

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.<sup>4</sup> 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

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

constitution that it organized political representation and inclusion through the pattern of governmental *caciquismo*: that is, through a political structure in which the nomination of deputies for the Cortes was widely monopolized by leading families and members of the nobility in particular local constituencies, and nominees, or *caciques*, secured their hold on their constituencies through clientelistic offering of benefits and personal patronage. Owing to this system, which, as in Italy, served to maintain central government in a highly localized society, elections were often uncontested or their outcomes dictated by informal pacts or effective transactions, and real legislative power was not wrested from private social milieux. As a result, political parties were weak, power was concentrated in the hands of a parliamentary oligarchy and state power was routinely traded as an object of patronage and even subject to clientelistic 'enfeoffment' (Varela Ortega 1977: 354). The Spanish state of the imperial era, in consequence, was also a state that constructed and applied its power at a relatively low level of inclusion and generality, it was based in a complex fusion of public and private functions, and it struggled to assume a monopoly of coercive power in society (Kern 1974: 75). Indeed, the Canovite constitutional apparatus was a striking example of a political order in which the residues of seigneurial power persisted in the institutions of a liberal state.<sup>5</sup> Through this coexistence, the state incorporated inner reactionary forces that decelerated its full formation as a state, and the constitution merely preserved a thin stratum of governance above society that substantially protected and relied on potent private interests.

The constitutional cases of Italy, Germany and Spain, in sum, demonstrate how, during the earlier part of the age of imperialism, many European states were structurally founded in a pattern of low legislative capacity, weak national/territorial control and highly uneven social inclusion. These states typically developed a minimalist positivist constitutional apparatus that ensured that many areas of government both within the state and outside the state remained unregulated, and certain societal privileges were not subject to generalized legal jurisdiction. This dimension of states in the imperial era was not an oversight. Nor, as is often remarked, was it a refusal, on the part of the architects of the imperial constitutions, to adopt a clear political direction (Mommsen 1990: 11–38). On the contrary, the preservation of inner and outer

<sup>5</sup> The term *caciquismo* in fact originates in relations of vassalage in Latin America. On this see Tusell (1976: 75); Ortega (1977: 353–4).

pluralism in the state was a distinct and pragmatically necessary strategy of state construction at this juncture in European history: it was a technique for forming states around a pragmatic working balance between the disparate liberal and conservative groups that the politically relevant constituencies of European societies contained, and it was precisely the low intensity of the states designed through this balance that enabled these states to perform even basic functions of general societal regulation. The most extreme cases of weak statehood in the imperial period, exemplified by the newly unified polities of Italy and Germany, were induced by the fact that states were forced rapidly both to elaborate constitutional devices to extend political power across new nations and to harden societal foundations for their functions of statehood at the same time. These states, in fact, were called on to perform extensive inclusionary functions of statehood before they had been consistently solidified as states, and they were required to accomplish this in societies to which the experience of unitary statehood was new. In such instances, states simply relied on local structures and existing elites to perform functions of governance, and they remained embedded in a social reality in which the use of central power only became possible through a coalescence of the state with local, private or clientelistic sources of order. A further, more uniform, cause of the weakness of states in the imperial era, though, was the fact that in many instances key actors in the earlier processes of state formation had not been able to subordinate the nobility and other collective sources of privilege to the central power of the state. In the earlier nineteenth century, as discussed, many states had only selectively introduced a system of general rights under law, they had only precariously enforced uniform legal principles through society and they had continued to sustain their functions by relying largely on the remnants of a dualistic constitution, in which private and public authority were informally but necessarily conjoined. This model of statehood then persisted, in some societies, into the imperial era. For this reason, the constitutions of many states in the later nineteenth century were of necessity *residually dualistic*: that is, they were polities in which powerful social groups were not fully incorporated within the state, and in which constitutions bought acquiescence for the central state by placating dominant social actors, whose power then wandered irregularly between the private and the public domain.<sup>6</sup>

<sup>6</sup> Again, an extreme example of this is Germany, where Bismarck frequently toyed with the idea of replacing the parliamentary system with a corporate body.

The minimalism of these constitutions was an institutional design that allowed a loose fusion of liberal and conservative interests in the fabric of the state, and, in so doing, it facilitated the basic circulation of uniform reserves of power through society. To ensure that this was possible, however, these states were forced to ensure that many questions of social privilege, status and hereditary entitlement were not directly politicized and many exchanges through society were not assimilated into the functions of the state.

