interventionist policies of production control and investment steering normally served the advantage of high-level industrial elites.[56] 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.[57] Although evolving from the principles of corporate rights-holding and cross-class economic co-operation underlying Weimar political economy,[58] 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.[59] 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

[56] For excellent analysis see Buchheim and Scherner (2006: 394); Kahn (2006: 15).

[57] This view is shared by Witt (1978: 258, 259, 272).

[58] 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).

[59] 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).

converge and share power with non-political organizations, and it made the directive sphere of state power extremely vulnerable to privatistic re-particularization or re-convergence with particular societal interests. Elements of this process were ultimately reflected in the material constitution of the regime instituted by the NSDAP: the corporate legislation introduced after 1933 formed a legal system that committed the state to deep interpenetration with the economy, yet it also tied state policy to macroeconomic goals that demanded the technical suppression of collective interests and the coercive management of industrial bargaining structures.[60]

To conclude, therefore, many constitutional systems in Europe in the 1920s were founded in a pluralistic expansion of the state's inclusionary functions, through which states were expected to legitimize themselves by preserving wartime patterns of societal inclusion, by incorporating and reconciling diverse antagonistic social groups, and by allocating collective material rights in order programmatically to integrate and solidify their societal constituencies. In the case of Germany, most particularly, this was based in the assumption that a material democratic constitution was a precondition for a strong unitary state. However, few inter-war states were strong enough to convert the divergent private elements of this material will into a basis for public order, and the widespread failure of European states to translate the particularistic dimensions of the corporately formed will into public constitutional laws transformed the state into a battleground for particular private prerogatives. Owing to this, inter-war states often progressively relinquished the basic instruments through which they had originally (often incompletely) secured their differentiated and sustainably inclusive stability. Above all, inter-war states eroded the normative functions of constitutional rights, under public law and private law, as institutions that extract an internally constructed formula for the state's societal autonomy and that trace the boundaries of political order and regulate processes of reflexive political in- and exclusion. Instead of this, they began to use rights as devices for maintaining an equilibrium between different groups and for objectively controlling and cementing the private social foundations of their legitimacy. In fact, it might be argued, tentatively in the case of Italy and more decisively in the case of Germany, that the expansion of the state's rights fabric counter-intentionally promoted a re-corporation of society, a haphazard fusion

[60] See the account of the success of state-directed industrial enterprise in Tooze (2006: 99–134). On the party links of industrial players, see Ferguson and Voth (2008: 127, 134).

of public and private power and a resultant dualistic re-privatization of the state: that is, collective corporate rights were converted into privileges for select social groups and objective rights were converted into institutions for intensely coercive regulation. Through this, the defining quality of the modern state – that is, its ability to extract a normative projection of itself, under public law, as a centre of positive and relatively autonomous statutory power in a differentiated society – was undermined, and the state began to rely on private actors, often using high levels of unmonitored violence, to sustain its power through society.

The high level of pluralistic social interpenetration and notional identity between state and society produced by post-1918 constitutions and constitutional rights thus led, by a circuitous path, to a disastrous depletion of state autonomy. If the definition of a modern state requires that a state can identify a distinct set of political functions, that it can conduct these functions at a reasonably high level of consistency and territorial generality and provide relatively secure checks on the arrogation of public authority by private actors, the constitution of fascist states, marking the supplanting of formal-constitutional democracy through a model of corporate societal management, reflected and enacted a catastrophic dissolution of statehood. Indeed, fascist states, arguably, experienced a return to the crises of statehood that characterized the transition from feudal to early modern social structure, in which some societies were only able to mobilize public power by relocating power in entrenched private and neo-patrimonial milieux and so by purchasing partial compliance through society by outsourcing powers of state administration. The experiment in the corporate/pluralistic expansion of rights and the attempt to establish material/volitional identity between state and society after 1914, in short, destroyed the basic normative fabric of exclusionary abstraction and autonomy in political power. In fact, in abolishing the strict legal distinction between private and public power, it allowed political power to revert, in part at least, to its original form as a privately applied and arbitrarily coercive resource, whose transmission through society was highly inflexible, dependent on personal support, patronage and particular acts and threats of violence, and liable to encounter and produce innumerable sources of low-level obstruction. The varied change in the rights fabric of states after 1914, in other words, produced a dramatic diminution of the reserves of political power possessed by European societies. As a result, the increasingly pluralistic inner structure of the state led to a depletion in society's capacities for pluralism outside the state.

