independence against Turkey, the first Greek constitution (only partially applied) was drafted in 1822, and it was followed by revised documents in 1823 and 1827. The 1822 Constitution, although influenced by the French Thermidorean constitution, did not fully separate executive and legislative functions, and members of the executive retained control of military units and the state administration. It is also notable that, at such an early stage in the process of nation building, this constitution, although notionally centralistic, performed only weak integrating functions for the state, and it secured only loose control of the governmental periphery (Dakin 1973: 105; Argyriadis 1987: 68). Moreover, the resultant republic was short-lived, and it was soon replaced by a more authoritarian system. Nonetheless, the 1822 Constitution of Greece created a rudimentary state apparatus, and it contained sufficient symbolic power to draw members of an emergent society into an increasingly immediate and unified relation to the state. In partial analogy to this pattern, the Belgian constitution of 1831, highly influential for later constitutions of multi-ethnic societies owing to its provisions for language rights, concluded the separation of the Belgian provinces from Holland by providing a structure for a cautiously progressive constitutional monarchy. This constitution, strongly informed by the assimilation of Napoleonic law in Belgian provinces under French rule up to 1815, reflected the unitary construction of society under rights-based law by breaking dramatically with estate-based constitutions (Juste 1850: 301). It created a governmental order with two elected chambers (Arts. 47, 53), it gave the elected legislature (albeit representing only a tiny franchise) final control of legislation (Art. 28) and – above all – it made strict provisions for ministerial accountability to the legislature and it removed ministerial power from dynastic authority (Art. 89).

The prominence of national constitutionalism in anti-imperial national state building gained most exemplary expression in Hungary. In Hungary, the constitutional movement clearly incorporated two distinct state-building impulses: it consolidated both the inner-societal anti-feudalism and the strong external claim to national/territorial sovereignty typical of early constitutional foundation. Up to 1848, elements of feudal social order remained strongly embedded in Hungary. To be sure, after the 1820s reformist principles had become increasingly pervasive. However, there was no constitution in Hungary except for an assembly of organic laws. Serfdom still existed in rural areas, the delegatory order of estates, led by the aristocracy, remained intact, and administrative power was based in regions or counties (*vármegye* or

comitats) overseen by the aristocracy. The comitats retained powers to tax, to enforce laws and to preside over patrimonial courts, and, although not without reformist elements, government at comitat level provided a bastion for noble defence of ancient privileges (see Révész 1968: 123; Stipta 1998: 473–7). This came to an end in the anti-Austrian national uprisings of March 1848. As a result of this revolt, by April 1848 the parliament of estates, under the leadership of the gentry, introduced a sweeping body of liberal reformist legislation, which at once removed many remaining elements of feudal administration from Hungarian society and accorded greatly extended powers to a centralized and autonomous national government. This process did not entail the establishment of a full constitution, and in any case the reformist movement was eventually brutally suppressed by Austrian and Russian troops. However, this legislation, strongly indebted to the Belgian constitution, created a quasi-constitutional national order in Hungary, effectively forming Hungary as a distinct state within the Habsburg monarchy. At one level, the 'April laws' (subsequently subject to authoritarian revision) established popular representation and a democratic legislative process, and they abolished fiscal, judicial and executive privileges for the nobility. In this respect, the April laws eroded internal socio-structural boundaries, and they tentatively established a unitary political system within Hungary. These laws thus consolidated uniform constitutional rights to enact an inner-societal state-building process. At the same time, however, the April laws were also designed to regulate and strengthen the position of Hungary within the Habsburg empire. The construction of an elected parliament involved an attempt to formalize relations between Hungary and Vienna and to consolidate an autonomous national government in Pest (Révész 1978: 126). The April laws were thus also intended as a state-building exercise in external politics. Owing to the resultant conflict with the Habsburg authorities, this in fact led to Kossuth's (unrealized) declaration of Hungarian independence in April 1849. In both its internal and its external dimensions, therefore, the revolutionary experiment in Hungary reflected the dual potential of constitutional formation as a technique for simultaneous rights-based social inclusion and uniform social construction and (as corollary) intensified political abstraction and state building.