### *Russia*

The most extreme example of a nineteenth-century state founded in a fragile constitutional balance between central administrative organs and vested local powers was late imperial Russia, where the relation between high conservative social groups (i.e. the nobility) and the central monarchy assumed highly distinctive features. In the first instance, the middle decades of the nineteenth century were witness in Russia to a pervasive expansion of the state administration: this was widely driven by enlightened civil servants who aspired to create a social order based in regular legal and administrative procedures (Emmons 1968: 9; Lincoln 1982: 201). As in other European countries, the expansion of the central state administration brought the Russian ruling dynasty into direct conflict with the old nobility, whose authority was still founded in noble immunities, patrilineal privilege and extensive seigneurial jurisdictional rights, including rights of feudal tenure over serfs. It is against the background of this conflict, then, that the Great Reforms of 1861 were conducted: in emancipating the serfs, the reforms at once weakened the material basis for noble privilege and jurisdiction in Russian society and extended the power of the state administration into parts of society formerly under aristocratic jurisdiction.<sup>7</sup> In belated symmetry with other European societies, therefore, the central state in Russia consolidated its power through an assault on the local privileges and patrimonial rights of the nobility, especially in the courts of law. Indeed, the emancipation of 1861 was followed almost immediately, under the Judicial Reform statute of 1864, by a process of far-reaching legal transformation, in which provincial law courts were restructured, judicial arbitrariness was restricted, judicial rulings were made public, the judiciary became

<sup>7</sup> On the hostility of the nobility to the reforms and the ultimate triumph of the state bureaucracy, see Yaney (1973: 31); Field (1976: 292); Wcislo (1990: 43).

independent and (eventually) professionalized and the principle of equality before law was reinforced (Yaney 1973: 389; Lincoln 1990: 62, 105). This statute, a key element in the body of reform legislation, played the most crucial role both in limiting the autocratic power of the monarchy and in reducing the local or private power of the nobility.

Significantly, the expansion of state power prior to and after the Great Reforms left the Russian state with depleted fiscal and administrative capacities. This was due, in part, to the fact that the central administration now assumed responsibility for functions previously conducted at a local level by the nobility: it thus required increasing reserves of public finance to fulfil these functions. However, the fiscal side of this problem also had earlier causes: throughout the early 1860s the treasury had been in high alarm over the level of public debt incurred during the Crimean War (Starr 1972: 222). One outcome of both these processes, however, was the introduction in 1864 of a reform that established self-governing assemblies (*zemstvos*) in different localities, which were to be elected by the local population in three distinct estate-like bodies. Primarily, the *zemstvos* performed administrative functions in regions whose traditional hierarchical order had been destroyed: the *zemstvos* assumed functions in respect of local administration and taxation previously performed by the nobility. Additionally, however, the *zemstvos* also gradually assumed quasi-constitutional features, and they began to act as representational counterweights both to the state administration and to the prerogative powers of the imperial dynasty.

It has been widely observed that the Great Reforms were not intended to destroy the Russian nobility. The nobility's loss of seigneurial jurisdiction was softened by special tax exemptions and by guarantees for noble privilege in local government, and in 1902 legislation was even passed to assist the nobility in paying mortgage debts and to preserve noble monopoly of land ownership.<sup>8</sup> However, the reforms clearly led to a political marginalization of the nobility. Indeed, after the reforms many nobles were forced to seek new modes of political representation, and many began to engage in the politics of the *zemstvos*, often forming loose alliances with the gentry and other social factions.<sup>9</sup> As a result of this, the *zemstvos* became a key forum for the diffuse anti-autocratic political tendencies that gained momentum in the last decades of imperial Russia,

<sup>8</sup> See Ascher (1988: 28) and, on the laws of 1902, Becker (1985: 85).