5

Constitutions and democratic transitions

The first wave of transition: constitutional re-foundation after 1945

The period after 1945 witnessed a wave of constitution drafting in many of the states that either converted to fascism in the 1920s or 1930s or were subject to fascist occupation before or during the Second World War. In many instances this process of constitutional reform reflected the extension of Soviet influence across eastern and central Europe, and it was initiated by the government of the Soviet Union. Key examples of constitutions written at this time were the constitution of Hungary of 1949, the constitution of Czechoslovakia of 1948, the Polish constitution of 1952 and the Bulgarian constitution of 1947.

Constitutions reflecting the political dominance of the Soviet Union contained substantial distinctions, and each of them retained elements of indigenous legal culture. However, these constitutions derived some elements from the 1936 constitution of the Soviet Union, and they had important common features. First, they organized the state as a one-party regime committed to a high degree of economic control. Second, they rejected the separation of powers, which was commonly derided in post-1945 eastern Europe as characteristic of bourgeois constitutionalism: they provided for an integrally unified state structure, founded in the notional principle of full popular sovereignty or 'unitary popular power' (Skilling 1952: 208), in which both legislative and executive authority was concentrated in a unicameral legislature, dominated by a single (non-elected) party – this effectively tied legislative power to the prerogatives of a party executive. Third, they rejected judicial independence and strict judicial review (of these states, in fact, only Czechoslovakia had possessed an independent constitutional court before 1945). Indeed, these constitutions ascribed far-reaching political functions to the judiciary, and they often identified judges as custodians of the political will of the people – that is, as instrumental organs of the executive. For example, the Bulgarian constitution of 1947 (Art. 25) laid down that only the National Assembly could

decide on questions of statutory constitutionality and that judges were accountable to the legislature and so, effectively, to the party executive. Similarly, the Hungarian Constitution (Art. 41) stated that judges were required to 'punish the enemies of working people'. In these respects, these constitutions condensed all power in a party-based legislature, they relativized the higher-law principles underpinning many earlier constitutions, and in key matters they made the constitution subordinate to regular legislative functions. Fourth, these constitutions instituted a rights structure that simultaneously stipulated extensive declamatory portfolios of material rights and subordinated civil and political rights to restrictive laws. The Polish constitution exemplified this by establishing a sequence of clauses guaranteeing social and material rights (Arts. 57–65). Yet it also prohibited the exercise of certain political rights (Art. 72). The Czechoslovakian constitution, similarly, placed legal sanction on the exercise of rights likely to cause a 'threat to the independence, integrity and unity of the state' or to undermine 'popular-democratic order' (§ 37). Analogously, the Bulgarian constitution allowed the exercise of political rights only on condition that they did not obstruct the material objectives of the constitution (Art. 87).

In select respects, the constitutions of eastern Europe were proclaimed as legal bulwarks against the constitutional preconditions of fascism, and they employed (in remote and residual fashion) a neo-Jacobin legislative model to impede (or to claim to impede) pluralistic or neo-patrimonial fragmentation of state power. First, for instance, the strongly integrated concept of the state was promoted in these constitutions as a template for preserving a compact polity against semi-independent political forces in society. Second, in the same way that constitutions of pre-fascist states had aimed to co-opt plural economic associations in the state by granting flexibly interpreted corporate rights, the constitutions of the East European states after 1945 gave collective/material rights primacy over singular subjective rights: indeed, like fascist constitutions, they employed material rights as institutes of coercive social integration and planning. However, their essential design differed from fascist constitutions in this respect as they reserved rights of economic co-ordination to a strictly organized political party, which from the outset monopolized the state executive, and, at least in intention, they were constructed to avoid the fragmentation of state power through the uneven concession of rights in the form of corporate group rights. This redefinition of collective rights was intended, in part at least, to solidify the state against the patterns of erratic inclusion and political diffusion that had been characteristic of fascist rule.

