

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

as a principle of governance perhaps more effectively than less authoritarian political systems (Berton 1900: 362; Deslanges 1932: 593; Hazareesingh 1998: 89, 245).

More generally, however, the typical constitutional design of the period after 1848 was one that, while accepting the need for inclusive legal principles and procedures adapted to a thinly nationalized societal and political structure, continued to strengthen the position of private elites in the state. Across different national settings, the standard constitutional form of this era was an intermediary model of statehood, in which an apparatus of formal public law coexisted with a political order facilitating private access to political power.

An extreme example of this was the post-1848 Prussian state, whose constitution gave high-ranking members of the nobility privileged use of executive power. The revised Prussian constitution of 1850, formed through a series of progressively reactionary counter-revolutionary *octrois* between late 1848 and 1850, instituted (Art. 65, 1) a split legislature, in which a dominant position was given to the First Chamber, redefined after 1855 as a House of Lords (*Herrenhaus*), which, among others, comprised members of the high aristocracy and royal appointees. Additionally, in April–May 1849 the Prussian king used emergency provisions in the 1848 Constitution (Art. 105) to introduce an estate-based voting system for the elected Second Chamber, in which different social groups were unevenly enfranchised on the basis of their income status, and obtained bloc voting rights in proportion to their contribution to fiscal revenue. This system of representation, although not finally renouncing the principle of general electoral rights, hinged on a neo-feudal idea of the state as a stratified body of particular interest groups, which defined government as elected to represent a natural/corporate hierarchy of estates. Similarly, the polity of later nineteenth-century Austria contained a striking example of a constitution designed to solidify the power of the nobility. In 1848 and 1849, two separate constitutions were introduced in Austria. The 1848 Constitution placed a bicameral legislature alongside the executive authority of the Kaiser (§ 34). It also sanctioned limited basic rights and the general rule of law, and, vitally, it gave increased recognition to the Habsburg crownlands and endorsed free choice of language for their inhabitants (§ 4). The 1849 Constitution (never really enforced) promoted the abolition of remaining feudal legal relations, patrimonial jurisdiction and noble monopoly of state office (§ 26, 27, 28, 100), and it established a bicameral parliamentary system, with an upper chamber comprising deputies elected on a regional basis

(§ 40). However, this constitution, which was an imposed constitution and never assumed full legal force, was suspended in 1851: 1852 saw the abandonment of the plan for a centrally elected chamber of deputies and a partial return to estate-based deputation. This assumed more constitutionally ordered shape in the Oktoberdiplom of 1860, which, although sanctioning earlier federal rights and giving limited recognition to regional assemblies (Art. 1), stated that laws had to be passed and ratified by the *Kaiser*. Subsequently, this system was revised in the Februarpatent introduced by Schmerling in 1861. This document, which in itself was intended to avert a full constitutional reform of the state, established a bicameral imperial council, containing imperial nominees and elected representatives of the crownlands. It was, however, only in 1867 that the representative constitutionalism initiated in 1848 firmly took root in Austria, and that concessions to the nobility were tempered. In 1873, parliamentary supremacy was consolidated and by 1907 reforms were conducted to ensure the authority of parliament and to introduce universal manhood suffrage. Even states that adopted relatively liberal or at least moderate conservative constitutions, such as Spain after 1845, retained a constitutional model preserving regional and local/territorial power. Notably, the Spanish constitution of 1845 instituted a split legislature, including an upper chamber, or senate, to which the nobility had privileged access (Art. 15), and this ultimately obstructed progressive reform and left power in the hands of personally appointed cabinets.

In each of these cases, a constitutional pattern developed after 1848 which ensured that political power rested with a monarchical executive, supported by groups endowed with hereditary privilege, and in which the role of parliamentary assemblies did not, in all respects, conclusively exceed the representative dimension of earlier dualistic constitutions. Although they reflected the growing centralization and nationalistic construction of society by recognizing social agents as obtaining formally equal status under law, the constitutions instituted at the end of the revolutionary period pursued a policy of very minimal political centralism and regular inclusion, and they permitted heterogeneous social, regional and ideological elements to coexist as formative components of the state. In consequence, the states that were formed in most European societies after 1848 were states that had only a partially integrated constitutional form, that were inconclusively constructed as unitary public orders, and that still attached power to potent vested interests and allowed power to be channelled through patronage, favour and standing. Moreover, because of their inherent personalism, these

states habitually struggled to detach power from private tenures, to institutionalize political opposition, or even to rotate government: as a result, they lacked flexible options for the application of power. These states were, in other words, states that were incompletely formed as states, and their ability to apply power autonomously through society was restricted.