<sup>9</sup> See the account in Manning (1982a: 28, 43). It is calculated that nobles amounted to above 40 per cent of *zemstvo* membership (Galai 1973: 7).

and many nobles and members of the gentry drifted through the *zemstvos* into the Liberation Movement, an influential political grouping that urged moderate constitutional reform in the imperial state. The activities of the *zemstvos* in this movement culminated in the Zemstvo Congress of 1904. This Congress witnessed the formation of a pro-reform constitutionalist majority among different groups in the *zemstvos*, which demanded the establishment of limited representative government throughout Russia. The political intentions of the *zemstvo* activists have often been questioned, and their constitutional ambitions were clearly still, in part, intended to secure elite privileges outside the central state, and to fight incorporation of the nobility within the state bureaucracy: they are viewed as forming a constitutionalist group that at once rejected the central bureaucracy and yet also normally fell short of endorsing fully democratic constitutional reform (Manning 1979: 51). Ultimately, however, the *zemstvos* played a substantial role in the half-completed constitutional revolution of 1905, and in particular they helped to force the tsar to commit himself to the October Manifesto in that year. This Manifesto, extracted against a background of general strikes and rising political insurrection, promised fundamental civil freedoms for the Russian population, committed the tsar to an extension of suffrage and the convocation of a national parliament (Duma), to be ascribed fixed and irrevocable legislative powers. This period of national reform finally resulted in the Fundamental Laws of April 1906, which, while reserving substantial veto powers and rights of ministerial control for the tsar, created the first basic constitution and system of national representation for the modern Russian state.

The emerging constitutional order of late imperial Russia, thus, contained important parallels to other states in the imperial era, and it, too, hinged structurally on a precarious balance between centrist interests concentrated in a state bureaucracy and the diffuse privileges of powerful elites. In Russia, to be sure, the central bureaucracy was more markedly personalistic and prerogative than that of other states: notably, the imperial family utilized the civil service more strictly as a chain of autocratic command. In many respects, moreover, gentry constitutionalism was stimulated, through the *zemstvos*, in a fashion reminiscent of aristocratic resistance in other European states at an earlier historical juncture. Indeed, the term 'gentry fronde' to describe the constitutional activities of the *zemstvos* is especially apposite: this description captures both the anti-imperial and the anti-centralist motivations of the *zemstvos*, which remained a source of simultaneously progressive and reactionary opposition both in the authoritarian

imperial state and in the reformed imperial state after 1905.<sup>10</sup> Nonetheless, the constitutional force of the *zemstvos* again illustrates how the structure of states in the imperial era remained broadly rooted in a constitutional dualism, in which the administrative power of the state was ambiguously both supported and fragmented by politically suspended members of the nobility and other corporate elites. In fact, Russia had the distinction among imperial states that its failure internally to accommodate landed elites caused an unusual, although temporary, fusion between some sectors of the nobility and the gentry and more progressive constitutional/democratic sectors of Russian society.

### *France*

Partial alternatives to these patterns of diffuse or weakly consolidated statehood existed in France and Britain: in societies, that is, in which by the later nineteenth century states possessed a relatively high level of public density and political inclusivity. In this context, the briefly worded constitution of the Third Republic of France, introduced in 1875, occupied the middle ground in the spectrum of governmental integrity in different European societies. This constitution, naturally, stood outside the category of imperial constitutions as, after 1870, France was a republic, and, although it (initially) contained a powerfully symbolic presidency reflecting the interests of the majority monarchists in the National Assembly, it was founded as an alternative to the Caesaristic design of the Second Empire. Nonetheless, the founding document of the Third Republic shared some common features with other constitutions of the age of empire. For instance, first, this constitution contained no formal catalogue of rights, and it located questions of rights in the sphere of civil law and administrative law. Second, this constitution allowed great flexibility and tactical minimalism in the definition of governmental legitimacy. Although it committed itself by legal resolution to the core doctrines of general suffrage and republican rule, the representative system of the Third Republic was originally centred around a powerful second chamber, designed to restrict the force of popular democracy (Mayeur 1984: 57). Above all, the founders of the Third Republic symbolically refused to define the state as a localized centre of sovereignty. Indeed, prominent commentators on the constitution concluded that the Third Republic reflected a strictly limited, pragmatically realistic and decisively

<sup>10</sup> For this term, see Manning (1982a); Fallows (1985).