The constitution of the Fourth Republic in France, introduced in 1946, possessed, albeit in a democratic setting, partial similarities with the post-1945 constitutions of Eastern Europe, and it was also devised as the foundation for a strongly integrated state, centred on a powerful legislature. A first draft of the constitution, which was rejected by referendum in May 1946, contained a very strong presumption in favour of legislative sovereignty and, echoing Jacobin ideas of 1793, it contained provisions for a unicameral parliament (Shennan 1989: 129–30). This vision was tempered in the final constitution of October 1946, which endorsed a somewhat diluted principle of legislative authority, reinforced presidential powers, instituted a (still weak) second chamber and established an (also weak) Constitutional Committee (Art. 91) to review the constitutionality of statutes. However, this constitution was supplanted through a process of revisions in the 1950s, used to strengthen the government against shifts in parliamentary formation, and it was finally replaced by the 1958 Constitution, which founded the Fifth Republic. The Gaullist constitution of 1958 deviated paradigmatically from earlier French constitutions. It greatly strengthened the power of the cabinet and the president against the legislature, and it established a Constitutional Council (Conseil Constitutionnel) as a horizontal check on legislative power. Not originally conceived as a review court, the Council initially acted to oversee distribution of competences between legislature and executive. By the early 1970s, however, the Council had unsettled the principle of untrammelled legislative sovereignty, and in 1971 the Council was formally recognized as a protector of rights (see Vroom 1988: 266). Although differing from conventional constitutional courts in that it retained a position within the legislative process and it was not open to appeal by citizens or regular courts, it began, acting both within and outside parliamentary procedures for legislation, to assume a priori powers for judicial review of statutes and to promote non-derogable standards of human rights as legislative norms.[1]

Like the constitutions in Eastern Europe, the strategies of post-1945 constitutional transformation in Germany and Italy, pursued under the influence of the US forces, can also be seen as intended correctives to the constitutional crisis induced by fascism and its social preconditions. These constitutions represented alternative patterns of response to the corrosion of statehood and the depletion of political power affecting societies exposed to fascist governance.

[1] For samples of the immense literature on this ambiguity see Stone (1992: 4); Bastien (1997: 399); Delcamp (2004: 82).

Italy

In Italy, for example, the process of constitution writing after 1945 proceeded from a position of substantial political heterogeneity, in which a number of parties contributed to preliminary constitutional drafts. For all their differences, however, the main parties in the first stages of constitutional formation in Italy concurred in advocating the retention of some elements of quasi-corporate constitutionalism, and they sought to preserve aspects of pre-war Italian constitutional ideals.[2] In each stage of the drafting process between 1946 and 1948, delegates of the Italian Communist Party, allied with the PSI, urged the inclusion of a substantial body of material rights in the constitution: they projected a constitutional order committing the state to far-reaching policies of redistribution and trade-union involvement in legislation, and they even defined the exercise of political rights as correlated with the material formation and collective enrichment of society. At the same time, the newly founded Christian Democratic Party opposed these designs, and it placed emphasis on singular subjective rights as the 'preconditions' of the state (Gonella 1946: 38). However, in their constitutional stance the Christian Democrats, or some of their more reactionary elements, also retained a corporate stance: some members of the party sought both to preserve the regional structure of the Italian polity and even (in extreme cases) to form a corporativist Senate, elected both by universal suffrage and by regional and professional councils (Einaudi 1948: 662–4).[3] On these counts, therefore, the primary parties in the constituent body in Italy both originally aimed, in diverse fashion, to institute a diffusely broad-based and societally inclusive system of government.

Through the course of the ratification process, however, the inclusionary demands of different parties in Italy were either weakened or eliminated. The more corporate elements of Christian Democratic theory were not reflected in the final constitution of 1948, and the Senate was finally constituted as a body elected by universal direct suffrage (Art. 58). Moreover, although the partial autonomy of the regions obtained definitive recognition through the establishment of a regional council (Arts. 114, 121), regional competences were strictly

[2] The origins of the modern Italian constitution can be traced, first, to the decree laws passed by the interim government in summer 1944, Art. I of which provided for a constituent assembly to establish a new constitution for the state, and, second, to legislation of 1946, which set precise procedures for elections to the assembly.

