remained centered around deep antinomies. In particular, it explains that an accurate understanding of constitutional law can be best obtained if we add greater nuance to the concept of the political system implied in sociological analysis of constitutionalism. As mentioned, for all their differences, existing attempts to provide a historical-sociological construction of constitutional norms proceed from a generalized understanding of the political system, as a set of institutions that are internally proportioned to the law. Contra such outlooks, we can understand constitutional law more accurately if we observe its emergence as part of a very distinctive set of historical occurrences within the political system. This also allows us to reach a more fully founded comprehension of modern constitutionalism and the antinomies that it contains, and it makes it possible to interpret the deep crisis potentials embedded in modern constitutional law.

The antinomies of constitutional law are most effectively explained if we look in greater detail at the exact ways in which constitutional law mediates between law and politics, and if we disentangle the complex normative claims that are condensed in this coupling. To achieve this, we

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secondarization, of the national constituent power that formed the core legitimational source for the national polity.

need to examine the constitution as part of a multi-structural process of interaction between law and politics, in which law and politics are linked to each other in often contingent fashion, in a manner intensely affected by societal occurrences that accompanied the broader construction of the modern legal and political systems. To comprehend the form of the constitution, it is essential to strip away the purism of textual analysis and to examine the constitution as a series of interlinked and variably constructed semantic threads, which cannot be restricted to a simple or mono-dimensional medial law/power coupling.

The complex nature of the coupling formed between law and politics by constitutional law is already evident in the fact that the constitution contains a number of secondary couplings between these systems, and the functions of the constitution in generating legitimacy for law and politics are not articulated solely in formal constitutional norms. Importantly, the constitution is itself underpinned by a secondary legitimational figure, which, beneath the level of pure legal normativity, mediates in vital fashion between politics and law. That is to say, within the complex of norms which form the constitution, the essential responsibility for constructing legitimacy falls, not to the constitution as a text, but rather to the figure of the citizen (*citoyen/Staatsbürger*), which underpins the legitimacy of the constitutional text, and in fact condenses the coupling of law and politics at the deepest level. Notably, the dual legitimational function that Luhmann ascribes to the constitution, generating legal legitimacy for politics and political legitimacy for law, is not performed by the constitution as a simple textual configuration of norms. Instead, this function is performed by the citizen, who always acts though the constitution as the agent that connects the systems of politics and law. At one level, the citizen appears in constitutional law as a figure that transmits legitimacy *in political form* into the legal system. The citizen does this insofar as he or she engages, as an active citizen, in the production of laws by means of organized political participation. Such participation means that laws radiated across society are legitimated by the principle that they have an eminently volitional political origin. At a different level, the citizen appears in constitutional law as a figure that generates

legitimacy *in legal form* for the political system. The citizen does this insofar as it presents itself as a holder of invariable rights upon the recognition of which the legitimacy of law depends; the fact that the citizen is projected as a formal rights holder means that political power can only be translated into law if it is adjusted to a precise and pre-stabilized legal form, which means that the authority of political power is guaranteed by its internalization of certain legal norms. The text of the constitution, therefore, is merely the formal-normative order in which the citizen produces political legitimacy, and the legitimational functions of the constitution are in essence secondary formalizations of the primary legitimational functions of the citizen.

If we cut through the legitimational semantic of the constitution in this way, however, we can see that it was never the case that the constitution, in which the citizen is embedded, generated mutually transferable reserves of legitimacy for both politics and law. Indeed, if we look at the historical formation of citizenship, in its coincidence with the emergence of modern constitutional law, we can observe that the coupling of law and politics expressed in the constitution was never merely a simple bilateral coupling. On the contrary, modern constitutionalism, in which the citizen was embedded, always expressed a *trilateral coupling*, mediating, not only between law and politics, but between three separate sub-systems of modern society. It is through analysis of the *third element* in this coupling that we can approach the reasons why constitutionalism, alongside its legitimational functions, often acts as a highly unsettling premise for legal and political communications. Indeed, it is through investigation of this third element that we can begin to understand the basic antinomies inscribed in constitutional law that were presented above. The historical-sociological construction of constitutional law acquires particular explanatory importance as it focuses on this third element.