Similarly, 1848 saw the drafting of constitutions in many Italian cities: in fact, the European national-constitutional movement of 1848 began in Palermo. During the revolutionary fervour, some Italian states established constitutional systems in which monarchical power

was combined with a representative order and guarantees over basic rights. For instance, Sicily established a highly progressive, although short-lived, monarchical constitution. This constitution gave exclusive legislative power to a parliamentary assembly, elected by full male franchise, and, while preserving a monarchical executive, it instituted a supreme bicameral parliament (Arts. 4–5), and it provided for ministerial responsibility (Art. 68), judicial independence (Art. 72) and rights of political engagement. In Piedmont-Sardinia a constitutional monarchy was established, which was founded in classical liberal rights, the division of legislative power between monarch and two chambers (Art. 3) and ministerial responsibility (Art. 67). In the Papal States, too, a far-reaching democratic constitution was drafted in 1849 to support the Roman Republic founded in late 1848. This constitution, although the reforms preceding it were initiated by Pius IX himself, ended the temporal power of the pope, established ministerial responsibility (Arts. 43–44) and created a permanent representative system based in extensive manhood suffrage (Arts. 17, 23). Notably, most of these constitutions made scarce specific reference to national unity. However, the Roman Constitution defined itself as promoting Italian nationality, and the wider process of constitution drafting was shaped by a growing demand for Italian self-rule and for the expulsion of the Habsburgs from northern Italy. Moreover, this process was also shaped by the assumption that the constitutionally enforced rule of law would ultimately unify all Italian territories under the same power, and the ambition of creating a strong and constitutionally regulated political order overlapped with the ambition of establishing a unified nation.[81]

Germany

As in Italy, in 1848, the loosely associated states of the German Confederation also experienced a process of intense constitutional reconstruction, in which expectations of private rights and rights of political representation converged with a demand, far more potent than in Italy, for a unitary national state. In 1848, progressive constituencies in different German states, including Prussia and Austria, proclaimed, separately, the need for liberal constitutions. At the same time, a national

[81] To support this, although Italian nationalism remained relatively weak, we can observe the rise of national symbolism during 1848 and the choice of an Italian flag and a standard Italian language for the Roman Republic.

Constituent Assembly was convened in the *Paulskirche* in Frankfurt, comprising delegates from states of the German Confederation and other states within the Habsburg territories, to create a constitution for all Germany. The Constitutional Assembly in Frankfurt was faced with multiple state-building and nation-building tasks. On one hand, it attempted to construct the unified German *state* as an integrated national polity within defined territorial limits, to found the legislative power of the state in the designated rights of the German people (Section 4, Art. 3, § 93), and, at least in questions of public law, to assert national laws over the laws of particular German states. In addition, it sought to construct the German *nation* as a uniform body of citizens represented in an elected legislature, endowed with common rights of conscience, property, education, expression, intellectual inquiry, and political activity and association (Section 6, Arts. 4, 5, 6, 7, 8, 9). The all-German constitution of 1848–9 in fact represented the most literal attempt to utilize the state-building functions of constitutionalism, and its framers sought at one and the same time to employ a constitutional document to create the people as a source of power for the state, to ensure that state power was distributed evenly and inclusively through a particular society, and to construct the state itself, *ex nihilo*, as a central and fully monopolistic bearer of power. At the core of this endeavour was the deeply-lying conviction that a constitution guaranteeing national inclusion and uniform personal rights was required to elaborate a state able to act as the sole focus of identity and political unity within German society. Indeed, in enshrining the extracted principles of national/territorial sovereignty and personal rights under law, the German Constitution of 1848–9 was designed finally to wrest power from the nobility and the ministerial bureaucracy, and to build a fully public and conclusively sovereign state on that foundation. The constitution was centred in the principle that rights allocated through the state weakened power in the margins of the state, and that inclusion through national sovereign affiliation and through private and political rights was a precondition for a powerfully autonomous state. At the head of its catalogue of rights, in consequence, the constitution of 1848–9 emphatically proscribed distinctions of status before the law, and it abolished all use of titles not attached to an office: that is, external to the state (Section 6, Art. 2, § 137). Furthermore, it loudly prohibited private courts and the dispensing of justice on a patrimonial basis (Section 6, Art. 10, § 174). Leading members in the progressive and radical factions of the constituent assembly in Frankfurt expressed the view that the formation of a representative constitution was needed as a strategic concluding

step in a long process of political de-privatization, through which the dualistic estates of the German territories could finally be converted into inner components of a fully evolved state: only a deep-rooted rights-based national constitution, they argued, could rectify the persistent privatism and weakness of German statehood.[82] At this point in German history, therefore, the principle became reflexively clear that strong states presupposed constitutions and constitutional rights, and societies unified by rights converged uniformly around central national executives.