[3] Irene Stolzi advised me on this. See email exchange, 27 October 2010.

circumscribed in the constitution,[4] and objects falling under the exclusive legislative power of the state were clearly determined (Art. 117). In addition, the 1948 Constitution sanctioned a very extensive bill of rights, which reflected some objectives of the Communist Party and the PSI: this comprised roughly one third of the entire document. These rights included the classical rights of personal and domestic liberty, freedom of assembly, expression and conscience, access to impartial legal hearing, and protection from non-legitimate acts of public administration (Art. 113). Moreover, these rights included key distributory rights, such as rights to medical care (Art. 32), the right to a fair wage (Art. 36), rights to welfare support (Art. 38), and limited rights of union action (Art. 40) and collective bargaining (Art. 39). Despite recognizing the freedom of private economic enterprise (Arts. 41–2), the constitution contained prescriptive provisions for the partial regulation of private-sector economic activity and for state control of enterprises (Art. 43), and it stipulated that workers had rights of consultation in industrial enterprise (Art. 46). In fact, the constitution created a national economic council, comprising representatives of 'productive categories', to perform consultative functions regarding draft bills submitted to it by the government (Art. 99). In these respects the 1948 Constitution, reflecting the policies of the Communist Party, manifestly preserved core aspects of material constitutionalism. Despite this, however, the left-corporate principles implied in this catalogue also fell substantially short of the primary ambitions of the Communist Party, and they marked an attempt, influenced by US economic orthodoxy, to restrict the role of the state in the economic arena. The rights enshrined by the constitution specifically avoided the construction of a full corporate constitution: they preserved clear distinctions between actors in the private economy and in the state, they ensured that private conflicts were not immediately internalized in the state (i.e. that collective agreements were not dependent on state intervention in the bargaining process), and they guaranteed that the state was not forced endlessly to assume full regulatory responsibility for economic interactions through price setting and income stabilization. In this respect, the 1948 Constitution was designed, within broad limits, to delineate the boundaries of the state and to ensure the societal primacy of a strong, central, yet also functionally circumscribed, state.

Of crucial importance in the drafting process in Italy was the fact that the constitution placed particular emphasis on preserving the

[4] The new state was thus both 'centralized and decentralized' (Tesauro and Capocelli 1954: 48).

independence, impartiality and normative accountability of the judiciary (Arts. 101, 104, 111), and it consolidated constitutional rights as external to the sphere of immediate politicization around the legislature and the executive. In this respect, the constitution broke with stricter Italian traditions of Roman law, based on literal interpretation of written codes, and it provided for the institution of a Constitutional Court (established in 1953 and operative from 1956). In the first instance, it was the Christian Democrat members of the constitutional assembly whose programme advocated the creation of a Constitutional Court. This was because they saw the court as an eventual counterweight to the left-oriented bloc which they (erroneously) viewed as a probable feature of the first legislatures of the new republic (Furlong 1988: 10–11; Volcansek 1994: 494). After its institution, the court was empowered to decide on the constitutionality of laws of state, to resolve conflicts of legislative and judicial competence between central state and regions, to settle jurisdictional disputes between regions, and to act as final court of impeachment for cases brought against the president of the republic (Art. 134).[5] However, although lacking powers of abstract review in respect of rights,[6] the court also acted to determine normative compatibility of laws with the constitution and its provisions for fundamental rights and to conduct concrete review where cases from ordinary courts were referred to the court for query or confirmation.

The Constitutional Court performed important functions for the emergent republican state in Italy, and it served partially to rectify conventional weaknesses of Italian statehood. This became manifest, first, in the fact that it played a key role in countervailing endemic tendencies towards fragmentation and regional centrifugality in Italian politics (Evans 1968: 603). Although clearly defining spheres of separate regional jurisdiction and giving protection to the regional council, the constitution ensured that proper objects for central legislation were determined and preserved as such, and it enabled the government to question and control the legitimacy of laws made in the regions by referring these to the court (Art. 127). In addition, in appointing the court to clarify the relation between different levels of the legislative

[5] This was a matter of key importance. See Farrelly and Chan (1957: 316); Luther (1990: 78).