Constitutions in the imperial era

The combination of the limited rule of law, the partial preservation of private elite privileges, and the underlying minimalism of post-1848 constitutions ultimately provided a partial template for the constitutions of the imperial era, which were formed in the latter decades of the nineteenth century. This claim of itself requires two qualifications. First, it is self-evident that in the later nineteenth century not every European state or society possessed uniform imperial features. Indeed, the concept of empire itself contained very different implications in different societies at this time. For example, Britain and France ruled over rapidly growing colonial empires, whereas Russia and Austria controlled more established dynastic empires. After 1870, the newly formed German state invoked the notion of empire to legitimize a process of unified nation building and national-territorial consolidation. In contrast to this, Spain lost most of its empire in the course of the nineteenth century. Italy was excluded from the race for colonies until the late nineteenth century, and it did not acquire substantial dominions until after 1912. In consequence, it is questionable whether the concept of an imperial age can be applied across Europe as a whole. Nonetheless, it is proposed here that certain characteristics, with very strong variations, were common to European societies in the later nineteenth century, and that all, however diversely, were pervasively shaped by factors connected with imperialism. Notably, most European societies of this time, propelled by increasingly rapid industrial and technological transformation, were generally marked by territorial concentration and expansion, within one newly unified agglomerate of states or in colonies overseas. Moreover, most states were shaped by the reality or the growing expectation of extensive colonial annexation. As a result, most states used imperial slogans to produce symbolic legitimacy, and, vitally, by the 1890s the policies of major European states were increasingly defined by conflicts of interest and influence with other imperial blocs. In particular, these expansionary tendencies had the general result that most European states witnessed heightened requirements for social control

and mobilization, and the imperial era in general witnessed a rapid rise in the intensity and penetration of statehood. To this extent, it is possible to discern certain common features of European societies in the imperial era, and to observe ways in which each state was affected by imperialism.

Second, in addition, it needs to be very clearly noted here that in respect of electoral enfranchisement, guarantees over procedural order in legislation and general legal rule, most constitutions of the imperial period reflected a *very substantial inclusionary advance* on the first post-1848 constitutions. Indeed, the beginning of the imperial period after 1870 normally saw a striking acceleration in the process of political inclusion and intensification in European societies. European states of this era usually pursued more committed policies of unitary institutional consolidation, and in most settings the basic executive and ministerial structure of the state gained rapidly heightened integrity against particular bearers of power. Moreover, most constitutions of imperial Europe, with significant variations, promoted the tentative beginnings of mass-political organization, and an increase in parliamentary competence and party-political organization and inclusivity usually accompanied this process. Throughout Europe, thus, the imperial period brought both an extension of national franchises and a correlated consolidation of domestic statehood.

Despite this, however, the constitutions of European states in the imperial period remained shaped by constitutional minimalism and by a residual acceptance of elite pluralism as a basic foundation of public order. Indeed, in many cases the constitutions of imperial states were technically designed to stabilize the state as a restricted apparatus, able both flexibly to balance different elite groups and personal interests in its structure and to preserve a thin executive structure above the antagonistic conflicts of civil society, which possessed increasing political relevance.

Like earlier constitutions, the primary characteristic of the constitutions of the early imperial era was that they produced a synthesis of the disparate political elements of emergent liberal societies, and they enshrined a set of legal arrangements in which privileged private interests could be integrated into a state apparatus that sanctioned the basic liberal principles of legal generality and uniformity. This fusion was made possible by the fact that states in the imperial era remained very loosely integrated states, which had renounced the categorical inclusionary pledges of republican constitutional doctrines, and their constitutions allowed great latitude in the definition of the state's direction. This was made possible by the fact, further, that conservative elites gradually secured clear and distinct benefits from the models of statehood that took shape in most of Europe in the wake of 1848,