Across diverse patterns of revolution and state construction, the widespread political nationalism typifying the middle decades of the nineteenth century mirrored and extended the wider inclusionary dynamics of societal transformation after 1789. In all lines of national-sovereign state formation culminating in 1848, the concept of the sovereign nation as the source of power served both to remove political authority from embedded elites and to enable power to cut across the sectoral and patrimonial boundaries that still marked the inner structure of particular societies. In all cases, the principle of national sovereignty promoted a greater inclusivity in power, and, in increasing the extensibility of different societies, the idea of power as belonging to a nation raised the level of abstraction at which power could be produced and utilized. Moreover, in each line of national state formation characteristic of this time, the expansion of national power was closely linked to the construct of rights, and rights consolidated and fused with nationhood to shape and structure the underlying process of administrative consolidation and extensive societal inclusion. Demands for national statehood around 1848 were normally stimulated by the fact that the societies experiencing national revolution had already gained a high degree of internal uniformity through their transfusion with subjective legal rights. As a result of this, they possessed a structural propensity for conceiving themselves in uniform and unified legal categories (as nations), and so also for receiving power from central states, simply and uniformly counterposed to other functions in society. In emergent anti-imperial states, for example, independent state formation was normally accelerated by the unsustainability of late-feudal empires in the face of widening societies drawn together under post-Napoleonic civil law. This was

[82] For example, Friedrich Christoph Dahlmann, a leading liberal delegate in 1848, claimed that the traditional estate-based system in Germany could be transformed by a constitution into a strong modern state (1924 [1835]: 124–32).

especially prominent in anti-Habsburg national revolts and movements, which occurred in societies, for example in northern Italy, Poland and Hungary, in which rights-based civil law, resulting from late absolutistic codifications and Napoleonic influence, had found wide resonance and had done much to dissolve society from its localized pre-revolutionary structure. In nascent unified national states, alternatively, the enforcement of rights-based legal orders had created an increasingly uniform societal environment before the edifice of national statehood was created, and in these settings, too, a process of de facto legal unification preceded and smoothed the path for the revolutionary proclamation of national statehood. Much of Italy, for instance, had implemented revolutionary civil laws after 1795, and most parts of Italy had (haltingly) adopted Napoleonic civil legislation, which at once created a 'concrete terrain' for a unified nation and anticipated the possibility of 'legislative unification' (Ghisalberti 1972: 35). Indeed, the step-wise reception of the Napoleonic codes in Italy had established principles of civil equality, equal entitlement to private rights and general uniformity under law that deeply pre-structured the emergent conditions of national statehood (Ghisalberti 2008: 258).[83] Much of Germany, likewise, had also been, either directly or indirectly, subject to legal principles derived from Napoleonic rule. Each line of national state formation at this time thus gained specific momentum in societies integrally suffused with rights-based civil law, and it responded to a requirement in such countries for commensurately abstracted and inclusionary patterns of statehood. These societies then consolidated nationhood as comprising a uniform claim to rights, as obliterating the inner-societal vestiges of late feudalism, and as leading to the convergence of society around an administrative order able to include all people equally (as members of a nation) in its power.