[6] This extent to which judicial review in Italy entails ensuring compatibility of laws with rights is often disputed. For different views see Bonini (1996: 65); Cappelletti and Adams (1966); Pizzorusso, Vigoriti and Certoma (1983: 504–5). The primary role of concrete review appears to mean that in Italy rights play a less significant role than in Germany.

system, the constitution weakened residual corporate counterweights to the state: it acted to ensure that the central state reserved the power to terminate laws, it abrogated laws, especially repressive public-order legislation dating from before 1948 that ran counter to the constitution or dispersed the power of the state, and – by these means – it raised general confidence in the legal order.[7] Indeed, as a normative forum standing apart both from earlier state institutions and the (deeply tainted) regular judiciary, the court generated a significant reservoir of legitimacy for the new state, which enhanced its ability to concentrate the fullness of power in its acts. One key example of this was in the realm of constitutional relations between church and state. In the aftermath of the war, parts of earlier ecclesiastical legislation, derived from Mussolini's Concordat of 1929, had initially been absorbed into the state. This had significant bearing on the state's capacity for legislation over questions of family and matrimonial law. The Constitutional Court ultimately played a significant role in stripping out this legislation, and it intensified the legislative independence of the state in these spheres of regulation. Furthermore, the court permitted the newly founded state to recruit technical assistance in determining proper objects and procedures for legislation, and this made it possible for actors within the state, under the approval of second-order observers, substantially to assert their sole right to perform specifically allotted legislative functions. In stipulating exact principles for the ratification of statutes, therefore, the constitution created guarantees to make sure that all formative legislative power was condensed in the state administration, and that edicts or prerogatives not emanating from the central state (i.e. perhaps from regional parliaments or corporate groups) could not easily assume the technical force of law and could not dissolve the (albeit socially limited) cohesiveness of state power.[8] In particular, the constitution as a whole aimed specifically to restrict the formation of private/public corporations assuming quasi-state functions in the localities (Bartole and Vandelli 1980: 180). The Constitutional Court, thus, acted as an important block in a process of constitutional state building, and it substantially enforced the capacity of the emergent Italian state for the positive and abstracted use of power.

[7] This was a very important feature of the Italian court. See Volcansek (1994: 495); Franciscis and Zannini (1992).

[8] Separately from my argument here, the role of judicialization in consolidating states against fragmentation, especially in post-fascist environments in which trust in legislatures and regular courts was low, has been observed in Ferejohn (2002: 55–7).

In conjunction with this, the systemically stabilizing functions of the Constitutional Court in post-1945 Italy were evident in the fact that it formalized procedures for resolving conflicts over the rights expressed in the constitution, and it enabled the state to deflect to the law many factual contests over political legitimacy. Many of the more expansive and politically resonant rights in the constitution, for instance the right to strike and the right of the state to expropriate private enterprises, were clearly phrased in a manner that anticipated the referral of controversial statutes and judicial rulings to the Constitutional Court. Indeed, although the court was not staffed by political radicals, its rulings, even under conservative governments, tended to support the defence of civil liberties and rights of minority groups. In establishing a relatively hardened set of procedures, withdrawn from everyday political activities, to preserve and resolve issues related to constitutional rights, therefore, the Constitutional Court enabled the state to hold contests over distinctively volatile matters outside the centre of the political system. This meant that particular social groups and particular parties were not unreservedly at liberty to employ state power to address specific prerogatives, and that conflict over rights did not automatically consume vital resources of state legitimacy. The Constitutional Court formed an instrument in which the basic elements of societal design contained in the constitution – rights – could be applied through society at a diminished level of intensity, and the court increased the legitimacy of the state by preserving and enforcing principles enunciated as rights without causing a fully inclusionary convergence of society around singular demands or contests.

In each of these respects, the sentences of the Constitutional Court played a decisive role both in establishing the supremacy of democratic law and in producing a progressively (although still incompletely) unified monopolistic state in post-1945 Italy (Rodotà 1999: 17). The Constitutional Court acted as a significant device both in the transitional consolidation of democratic culture and in the consolidation of the Italian state per se. Above all, the functions of normative displacement and statutory control provided by the court acted, as in earlier cases, to rigidify the autonomous structure of the state and to simplify its selectively inclusionary use of power. In a societal setting in which the national polity had at once been afflicted by low levels of regional control and high levels of intersection with private actors, the Constitutional Court emerged as an institution that substantially fortified the state and substantially facilitated its functions as a monopolistic and relatively autonomous actor.