

the use of exceptional powers to bypass parliament in order to pass budgetary legislation. At the height of the hyperinflation, notably, President Friedrich Ebert (a Social Democrat) prorogued parliament and used emergency laws to implement fiscal packages to stabilize the currency, and many of the most vital decisions in this critical period of German democracy were made without parliamentary debate: crucial decisions regarding economic stabilization became law through executive fiat. This process necessarily led to a reinforcement of the executive in relation to parliament, it both factually and symbolically eroded the legitimacy of parliament, and – importantly – it offered financial experts and strategists direct personal access to the executive (Feldman 1997: 754–802). Between 1930 and 1933, the economic crisis caused by the Wall Street crash of 1929 provoked a similar response: the normal functions of parliament were again, this time more enduringly, suspended, and the day-to-day responsibilities of government were progressively assumed by appointed members of presidential cabinets, authorized to implement policy under Article 48 by the arch-reactionary President Hindenburg. After the Wall Street crash and the withdrawal of US capital from the German public economy in 1929, most major acts of legislation were introduced, as executive prerogatives, by presidential decree. Most legislation at this time was designed to pursue a radically deflationary austerity course, and emergency laws were used to cut public spending, reduce welfare and insurance provisions, and ultimately also to unstick the collective wage agreements established through the corporate bargains of 1918.<sup>44</sup> The model of government by presidential cabinets under Article 48, in fact, was specifically devised to replace the parliamentary coalition of 1928–30 led by the Social Democratic Party (SPD) with a simultaneously authoritarian and business-friendly executive.

In both crisis periods of the first German democracy, therefore, the parliamentary constitution of 1919 was dramatically weakened, ministerial offices were either partly or largely disconnected from the Reichstag, and a free-standing executive, supported by a conservative civil service, assumed many functions constitutionally accorded to the legislature. Owing to the semi-independence of the executive after 1930, in particular, cabinet positions were often allocated through personal associations and informal arrangements, and core functions of state were rapidly transformed into personally brokered commissions. Notably,

<sup>44</sup> Explaining these policies, see Scheuner (1967: 253); Krohn (1978: 119); Patch (1998: 182).

further, because of the primary fiscal orientation of legislation drafted at this time, the concentration of power in the executive also led to a close convergence between governmental and private/economic elites. It is widely recorded that the late-Weimar political apparatus was intensely vulnerable to the machinations and lobbying activities of private organizations, and the personalistic composition of the state executive meant that a number of socio-economic elites, who possessed limited democratic authority and whose access to power ran through personal channels, were able to assume entrenched positions in the margins of government (Böhret 1966: 104, 125; Winkler 1979: 203; Grübler 1982: 189). In addition, this system also gave a consolidated role to the military, which, to speak euphemistically, was not renowned for its democratic credentials: the last German cabinet before the assumption of power by Hitler's National Socialist Party (NSDAP) was closely linked to the army, and from 1932 onwards it was widely anticipated that the military might act as a bulwark for an executive whose societal legitimacy was becoming more and more fractured and illusory. Throughout the last death throes of the Weimar Republic, therefore, the structure of the state was thinned down to a narrowly founded, semi-accountable and extremely personalized executive. By mid 1932 this was close in composition to the ministerial executive of the imperial period, although its reliance on the military reflected a proximity to Italian fascist principles. This state, of necessity, was extremely porous to private interests, it pursued legislative functions through the concerted decisions of non-elected elites, and it freely co-opted representatives of private bodies in its planning apparatus (Patch 1998: 125–8).

As in Italy in 1922, therefore, the elites that assumed control of the German state executive after 1930 ultimately gave supreme political power to a movement loosely falling into the fascist family of political parties: they installed Hitler as chancellor in a cross-party ultra-rightist cabinet in early 1933. The motives of the German elites, it is legitimate to speculate, were probably rather different from those of the late-liberal and conservative elites in Italy more than ten years previously. Indeed, the German ministerial elites did not collapse in the face of extra-parliamentary intimidation quite as meekly as those in Italy. In Germany, between 1930 and 1933 extensive experiments were conducted, using emergency laws as a legal basis, to devise a non-parliamentary or at least executive-led political apparatus, which could be stabilized against the more radical trade unions and without the electoral support of the Social Democratic Party on one side, but by

