

participation in disputes over industrial conditions both for industrialists and delegations of labour. In so doing, it acknowledged the need for balanced rights between both parties in industrial conflict, and it designated the production process in its entirety as subordinate to the aim of national rejuvenation and expansion. In all these respects, the Charter marked a concluding moment in the elaboration of the corporate constitutional principles that had coloured most post-1918 European politics, and it gave intensified expression to the corporatist presumption that economic agents required inclusion in the state through structured material rights and that a legitimate constitution was one that oversaw the allocation and valorization of varied material rights claims. For its apologists, the Charter and the National Council provided foundations for a 'harmoniously unitary state', based in a 'stable balance between contrasting interests' of social classes (Zangara 1931: 147–50). Mussolini himself described fascist corporatism as a 'new synthesis' of liberal and socialist economic elements (1934: 18).

Beneath this constitutional rhetoric, however, it is notable that many elements of corporate order put in place by Mussolini directly contradicted the founding ideals of corporatist doctrine, and fascist corporatism diverged in its core principles from the original corporate principle that states assume legitimacy through equal organic inclusion of all social groups. First, notably, the National Council of Corporations did not possess factually integrative legislative power, and it remained subordinate to the Ministry of Corporations: it merely served as an organ for 'co-ordination of the forces of labour and production' (Palopoli 1930–1: II, 431). This was made still clearer in the Charter of Labour itself. Notably, the Charter strategically abandoned the principle of factual parity in rights holding between corporate parties, and it was clearly tilted to serve the interests of the entrepreneurial side in the industrial bargaining process. Most importantly, the Charter insisted that powers of veto in industrial settlements should fall to industrialists, and it ensured that directive force in the production process remained with the business class. In this respect, the Charter ultimately acted as a document that lent the coercive power of the state to support the economic decisions of powerful economic elites, and it effectively allowed entrepreneurial rulings to assume force of statute. Indeed, the Charter was only instituted after independent trade unions had been prohibited, and because of this the entire corporate experiment precluded dissent and envisaged unilaterally prescribed solutions for industrial disputes. Even in its basic attempt to stabilize relations between unions and employers, moreover, the

Charter only formed a directive framework document, and it had no *de iure* force.<sup>51</sup>

In the final analysis, in consequence, the early part of the Mussolini regime saw the introduction of a highly selective pattern of corporatism and collective rights attribution. This system renounced the integrationist aspects of original corporate ideals, and it began to use adapted corporate techniques as strategies of unilateral economic control, selective steering and repressively instrumental industrial management. In this system, in particular, collective claims over rights in the production process became susceptible to partial arbitration by the state, in which representatives of labour were heavily disadvantaged. Under fascism, therefore, material corporate rights, far from serving volitionally to engender an economically balanced state, acted as institutions that authorized the state to colonize independent spheres of social liberty and to solidify existing conditions of production through prerogative intervention, and that brought selective benefits to materially privileged social groups. Leading legal theorists of Mussolini's regime, notably, expressly expanded on these principles to argue that the corporate state was centred in an increase in *judicial power*, they demanded an inclusion of all economic activities under the judicial functions of the state, and they insisted on the application of corporate rights as instruments to draw all spheres of socio-economic exchange under direct state jurisdiction (Panunzio 1933: 31–2). Corporate rights, in other words, were progressively defined as the antithesis of personal/subjective rights and, as such, they were enforced, not to channel the material will of the people into the state, but both to eliminate the freedoms guaranteed under personal/subjective rights and selectively to intensify *de facto* rights and privileges of certain socio-economic groups.