and the liberal proponents of centralized legal and constitutional order proved increasingly willing to co-operate with traditional elites and to accept a greatly attenuated version of their original ideals of state legitimacy. Most importantly, the early imperial period was the historical epoch in which the social forces (that is, the growing middle class) that had traditionally supported the central legal state began (although still not without tension and equivocation) consistently to accommodate the forces of political conservatism, which had traditionally opposed the central state and the general rule of law. As a result of this, first, the imperial era was a period in which models of constitutional statehood were promoted that fostered an alliance between traditionally statist and traditionally anti-statist groups within society. Second, notably, it was a period in which enthusiasm for the central state became gradually integral to common conservative outlooks, so that (at least intermittently) a conceptual union of the two forces that had previously vied for influence in the process of state formation was established. Third, it was a period in which traditional liberal policies of legal regularization and codification were pursued in an attitude of strategic placation towards conservative groups, and in which even the more systematic drafting of economic laws and singular rights retained a conciliatory dimension and did not sweep away the traces of seigneurial privileges. Owing to these tendencies, in fact, most states of the imperial era remained weakly unified states, and, following varying patterns, their appeasement of vested elites persistently obstructed their formation as structurally integral public actors, able to utilize their power at a high level of general intensity.

Italy

In Italy, for example, after the hasty and haphazard process of national unification in the early 1860s the formal constitution remained unchanged from 1848, and, supplemented by the national legal reforms of 1865, the Statuto Albertino of Piedmont-Sardinia was extended to form the internal legal foundation of the unified Italian state. As discussed, the Statuto was a skeletal, flexible constitution, and, apart from its provisions for constitutional monarchy and its limited guarantees for personal rights, its commitment to a determinate institutional order was limited. Under this document, a governmental system emerged that combined aspects of liberal constitutionalism and the basic elements of representative democracy: that is, it guaranteed the rule of law, a constrained monarchical executive, and rights of personal economic autonomy, and it endorsed a limited (although still significant) representative-democratic

parliament, albeit based in a very small franchise, countervailed by an appointed senate. It has been noted that in Italy a powerful parliamentary legislature developed with surprising rapidity under the Statuto, and the Statuto clearly facilitated the beginnings of a semi-democratic representative state (Di Lalla 1976: 116; Romanelli 1979: 37; Kirsch 1999: 129). Nonetheless, in some of its features, notably its ambiguous stipulations for ministerial responsibility (Arts. 65, 67), the Statuto favoured weakly integrated statehood. The constitutional order of unified Italy was essentially one that stabilized the state apparatus above society as a body of functional institutions with only restricted inclusionary substance and in which power was habitually transacted in closed personalistic fashion. Indeed, in the later nineteenth century, the Italian polity was defined by the emergence of a system of deeply personalized parliamentary governance widely identified as *trasformismo*, which was in large part attributable to the Statuto itself and its attenuated commitment to a strong and electorally accountable executive. This governmental model was pioneered under the progressive leadership of Agostino Depretis in the 1870s and 1880s, and until the extensive suffrage reforms of 1912 it served, intermittently, as the working basis of government in Italy. Under *trasformismo*, governmental decisions were made by the personal brokering of agreements between factions and informal groups in the parliament, and inter-party associations and diffuse cross-milieu alliances were routinely constructed to create a mandate for particular acts of legislation. In the absence of an evolved party democracy, *trasformismo* served within parliament as a technique for administering consensus in government and for garnering ad hoc support for the executive, and outside parliament as a technique for consolidating leading liberal interests in society more widely and for gradually cementing the authority of a powerful progressive class, which used parliament to guarantee its influence (Perticone 1960: 92; Salomone 1960: 110; Agócs 1971: 647). As such, *trasformismo* was a pattern of rule that was expected gradually to broaden the foundations of the unified state through the cautious widening of the executive elites and the very tentative inclusion of different milieux, factions and regional groups in decision-making functions, and so to create a national political culture to support the precariously constructed edifice of the new Italian state. However, owing to its personalistic structure, *trasformismo* strongly encouraged bureaucratic clientelism, and it prevented the emergence of a conclusively representative political system (Ghisalberti 2000: 189, 203). It also meant that much legislation was introduced without full parliamentary approval and that extra-parliamentary personal support for legislation was often vital: it prevented parliament from becoming the

centre of political authority (Rebuffa 2003: 92–4). This mode of governance culminated in the periods in which Giovanni Giolitti held the office of prime minister in the 1890s and after 1900. These periods were marked by the conduct of government through informal accords and by the widespread use of personal contacts within a parliamentary elite to obtain support for legislation from increasingly disparate social groups and their delegates.