In many respects, the history of modern citizenship was always a history of warfare. In classical societies, military engagement and citizenship were deeply connected. In medieval societies, rights of political participation were strongly determined by military service, and, to the extent that citizenship existed as a recognizable legal category, it often presupposed

voluntary military service.[17] Through the formation of modern constitutional systems, however, the connection between citizenship and military conflict was greatly intensified. In fact, in the later eighteenth century, the nexus between citizenship and military affiliation moved to the epicenter of the legitimational structure of society, and it had a profound impact on the constitutional articulation of political legitimacy.[18] In many cases, classical modern societies formulated their basic legitimacy in constitutional norms that were created through revolutions, which meant that rights of citizenship were constructed through the inner-societal militarization of citizens.[19] Later, this connection was intensified as many societies acquired their modern constitutional form through anti-colonial uprisings. Even in societies in which constitutional citizenship has not developed through actual revolution, the formation of democratic constitutions has usually resulted either from civil war,[20] or from war with external enemies, in which overarching patterns of affiliation were cemented and intensified through collective adversity.[21] Across most cases of modern constitutional formation, therefore, the citizen became the legitimational center of the political system in a form that was saturated with military conflict, and in which the obligations of citizenship had been at least partly formed by war. This means, in short, that the constitutions that formed

17 This is clear in the works of Machiavelli, who, in *Il Principe* (1532), saw the presence of good laws as connected with the presence of a good army.

18 See general discussion in Bradburn (2009).

19 In both the American Revolution and the French Revolution, citizenship and military engagement were closely associated (see Thornhill 2018a, 12–13).

20 The key example of this is the construction of black citizenship in the USA. This occurred through the long and intermittent civil war that lasted from the 1860s to the 1960s.

21 The most dramatic processes of citizenship formation in recent history occurred after 1918, reflected in the general enfranchisement of most men in Europe, and after 1945, reflected in the emergence of democratic government as a global normative expectation.

the legitimational couplings between law and politics in modern societies actually formed tripartite couplings—between law, politics, and war. It is, in consequence, not possible to speak of constitutional law as a binary link between the legal system and the political system; constitutional law is a coupling between the legal system, the political system, and the military system. In fact, constitutional law usually originates in situations in which the political system and the military system are closely fused.

The basic antinomies in constitutional law are explicable on these grounds. Indeed, this perspective enables us to appreciate the deeply conflictual aspects of constitutionalism, and to understand why it is often more likely to destabilize the political system than to generate more robust principles of legitimacy. In essence, the formation of constitutional law, in which the legitimational fulcrum of society is condensed, has been constructed through the expectation that demands and experiences of an essentially military nature can be distilled in a formal normative order. The form of the citizen that underlies the constitutional interaction between law and politics is that of the citizen claiming constitutional rights that reflect highly incubated, conflictual, and collectivized conditions of political affiliation.[22] This lies at the core of the tension between the legal and political elements of constitutionalism addressed above. In this tension, the emphatically political dimension of constitutionalism is clearly transparent to experiences of intense mobilization, to expectations of full identity with the system of social command, and to notions of collective identity, which are usually engendered among citizens by war. This fusion of war and law in the constitutional system of the modern polity has imprinted on contemporary society an acutely militarized form, in which still today, patterns of citizenship and rights assertion are not easily separable from military organization.[23] In particular, this has stimulated patterns of political subject formation that are not easily represented in stable constitutional form, and whose demands are not easily secured in

22 This was of course intuited in the wake of the French Revolution (see Constant [1819] 1997).

23 See for discussion of this Thornhill (2018b; forthcoming).

simple constitutional rights. The basic legitimational standard of democratic constitutionalism, therefore, is the product of a highly contingent construction of the political system. Inevitably, the form of the constitution constructed under such circumstances does not create reliable or stable reserves of legitimacy to support society's legal and political exchanges.

Conclusion: Resolving constitutional antinomies

Overall, a historical-sociological approach to constitutional law teaches us, primarily, that constitutions have developed through very contingent processes, they do not peacefully or formally mediate between politics and law, and they place society's legitimational resources on precarious foundations. Before we seek to overcome the antinomies in constitutional law, it is vital to observe how such antinomies have been historically constructed. Importantly, one highly influential account of citizenship has argued that a full understanding of political legitimacy requires a theoretical analysis of ways in which the citizen might be released from its historical attachment to national society (Habermas 1991, 22). However, a more fundamental, more pressing task might be to explain the legal forms through which the citizen can be released from its attachment to military society. This has of course partly been achieved through the recent hyper-entrenchment of global human rights law. Further historical-sociological research is required now to explain global law from the perspective of societal demilitarization, examining the entrenchment of such norms as a necessary dislocation of citizenship from its own military origins.

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