In the case of Italy, in sum, the corporate transformation of constitutional ideals during and in the aftermath of the First World War created a situation in which the constitution of the state renounced its classical functions, and it began to promote intensely authoritarian and socially annexationist patterns of governance. In particular, the corporate constitutional system in Italy after 1922 relinquished the conventional exclusionary functions of constitutional law and constitutional rights, and it acted, not to trace the boundaries of political abstraction and to reduce the state's political intensity, but instead to augment the volume of exchanges directed to the state, to harden the state's interpenetration

<sup>51</sup> For analysis see Adler (1995: 368); Somma (2005: 90).

with private groups in society and to provide instrumental conventions through which the state could sustain strategic control of private interactions. In consequence, this constitution extended material rights to such a degree that the state lost both the ability to extract an autonomous account of its power under public law and the ability to trace its distinction against other parts of society in private law: on both counts, it experienced a rapid loss of autonomy and entered a cycle of deep re-particularization. The classical public-legal and private-legal functions of rights in upholding an abstracted and differentiated political system, in short, were eroded through corporate experiments, and the uncontrolled inclusivity of the state sanctioned by corporate rights facilitated a dissolution of the abstracted quality of the state and the differentiated structure of society more widely (Stolzi 2007: 76, 190). This meant that rights, in renouncing their exclusionary status, acted at once to dissolve the specific legal distinction of the state and to open the state to private agents and to provide extensive institutions for egregious private use of the means of public coercion. Both constitutional tendencies in Italian fascism – that is, the dislocation of the executive from the legislature and the use of collective material rights – thus culminated in the fact that they allowed dominant economic agents privileged access to the resources of the state (Sarti 1971: 2), and they permitted the reallocation of coercive reserves of state authority to powerful local, sectoral and neo-patrimonial groups throughout different social spheres.

### *Portugal and Spain*

Analogies to these processes in Italy were also apparent in the destruction of the parliamentary system in Portugal and the establishment of an authoritarian-corporate constitution under Salazar. As in Italy, the formation of the Novo Estado was flanked by a partial move away from the socio-organizational forms typical of liberal capitalism, and, once in power, Salazar's government began to disband organs of class association and, in particular, to transform trade unions into guilds and state-regulated syndicates. Strongly influenced by clerico-corporate ideology, Salazar instituted a model of political-economic interventionism, formalized in the constitution of 1933, which accorded substantial legislative powers to the professional bodies and organized syndicates assembled in the Corporative Chamber. In this system the state assumed (notional) responsibility for ensuring conditions of economic stability by guaranteeing material rights for all members of society: that is, by

limiting the autonomy of economic actors and by subjecting the economy to constraints via price setting, output management and investment selection. Expressly, the 1933 Constitution imputed to the state the obligation to maintain 'equilibrium' between labour and capital and to prevent exaggerated profits for capital (Art. 31), to promote a 'national corporate economy', to limit unrestricted economic competition (Art. 34) and to police property, capital and labour so that their 'social function' was preserved (Art. 35). Salazar's state was based, in appearance at least, in a highly absorptive constitution, which opposed the political, economic and legitimating conventions of formal liberal statehood by defining citizens as materially formative of state power and as authorized claimants to material rights from the state. Like other constitutional documents of the post-liberal epoch, in particular, this constitution also defined rights of persons as privileges obtained through group membership or affiliation, and it implied that all such rights had to be actively made good through the corporate body of the state (Wiarda 1977: 38, 85–6). On this basis, the constitution imagined the state in its entirety as a highly expansionary body composed through multi-levelled corporate membership, and it viewed corporate associations as inclusionary elements of the state, through which members of society were formally integrated into the margins of public authority. The 1933 Constitution included most classical rights, such as rights to life and personal safety, rights of privacy, rights of fair trial and rights of association (Art. 8). However, its catalogue of formal rights was very weak. These rights were in some cases subject to restriction and special laws, and the primary motive of the constitution was, evidently, not to preserve singular rights but to secure legitimacy by solidifying the state's group constituencies through material allocation.