It should be noted that the programme of *trasformismo*, refined in the political strategies of Giolitti, was not entirely flawed. Although based in a limited, technical constitution, the Italian polity soon established itself as a moderately integrative state, and it outstripped many other states in its positive legislative capacities. In particular, liberal Italy showed notable success in the sphere of labour legislation. The first decade of the twentieth century witnessed a significant opening to the left, punctuated by Giolitti's legislation establishing workers' insurance, mediation in labour disputes and favourable conditions for moderate unions. Despite this, however, until 1912 the policies of *trasformismo* meant that the social foundations of the state necessarily remained local, particular and personalized, and, as the power of national government was sustained through isolated compromises, the state struggled to detach its power from particular personalities and prerogatives. Italian politics was marked by a weak distinction between government and opposition, and the rotation of power was often dictated by personal concerns and clientelistic favours. Moreover, the power of the Italian state was also subject to acute regional variation, and, despite the use of local prefects to centralize the administration, in many southern areas regional authorities remained outside the absorptive pull of *trasformismo* and basic functions of the central state were scarcely accomplished (Elazar 2001: 34–5). Both at a formal and at a material level, therefore, the constitutional state of liberal Italy was characterized by a relatively low level of generality and a moderate level of inclusivity. Most crucially, Italy remained a weakly integrated state, which struggled reliably to impose direction on society as a whole, and its constitution was clearly adjusted to its level of inclusionary power.

Germany

Some related features can be identified in the constitutional order of imperial Germany (*Kaiserreich*), which was established after Bismarck's work of national unification had been concluded in 1871. The 1871 Constitution, substantially based on the constitution of the North

German Confederation that Bismarck wrote while on vacation in late 1866, was also very flexibly worded, and it contained aspects of very different conceptions of statehood. Like other documents of this era, its essential intention was to stabilize a thin political superstructure above society, and to establish for society a limited apparatus of general coercion and legal control that did little to dislodge entrenched social positions. At one level, the Bismarckian constitution fell into the broad terrain of liberal constitutionalism: it used positivist ideas to guarantee the rule of law, it insisted on publicly disclosed procedures for legislation, and it balanced the supreme executive powers of the *Kaiser* with competences accorded to a council of federal delegates (Bundesrath) and an elected parliament (Reichstag), both of which possessed a portion of legislative power (Art. 5). It also, notably, endorsed a very advanced system of manhood suffrage. Despite this, however, the Bismarckian constitution was largely silent on the question of basic rights, and it mainly addressed rights as institutions under civil law. Moreover, this constitution had the distinctive feature that it left extensive powers – notably in fiscal and judicial functions – in the hands of the federal states, so that the imperial state did not in all respects act as the supreme organ of political power. In particular, it preserved the regional power of the Prussian aristocracy within the newly unified Reich. It ensured that Prussian interests were disproportionately represented in the Federal Council (Art. 6), which was under the fixed presidency of the Kaiser (in fact, the king of Prussia) (Art. 11). Further, under this constitution the regional parliament of Prussia (Preußischer Landtag), which was still (until 1918) based in the weighted franchise of 1849, had a prominent position, so that Prussian interests could be easily within and asserted against the Reich. The unified state of imperial Germany, in consequence, was also a weakly integrated state, and many basic institutions of state power were not fully brought under central state authority. Notably, the revenue-raising capacities of the state were low, the state's control of the judiciary was limited and the ability of the state to enforce policy across all regions remained precarious. It was also not until 1900 that Germany obtained a fully uniform Civil Code, and even this document clearly acknowledged the inner pluralism of the state by preserving certain elements of seigneurial law (Blasius 1978: 222; John 1989: 96).