*anti-Jacobin* conception of popular sovereignty, in which sovereign power was commonly vested in diverse institutions of state and not derived from one primary formative act or one unitary expression of sovereignty (Durkheim 1950 [1900]: 85; Duguit 1921 [1911]: 495). Underlying the transition from the Second Empire to the Third Republic, in fact, was a widespread and deeply rooted conceptual process, in which earlier doctrines of national sovereignty and legislative power were transformed into a gradualist and highly positivistic theory of ‘republican legalism’, which perceived the formation of republican states as a process, not of spontaneous engagement, but of elite-led legal engineering and gradually inclusionary social ‘pacification’ (Nicolet 1982: 156–64).<sup>11</sup> The 1875 Constitution was thus marked by the initial sense that the stability of the state depended on the fact that it should – specifically – not be required to perform extensive functions of foundation or inclusion, and that the actual direction of government should not be prescribed in constitutionally exclusive principles.

In these respects, the 1875 constitution of France had a clear similarity with other constitutions of this era in that it was intended to institute a technical order of governance above the primary conflicts of society. At the same time, however, the constitution of the Third Republic clearly exceeded other constitutions of the imperial era in its exclusion of private groups from the state and in its ability to consolidate the state as a substantially public order. Vitally, in Article 6 the constitution made ministerial responsibility the cornerstone – or the ‘essential element’ – of the state, and it defined ministers, both particularly and collectively, as bearers of strictly public functions (Esmein 1928: 257). Moreover, although it rejected higher-norm provisions for control of statutes, it contained a limited entrenchment clause (Art. 8) to ensure that the public form of state could not easily be altered by simple legislative decisions. Indeed, the Third Republic, although sworn to the republican concept of popular sovereignty, also witnessed a tentative increase in support for external judicial control of sovereign power.<sup>12</sup> Owing to

<sup>11</sup> For examples of positivist republicanism, see Littré (1879: 444). Littré saw the *theoretical rule* of the people as coincident with the *factual rule* of bourgeois elites, guaranteeing the rule of law through society (Scott 1951: 99). On the Third Republic as an ‘absolute republic’, see Rudelle (1982: 289).

<sup>12</sup> After three decades of the Third Republic, leading constitutionalists acknowledged the ‘political preponderance’ of the legislature but argued that the lack of judicial control was *très regrettable* (Jèze 1925 [1904]: 385). Hauriou, although clear about the prescribed separation of judicial and legislative functions, also argued that ‘control of the constitutionality of laws’ was the ‘logical consequence of the supremacy of the national constitution’ (1929 [1923]: 267).

these principles, this constitution was also able to construct a state apparatus that was fully distinct from singular persons, to promote ideas of loyal opposition and to allow different political parties to rotate in the use of power. Above all, it created a ministerial executive that was designed to efface personal privilege from state power. Leading republicans of the 1870s, notably Jules Ferry, were able to observe the state of the Third Republic as an organ of 'general interest', which was fully separate from any personalistic or quasi-feudal obligations (Barral 1968: 278). Gradually, in fact, the 1875 Constitution provided effective positive foundations for the exercise of state power, it strengthened the distinction of the state from specifically embedded interests and it consolidated the state as a deeply inclusive public order. In consequence, the Third Republic gradually evolved capacities for applying laws at a higher level of generality and inclusivity than many other European states. Unlike the governments of Spain, Germany and Italy, it was able positively to extend the sphere of legal-political regulation, across regional and functional differences, to incorporate a large array of societal exchanges. In particular, this can be seen in the packages of labour law introduced by republican parties in France: most notably the laws of 1884, which authorized the free formation of trade unions and sanctioned rights of economic coalition, the industrial arbitration law of 1892, and the moderate syndicalist laws before and after 1900 that promoted municipal labour exchanges (*bourses du travail*) to co-ordinate union organization and worker education. By 1899, in fact, the Waldeck-Rousseau administration brought a socialist minister, Alexandre Millerand, into government. On these grounds, the Third Republic was an example of a state whose constitution, at least intermittently, led to a rise in both the integrity of its institutions and the inclusive force of its laws.<sup>13</sup> In this instance, the limited commitment to republican integration in the 1875 Constitution provided a foundation for a sustainable and increasingly deep-structured polity, in which the state's controlled and selective inclusion of society widened its capacities for the general circulation of power.

### *Britain*

A further alternative pattern of constitutional formation and polity building in the imperial age was evident in the constitution of Britain.

<sup>13</sup> An important article on this point stresses that the republican governments of the Third Republic were able to legislate 'independently of elite interests' (Friedman 1990: 152).