As in Italy, however, it has been widely argued that, although Salazar's constitution was introduced under the inclusionary banner of national/economic harmony, a fully corporate system was never comprehensively institutionalized in Portugal, and corporate rights and principles were only applied in highly strategic and selective fashion. Although, for example, Salazar created national unions to regulate and control industrial activity, the corporate oversight of employers' associations was much more fitful (Costa Pinto 1995: 62). Moreover, while endorsing consensual bilateral negotiation and state arbitration in disputes relating to production, the constitution effectively prohibited strikes (Art. 39), and it clearly privileged the entrepreneurial side in labour disputes. As under Mussolini, state co-ordination of the economy was proportioned

to potent social interests, corporate status was strategically allocated, and group rights (supposedly formative/integrative dimensions of the state) were used to govern proximity to state power: real power was preserved in a central executive, to which certain elites had obtained privileged rights of access.<sup>52</sup> Indeed, Salazar's constitution was perhaps the closest of all the corporate constitutions to a neo-patrimonial social order, in which the state, although purporting to act as an inclusionary political actor, factually purchased support for its power through society via the pluralistic allocation of structural status and selective privilege to influential social groups – and often to particular prominent families. As in Italy, therefore, constitutional rights were re-converted into private privileges, and they effected a corporate or internally pluralistic parceling of the reserves of political power contained in the state.

A related set of patterns was observable, during and after the destruction of the Second Republic between 1936 and 1939, in the quasi-constitutional documents promulgated by the Franco regime in fascist Spain. More than a decade before the advent of the fascist regime under Franco, Spain had already experienced various experiments in semi-corporatist constitutionalism. In Spain, which had been non-combatant in the First World War, the 1876 Constitution had initially remained in force after 1918. As in Italy, however, the post-war years had seen a wide push for a reinforcement of the power of the Cortes and an attempt to limit *caciquismo*. After 1918, moreover, Spain also experienced a very high level of union militancy, and at the same time the potency of left-syndicalist models of government increased dramatically.<sup>53</sup> In reaction to this, in 1923 the dictatorship of Primo de Rivera was established, which, in parallel to the rise of Mussolini in Italy, founded a governmental system designed to block the rise in parliamentary power and to suppress (albeit in placatory fashion) the radical labour movement. Under the de Rivera dictatorship a body of social legislation was passed, which contained strong clerico-corporate elements, albeit with lower levels of coercive integration and greater support of the organized labour force than in fully fascist states. In the last years of the regime, an attempt (never fulfilled) was made to place the regime on more regular constitutional foundations, with an electoral system combining representative and corporate elements. Subsequently, after the collapse of the de Rivera dictatorship in 1930 the constitution of the Second Republic (1931)

<sup>52</sup> To support this see Wiarda (1977: 140); Machado (1991: 61); Meneses (2002: 162).

<sup>53</sup> For discussion see Meaker (1974: 146–88).

established a democratic polity, supported by left-oriented principles of Weimar-style economic legislation. In particular, the democratic constitution of 1931 mirrored the Weimar Constitution in that, although recognizing rights to private property, it authorized the state to expropriate property for the national economy (Art. 44), and it anticipated social legislation to sanction economic redistribution and to enable the participation of workers in collective bargaining and industrial decision making (Art. 46).<sup>54</sup> A further law of 1932 also made land held by nobility subject to expropriation. Indeed, like the Weimar Constitution the 1931 constitution of Spain made extensive provision for prerogative powers. It established far-reaching presidential authority under Article 81, and it was flanked first by a Law for the Defence of the Republic (1931) and then by a Law of Public Order (1933), which concentrated exceptional powers in the executive. Different degrees of emergency legislation became a general feature of daily governance under the Second Republic, and for almost the entire duration of the republic some constitutional rights (although in principle protected by a supreme court) were subject to different degrees of exemption.