It is of the greatest importance, however, that the actual constitutional model stabilized in the major European states before, during or after 1848 was settled through a formal renunciation of the more expansive promises of national self-legislation in the revolutionary proclamations of 1848–9. In different ways after 1848, European states reverted to a model of constitutionalism that used limited catalogues of rights to separate the state from particular interests and factually to limit the democratic

[83] In Italy, some Napoleonic law was initially removed after 1815. But subsequent legal codes, culminating in the *codice civile* (1865) for all Italy, were strongly influenced by Napoleonic ideas. For discussion see Ghisalberti (1995: 19, 80, 91).

element of national sovereignty. As discussed, in France the constitution of 1848 only contained a reduced version of the rights originally anticipated as the outcome of the revolution. In late 1851, this constitution was removed by a Bonapartist *coup d'état*, and the Second Empire reaffirmed the basic disjuncture, characteristic of authoritarian-liberal states, between a formally independent and quasi-prerogative state apparatus and an economic system based in subjective rights of proprietary autonomy. Events in Italy formed a partial analogy to this. In Italy, the only constitution to survive post-revolutionary repression was the constitution of Sardinia-Piedmont: the Statuto Albertino. This contained provisions for basic rights, including individual liberty (Art. 26), freedom of the press (Art. 28), freedom of property (Art. 29) and freedom of assembly (Art. 32). However, it was flexible in its approach to political representation and integration, it reserved to the monarch the right to approve and promulgate law (Art. 7), and it placed only ambiguous constraints on executive power. In the German states, the planned constitution for a unified Germany was not enacted, the National Assembly in Frankfurt was eventually suppressed by Prussian troops, and the revolutionary era concluded with the imposition of a highly restrictive constitution in Prussia. Indeed, as in France, the Prussian constitutions of 1848–50 were imposed through an effective *coup d'état*, in which the Prussian monarchy, acting in conjunction with the ministerial bureaucracy and the army, used prerogative legislation to suppress the progressive parliamentary-constitutional faction, first, in Prussia and, subsequently, in the German states more generally (Grünthal 1982: 65). The Prussian Constitution in fact remained in some respects a Bonapartist constitution. The infamous Article 105 of the 1848 Constitution contained substantial provisions for rule by emergency decree. Similar provisions were preserved in Articles 45 and 51–52 of the 1850 Constitution.

In each of these instances, two points have particular salience. First, even in the middle of the nineteenth century the full potentials of the revolutionary constitutions of the late eighteenth century were not realized. Constitutions that remained enduringly in force contained mechanisms for restricting the expansionary implications of popular sovereignty. Second, by 1848 a heightened element of reflexivity had become apparent in the application of constitutional laws, and a weakened version of the Bonapartist principle that constitutions could be routinely employed as restrictive models of social design was now conventional. Constitutions were imposed in order selectively to simplify

and generalize the functions of the state, yet also to ensure that states did not become fully inclusive and did not fully renounce their attachments to particular dynasties and personal elites. Notably, the only revolutionary constitutions that survived the outbursts of 1848, those of Piedmont-Sardinia and Prussia, were in fact counter-revolutionary constitutions (*constitutions octroyées*), and they were used to preserve a private/familial monopoly of power while ensuring that this monopoly could be applied in a system of public law adapted to the generally uniform structure of a modern society.

4

Constitutions from empire to fascism

Constitutions after 1848

As discussed, the revolutionary constitutions of the later eighteenth century did much to consolidate the power of central states, and in supplying the idea that the nation of rights holders was the origin of legitimate state power they greatly simplified the social abstraction and circulation of political power. The constitutions of 1848, then, consolidated the state as a broad-based body of institutions, and they at once heightened the power of states and distributed power in more even fashion through society by enunciating the principle that all members of a national society had a common and equal relation to political power. In both periods, the forming of constitutions continued a process of political distillation that had shaped most European states throughout the seventeenth and eighteenth centuries, and the patterns of liberal-national constitutional formation that culminated in the middle of the nineteenth century extended the centralistic and inclusionary impetus of earlier constitution writing. Indeed, as discussed, the liberal-national constitutional movement resulted directly from the primary state-building tendencies of the age of 'absolutism'. Naturally, this does not imply that the constitutional models that emerged in the age of revolution did not profoundly alter the inner organization of states, and that their emphasis on popular sovereignty and rights-based self-legislation did not produce a condition of more equal legal and political inclusivity in society in which a popular legislature played an increased role in governance. However, the revolutionary constitutions of the period 1789–1848 formed a structural continuum with the administrative innovations typical of 'absolutism'. It was in these constitutions that the attempt of 'absolutistic' states to abstract an inclusionary and generalizable form for political power was finally accomplished. National-liberal constitutionalism eventually consolidated itself as a dominant mode of governance in Europe precisely because its core principle of popular