Imperial Britain was a state that possessed a relatively high level of administrative solidity (Chester 1981: 362), and it was capable of utilizing statutory power, to a large degree, in autonomous and uniformly inclusive fashion. By the late 1880s the British state had, through a series of quasi-constitutional reforms, acquired a broad-based male franchise (although one still including only roughly half of all working-class men), and it at once drew support from and applied power to society in relatively generalized and recursive style. In addition, the British state was strengthened by the fact that it possessed the beginnings of a mass-democratic party system, in which political parties were directly involved in the formation of governments, and it was able to control social inclusion and parliamentary mobilization by means of two (usually) quite simply differentiated party-political factions. The fact that there were only two major parties until after 1900 meant that the British state could control its reactions to matters for legislation, that the distribution of power between government and opposition could be procedurally simplified, and that the ascription of power to individual politicians occurred at a low level of personalism and without disruptive resonances for the state as a whole. Through these processes, the state obtained an apersonal structure under public law, which greatly inflated the mass of effective power that it contained. Even theorists close in some questions to conservative principles, such as Dicey, were adamant that the 'sovereignty of Parliament and the supremacy of the law of the land' were 'the two principles which pervade the whole of the English constitution' (1915 [1885]: 406).

Of particular significance in the British constitution of the later nineteenth century was the fact that the strength of the parliamentary apparatus, which had been established at a very early stage, meant that liberal and conservative interests acted as coexistent elements of the state, and highly particularist interests of regional conservatism did not drag too heavily against the state's legislative operations. As a consequence, the British state possessed an advanced degree of autonomy in its legislative policies, and it was able consistently to draw most questions of social distinction and most objects of social contest under positive state jurisdiction. Crucially, for example, Britain had already begun to impose permanent income tax in the 1840s, and throughout the imperial era the British state was clearly able to implement statutes that weakened power attached to aristocratic land tenures. Furthermore, by the late nineteenth century the British state, like its counterpart in France, had also begun to assimilate aspects of the labour movement. Throughout the latter stages of the nineteenth century the more repressive legislation for control of labour markets was

repealed, and trade union activity was decriminalized in the early 1870s. By the first decade of the twentieth century the labour movement had been integrated, via the Liberal Party, into the margins of the political mainstream.<sup>14</sup> The expansion of the state's statutory authority, however, culminated in the policies of Lloyd George in the years before the First World War. In particular, this was reflected in the reform of the House of Lords (1911), which cut the veto powers of the Lords, in the 1909 budget which aimed to increase inheritance tax and in the cautiously labour-friendly packages introduced in the National Insurance Act of 1911 and the Trade Union Act of 1913. None of this is meant to say that in the imperial period the British state was not an inherently conservative state. Indeed, it is patently clear that in Britain in the imperial era the aristocracy possessed privileged access to the executive. However, it was a conservative state in which conservatism had fused with liberal statism at an early formative stage, and it was able independently to legislate against entrenched interests of conservative elites. Indeed, the fact that as early as the eighteenth century a preliminary variant on liberalism, Whiggism, had been able to assert itself in Britain as a potent outlook meant that by the imperial era liberal concepts of statehood were able to traverse and include a number of social groups, and most factions in society were prepared (notionally, at least) to accede to a concept of the state as an inclusive public order under general laws. In legislating positively over labour, then, liberal politicians were also able gradually to lower the inclusionary threshold of the political system in society, and internally further to solidify and generalize the state's foundation and to harden it against particular elites. To a greater extent even than that of France, the nineteenth-century British constitution provided for a strongly integrated state which was able to use political power at a reasonably high (although surely not unconstrained) level of autonomy and generality.

On balance, through the imperial period the strongest states (that is, the states able to apply their power at the highest level of general autonomy and inclusion and statutory positivity) were those states that possessed the most elaborate and embedded constitutional structure, usually containing, to a limited degree, inclusionary elements of mass democracy. States that fell short of semi-democratic constitutionalism normally encountered

<sup>14</sup> On this gradual process, see Steinfeld (2001: 192); Curthoys (2004: 236). One historian has described the Liberal Party as 'the principal working-class party' in late nineteenth-century England (Tanner 1990: 19). On the importance of the partial integration of labour as a source of post-1918 democratic cohesion, see Luebbert (1987).