Unlike other fully dictatorial regimes of the 1930s, the political system created by Franco contained a distinct and comprehensive constitutional order, sweeping away the radical-liberal documents of the Second Republic. The first decrees and organic laws of the Franco administration, the laws of 1936, 1938 and 1939, transferred full power to Franco as head of state, they suspended the democratic Cortes, and they created a detached ministerial executive, in which all ministries were subordinate to Franco. By 1942, however, laws came into force that replaced this exceptionalist order with a more fully evolved constitution. These included effective constitutional laws, the Constitutive Law of the Cortes, which re-established some functions of the legislature. Under this arrangement, the objectives of the Cortes were restricted to 'elaborating and approving' acts of law (Art. 1) and membership of the Cortes was reserved for appointees, normally already bearing public office, and for representatives of diverse syndicates and other organic associations. The president of the Cortes was directly accountable to Franco. As in Italy, therefore, the primary impetus behind early fascist legislation in Spain was that it removed the executive from the broad-based legislature,

<sup>54</sup> On the influence of German constitutionalism on the constitution of the Spanish Second Republic, see Payne (1993: 60). On disputes in the parliamentary commission regarding the status of property, see de Meer (1978: 109).

it eliminated dissent within the legislative apparatus and it freed both legislature and executive from the constraints imposed upon them by catalogues of rights. In 1945, subsequently, a more elaborate order of rights and duties was introduced, bearing a certain resemblance to conventional catalogues of rights. These laws, the *Fuero de los Españoles*, made partial provision for a legal regularization of the regime. Notably, they forbade retroactive incrimination (Art. 19) and separated judicial procedures from the military authorities that had dispensed gun-barrel justice in the aftermath of the civil war. Nonetheless, this legislation only sanctioned very partial and circumscribed civil rights, and it insisted both that the exercise of rights was subject to conformity with fundamental principles of state (Arts. 12, 16) and that they could be suspended by decree (Art. 35). It also restricted political rights (Art. 10) to rights of participation in public functions through the corporate institutions endorsed by Franco: that is, corporations representing 'the family, the municipality and the syndicate'. It thus abolished the party-political organs in which political rights might ordinarily be articulated, and it contributed further to the reinforcement of a narrow, detached executive.

The political constitution of the Franco regime was accompanied by a distinctive body of semi-corporate economic and industrial legislation. The fundamental laws introduced in 1945, for example, offered (formal) protection for the right to work, they defined work as an activity subject to principles of human dignity and just remuneration (Arts. 25 and 27), and they stated that representatives of labour and capital were entitled to share the benefits of production (Art. 26). In particular, though, these laws described the right to work as a personal obligation, they articulated this right as a coercive directive principle, and they partly devolved responsibility for material welfare to corporate bodies and the Roman Catholic church (Art. 29). Perhaps the key document in the entire raft of Franco's labour statutes was the Fundamental Labour Law (*Fuero del Trabajo*) of 1938. This text protected the right to work and set minimal wage levels (III/1), and it made explicit reference to the obligations of the state for the poor, especially in family law. It also foresaw a representation and co-ordination of all productive sectors in organic syndicates, acting as 'corporations under public law' (XIII/3), which were expected to oversee, regulate and improve the conditions of production. In this respect, it imagined that syndical organization of the economy might obviate or at least soften intense class conflicts. At the same time, however, this law also gave express sanction (XI/6) to 'private initiative as a fertile source of the economic life of the nation', it specifically

sanctioned the existing system of property relations, and, primarily, it ensured that the owners of industrial units retained authority in setting economic objectives (VIII/3) (Dlugosch 2008: 332–3). Like Mussolini's corporate laws, in short, these laws created a highly selective model of corporate economic design, and they assigned far-reaching directive economic authority to industrial elites.

The Franco regime followed other fascist dictatorships in creating a constitutional system marked at once by a semi-autonomous executive and a strategically structured quasi-corporate economy, in which corporate laws, purporting to secure collective material rights, strongly favoured potent private-interest groups. In this setting, the corporate composition of the Cortes clearly involved a selective re-privatization of the apparatus of government, and it expressly permitted, through corporations, the assignation of public office to actors on the basis of their private/economic status and associational connections. To a greater extent even than in Italy, in fact, the Franquist system of executive dictatorship masked a withdrawal of the state from primary public functions, and the reinforcement of the executive as a largely suspended centre of political agency involved both a corporate privileging of certain social groups and a relinquishment of state power to private actors in society. Most particularly, this system was also based in a reconstruction of corporate ideals, in which collective objective rights were redefined as instruments of state control, economic stabilization and neo-patrimonial privilege. Indeed, the commitment to corporatism in Franco's regime was even more strategically deliberated than in other fascist systems, and it did little but offer an ideological facade for a system of personally directed capitalism.