sovereignty, correlated with the concept of citizenship as rights holding, was successful in concentrating political power as a generally abstracted resource, and it was more effective than personal/monarchical rule in weakening society's local and patrimonial structures. The early form of constitutional democracy, thus, emerged as a political system that, more than any previous political model, adequately reflected the growing autonomy of political power and enabled societies to use power as a positive iterable phenomenon. As discussed, the tendency towards accelerated nation building in the constitutional movements of the middle part of the nineteenth century immediately reflected both the growing abstraction of political power and the increasing construction of societies around uniform processes of political inclusion, in which the separation of political power (state) and the rest of society (nation) was organized through generally articulated rights.

In the same way that absolutist states governed in spite of particularist opposition, however, states founded in national-liberal constitutionalism were also opposed by social groups who possessed entrenched regional and status-determined authority, and in the nineteenth century the national-constitutional ideal of autonomous statehood found its main adversaries in conservative elites. As discussed, privileged social groups had originally approached central states with deep scepticism. Nonetheless, by the eighteenth century an informal compromise had been established in many European societies, in which regents and dynastic families assumed a monopoly of political power in society and old elites obtained a constitutionally protected position within the state: this usually presupposed that the nobility sacrificed its political liberties in return for guarantees over social privileges and status. Throughout the nineteenth century, however, this familiar antagonism began to reproduce itself in a new form, and bearers of local and hereditary status necessarily perceived centralized constitutional states as perpetuating, now in far more threatening fashion, the more general statist attack on their particular liberties and noble indemnities. Even in the later nineteenth century, in consequence, many European societies contained sporadically influential conservative factions, such as the Carlists in Spain and the *légitimistes* in France, who continued to oppose the central state and dedicated themselves to the preservation of the local/corporatistic structure of society. Both at a political level and at a social level, in consequence, the centralistic design of constitutional states arising in the era of revolution did not provide a conclusive pattern of convergence for legally and politically unified societies, and it was only through subsequent adjustment that states obtained solid foundations in society.

The constitutional orders of European states after 1848 were normally marked by a double process of entrenchment, and they typically preserved a pragmatic balance between centralistic principles of government, reflected in a unitary state apparatus and a general legal system, and the embedded prerogatives of established elites. After 1848, most European states possessed rudimentary features of constitutional order. That is to say, they guaranteed some basic mechanisms of representation, and they normally provided for clear public procedures to determine the introduction, promulgation and enforcement of laws. Moreover, the societal basis of states was increasingly impervious to collective private privileges and, even in more traditional societies, Roman-law concepts of singular personal rights, separating private activities from institutionally defined state structures, became prevalent. However, most states also fell substantially short of uniform constitutional inclusion, and they retained legal instruments to ensure that constitutional provisions concerning the rule of law and the legal foundations of the state were selectively and unevenly applied. Indeed, after 1848, most states reverted to a pattern of constitutional construction that was designed to appease and even to co-opt traditional elites and to guarantee that those groups with vested regional and personal privileges were not fully alienated from the state.

To illuminate this, after 1848 few states entirely relinquished the essential integrative dimensions of constitutional statehood, and even those that opted for more authoritarian-governmental structures did not revert to a pre-constitutional political order. For example, even in France during the Second Empire an implicit constitutional structure remained intact. Following the neo-Bonapartist assumption of power in 1851, the authoritarian constitution of 1852 was imposed throughout France, and it abrogated many constitutional achievements of 1848 and before. However, even in this period of French constitutionalism, executive powers were subject to clear constraints: the daily conduct of government by semi-accountable elites was flanked by a restricted system of election and representation, administrative acts were subject to control by a senate, and a general legal order was preserved (Price 2001: 65). Moreover, throughout the Second Empire accountable political institutions and counterweights to the Caesaristic executive were increasingly strengthened. After 1860, in fact, the French polity was defined by a clear liberalization of constitutional design, and by an increase in political participation. Indeed, in its centralistic impetus Bonapartism paved the way for the re-establishment of inclusive political citizenship