In addition to this, the 1871 constitution of Germany, although in principle sanctioning a parliament elected by universal suffrage, constructed the state on a quasi-Caesaristic foundation, and it stabilized the executive (originally around Bismarck himself) as a semi-prerogative ministerial body. Indeed, the constitution contained provisions to ensure

that the impact of parliamentary debate on national policy was limited, it placed strict limits on the legislative powers of the Reichstag (Art. 23), and it expressly prohibited the assumption of ministerial office by members of parliament (Arts. 9 and 21). Ministerial office was almost without exception assumed by appointees, whose accountability to parliament remained minimal (Mommsen 1990: 64), and because of this the thread of responsibility between the ministerial body and the Reichstag was tenuous. Moreover, the elected members of the legislature were not authorized to form governmental cabinets, or unilaterally to initiate legislative acts. As a result of this, in turn, the policies of the parties in the Reichstag normally centred on arrangements to create informal coalitions to prevent the passing of legislation, and political parties tended to be structurally weak and defensive. The parties of imperial Germany remained highly milieu-specific, lacking broad integrative force, to some degree rooted still in private associations, and capable only of performing negative functions in the legislative process.¹ Above all, in consequence, in imperial Germany state power was residually diluted by, or in fact not conclusively distinguishable from, local, regional and private authority, mechanisms for the routine rotation of governmental power were under-evolved and personalized, and the constitution necessarily resulted in government by a limited and semi-independent executive, placed above, and selectively interacting with, disparate private groups in civil society.²

It is habitually asserted that the state of imperial Germany was a strong state, able extensively to mobilize society and, in particular, to dictate economic policy to an unusual degree.³ Owing to its personalistic design, however, by most reliable indicators (especially fiscal competence and judicial control) the state created by Bismarck was a weak state. Throughout the imperial era, in fact, there existed certain crucial questions of social direction over which the state could not reliably legislate, and which were normally removed from the state's jurisdiction by the vested interests solidified at its core. The key example of this was

¹ This was Max Weber's view (1922 [1917]: 221).

² For one sample of the vast literature on the 'crippling' of political organs in imperial Germany resulting from the interpenetration of the political system with private associations, see Puhle (1970: 361).

³ This is the myth propagated by the claim that imperial Germany was a Caesaristic political system based on a hegemonic agrarian/industrial coalition of 'rye and iron' which acted as a prerogative 'instrument for the co-ordination of organized interests and the control of the public sphere' (Stürmer 1974: 181).

fiscal legislation. One of the defining problems of imperial Germany was that the state struggled to reform its taxation system and, in particular, reliably to impose inheritance tax. Attempts uniformly to impose such taxes, most notably in the unified liberal-conservative parliamentary coalition of 1907–9, led to the dissolution of government. A further matter which resisted legislative control was the status of Prussia within the empire. Both the reform of Prussia's internal political apparatus and its hegemony in the Reich were questions that could not easily be addressed or altered under the existing constitution. In short, imperial Germany was a key example of an incompletely formed state in which local and private elites assumed powerful positions within the central state.⁴ In these positions, these elites at once utilized the state for their own objectives and residually impeded the full consolidation of the state as a set of autonomous institutions possessing a positive monopoly of legislative power.

Spain

Such characterization can be applied still more strictly to Spain in the imperial era. After a series of constitutional experiments, including a short-lived republican interlude in 1873–4, Spain obtained a more enduring constitutional order in the restoration constitution of 1876. Like other constitutions in the imperial era, the 1876 Constitution was a limited constitution, and it was strongly marked by a 'coexistence of diverse political conceptions' and by a reluctance to endorse one model of government as categorically valid (Sanchez Agesta 1955: 344). In the first instance, this document gave limited recognition to liberal conventions: it enshrined basic positive principles of general legal rule, it guaranteed a catalogue of rights (albeit subject to repeated suspension), and it placed partial legislative power in the elected Cortes (Art. 18). However, the progressive aspects of the constitution were counterbalanced by the fact that the power to convoke and dissolve the Cortes was accorded to the monarch, and the Cortes was organized on a bicameral model in which the elected parliament was checked by the senate, comprising, among others, royal family and appointees, and senior military, administrative and ecclesiastical figures (Arts. 21–22). Most importantly, it was a salient working feature of the Canovite

⁴ Not for nothing has one historian observed that in imperial Germany the 'boundaries between private and public interest almost entirely disappeared' (Winkler 1972: 12).