### *Germany*

The distinctive body of corporate and collective material rights contained in the Weimar Constitution also had two longer-term consequences that contributed to democratic/constitutional collapse in Germany. First, the corporate rights and arrangements in the constitution, originally intended to define different actors in the labour process as sources of material legislative power, were progressively transformed in the early years of the Weimar Republic, and through this transformation the influence of corporate groups representing the management side in production (i.e. industrial lobbies) increased disproportionately. By the late 1920s, in fact, little remained of the cross-class organic consensualism of the post-1918 era, and associations of industrialists widely campaigned for suspension of their



corporate commitments: notably, the Grand Coalition (the last democratic government in the Weimar Republic) collapsed in 1929–30 owing to the inability of its business-friendly and Social Democratic components to agree spending and taxation policies. After the Wall Street crash of 1929, the final years of the Weimar Republic were marked, not only by a dramatic reduction in the competences of the elected parliamentary legislature, but also by a rapid expulsion of both the Social Democratic party and the trade unions from positions of high bargaining influence and by a selective dismantling of the arrangements for welfare rights that had originally been established through corporate negotiations. As discussed, this period saw the repeated use of executive fiats to diminish welfare spending, and the limiting of parliamentary power coincided with a deep reduction, initiated under the chancellorship of Heinrich Brüning, in the redistributive dimensions of corporate order. In the course of the 1920s, in short, the corporate rights in the Weimar Constitution gave both unions and management powerful roles in the policy-making process. Ultimately, however, actors representing industrial management were the beneficiaries of this arrangement, and after 1930 they were able to utilize their position close to the state executive to renege on their bilateral corporate commitments (Grübler 1982: 353; Meister 1991: 243; Hartwich 1967: 162). The late-Weimar strategy of deflationary economic governance by fiat cut away the bare political superstructure from the objective/consensual foundations that had supported it through the 1920s, and, as examined above, it transformed the corporate/democratic state into a precariously detached executive, reliant on presidential intrigues, private favour and – potentially – the military for its continued existence.

Second, the initial years of the regime established by the National Socialists brought a partial, albeit highly selective, revival of earlier corporate arrangements. This period was initially marked by wide declarations of enthusiasm for a return to an estate-based system of governance, and some National Socialists proclaimed that the party created an organic state founded in political-economic estates (*Ständestaat*), which resolved the divisions of class society by finally establishing rights of social ownership of property (Bülow 1934: 61). In this period, a number of strategic laws concerning industrial design were introduced. In particular, the first years of Hitler's regime witnessed the introduction of various laws to regulate conditions of production, to maintain stability in the production process and to obviate industrial conflicts. First, notably, in May 1933 the German Labour Front (Deutsche Arbeitsfront, DAF) was formed. The DAF was originally heralded as a corporate forum for

syndical organization of the workforce, and in its initial functions it was considered a mechanism for securing material rights at the workplace and ameliorating general conditions of employment. In fact, however, although it remained an intermittent platform for labour dissent, the operations of the DAF were soon re-specified, and it acted mainly as an organ of social indoctrination and pacification.<sup>55</sup> The creation of the DAF was followed in 1933 by a law for the forcible creation of industrial cartels, which was designed to facilitate price setting and general economic co-ordination. Additionally, these institutes were soon accompanied by a further package of labour legislation: notably, the Law for the Organization of Labour (*Arbeitsordnungsgesetz*) of 1934, which was designed to organize industrial relations in a highly authoritarian corporate structure. Like the corporate laws of other fascist states, this law followed the earlier proscription of trade unions and provided for delegations of labour at the place of work, and it established a formal order of industrial arbitration. However, this law prohibited independent industrial representation and it gave supreme authority for the regulation of labour disputes to factory leaders (*Betriebsführer*), whose position had normally been established under the laws of the free market before 1933. Moreover, this law stressed that the workforce owed obedience to the factory leader, and it stipulated that conflicts within factories or companies fell under the competence of appointed trustees of labour (*Treuhänder*), whose duty it was to ensure that conflicts were resolved in accordance with wider macroeconomic prerogatives of the regime. As in Italy, this legislation also foresaw an expansion of the judicial power of the state into industrial activity, and it established tribunals at the place of work to apply political sanction for professional misdemeanours (absenteeism, alcohol abuse, etc.). From the late 1930s onwards, these acts of legislation were followed by further laws to promote labour-market regulation, which strengthened the power of the party to channel investment, to prioritize certain areas of production, to determine prices for commodities and for labour and even to regulate labour flows.

As in Italy, in consequence, the material constitution of Hitler's Germany ultimately formed a highly coercive system of corporate societal management. Moreover, as in Italy, although the party state assumed a degree of co-ordinating authority not widespread in pre-1945 liberal economies, the state's regulatory functions left the basic processes of capitalism (i.e. free investment, free accumulation, free exchange of contracts and free selection of markets) intact: indeed, the

<sup>55</sup> See the account of this in Mason (1966).

interventionist policies of production control and investment steering normally served the advantage of high-level industrial elites.<sup>56</sup> In this system, state intervention in the economy and state control of production were designed to manage the production process in favour of specific social groups, and the industrial apparatus as a whole reflected the aims of a regime generally committed to dismantling the welfare arrangements of the Weimar era and upholding a low-wage, low-cost economy.<sup>57</sup> Although evolving from the principles of corporate rights-holding and cross-class economic co-operation underlying Weimar political economy,<sup>58</sup> the industrial legislation of the National Socialists in fact supported a system of legally privileged economic self-administration, in which heightened coercive powers were given to actors promoting national growth targets.<sup>59</sup> If the original corporate-constitutional design of the early-Weimar era contained an aggregate of objective rights and legal institutions to facilitate a simultaneous political and material-democratic inclusion of society in the state, then the corporate structure arising after 1933, following the transformations in industrial relations experienced in the later 1920s, formed an apparatus of coerced material integration, in which state powers of regulation and distribution formed devices for securing cheap labour supplies and intensifying production. As in Italy, in consequence, the expansion and materialization of rights in the legal order of the post-1918 German state acted to widen the periphery of the state and to incorporate potent social groups in the state's periphery. To a yet greater extent than in Italy, however, this material reconstruction of the state's constitutional rights fabric blurred the state's integrity in relation to other spheres of society and other social actors. In particular, this process forced the state in part to

<sup>56</sup> For excellent analysis see Buchheim and Scherner (2006: 394); Kahn (2006: 15).

<sup>57</sup> This view is shared by Witt (1978: 258, 259, 272).

<sup>58</sup> On the ambivalent attitudes of the NSDAP to Weimar property laws see Stolleis (1974: 115). On continuities between ideals of property law among the lawyers of the Weimar era and the NSDAP see Kahn (2006: 8).

<sup>59</sup> Some ideologues of the Nazi *Ständestaat* observed it as a political order supporting independent economic 'self-administration' (Frauendorfer 1935: 21). On the deep conflict between the ideal of the *Ständestaat* and Hitler's economic designs see Freise (1994: 19–20). Ernst Rudolf Huber defined 'German socialism' as an economic system in which 'the total economic state' recognized that the economy possessed its own 'vital principle'. This did not negate the contrast of 'ownership and non-ownership' (1934: 14, 20). Similarly, albeit from a position critical of the NSDAP, Franz Böhm saw a combination of 'competition' and 'order' as the foundation of the National Socialist economy (1937: 108).