means of which Hitler could also be excluded from power.<sup>45</sup> It was only when, against a rising tide of street-level political violence, the options for constructing an executive bastion against both the left and the extreme right had been exhausted that the introduction of legislation under emergency clauses was suspended and a deal was struck between the old reactionary elites entrenched in the executive and Hitler's party.<sup>46</sup> Moreover, in their numerical strength the National Socialists were far more powerful in 1933 than was the PNF in Italy in 1922, and they were able both to mobilize a violent cross-class front and to exploit procedures of democracy to destabilize the democratic system, much more potently than had been the case in Italy. In Germany, in consequence, the extreme right around Hitler did not follow the Italo-fascist technique of simply using old elites as accomplices in the dislocation of the state executive from the legislature. On the contrary, the old conservatives in Germany had already effectively created a semi-detached minority executive by 1930, or at the latest by 1932. The National Socialists then came to power by mobilizing resources both of mass democracy and mass-political agitation in order finally to overthrow the remnants of this executive, which had been rendered hollow and precarious through the use of prerogative laws. Once in power, in fact, unlike the PNF, the NSDAP began rapidly to dissolve (and, in some cases, to murder) the old elites installed in the state executive, so that the power of the NSDAP was, ultimately, not checked by the residually pluralistic political arrangements that characterized Mussolini's rule. Overall, the pattern of democratic/constitutional collapse in Germany reflected, not solely a process of executive detachment and elite collusion, but also a process in which the executive was colonized by a populist movement that possessed (in numerical/electoral terms) a much stronger mandate than existing governmental alternatives or possible coalitions.

After a short period of government the National Socialists demonstrated the extent of their annexation of the state executive by

<sup>45</sup> Chancellor Brüning obtained the passive support, or the 'objective co-operation', of the SPD. His anti-Nazi stance was affirmed by traditionally conservative groups in the business community.

<sup>46</sup> This is an unfashionable argument. Most interpreters see a direct continuum between Papen, Schleicher and Hitler, and they argue that Hitler came to power under Art. 48. In my view, though, Hitler came to power, not through presidential use of prerogative laws, but because Hindenburg renounced the use of such laws. By late 1932, Art. 48 was primarily designed to keep the NSDAP, the largest party in the Reichstag, out of power, and Hitler was – paradoxically – a more democratic alternative to government under Art. 48. To support this, see the half-forgotten essay by Freund (1962: 117).

conducting a dramatic overhaul of the internal structure of the state. In some cases this reflected the policies practised by Mussolini after 1922. In Germany after 1933, in the first instance, the NSDAP immediately abolished free legislative institutions, and Hitler's introduction of the Enabling Law in March 1933 effectively dissolved all opposition parties and suspended the democratic provisions of the 1919 Constitution. As in Italy, this process of institutional demolition was also flanked by a destruction of the liberal judicial order. The early months of Hitler's regime saw a political cleansing of the judiciary, under laws of April 1933. These months also witnessed the introduction of criminal laws, most importantly the 'Lex van der Lubbe', which imposed new measures against treason and allowed retroactive application of criminal law. As a result of this, the People's Court (Volksgerichtshof) was founded in 1934, and it was designed to try special cases of treason, and in particular to apply new laws against political crimes: as in Italy, the politicization of criminal law was a vital instrument in the suspension of liberal-constitutional rule. Moreover, Hitler's regime also followed the pattern created by Mussolini in that it began a selective re-privatization of political power, and it obtained support for the party executive by entrusting the enforcement of power to a diffuse array of private and social actors. As in Italy, this was most especially the case in economic policies, the implementation of which was coloured by deep interpenetration between public and private initiatives. Reflecting the precedent of the PNF in Italy, in fact, Hitler's regime triumphed in a political landscape in which offices of state had already been subject to a process of partial re-privatization, and in which the functions of state had fused in amorphous fashion with extra-political actors. Ultimately, the NSDAP formed a regime in which, for all its claims to political totalism, many social functions were withdrawn from the state, the state began to coalesce with officers, commissioners and special delegates assuming power outside the state, and state power was sustained through society by its hazy convergence with the clientelistic authority of half-private half-public actors.<sup>47</sup>

Despite these similarities, however, Hitler's regime deviated from the model of Italian fascism in several ways. This was most obviously the case in that it began comprehensively to replace the conventional institutions of the state and the state administration by fusing offices of state with the private offices of the governing party and by at once replicating,

<sup>47</sup> For an example see Gotto (2006).

multiplying and conflating the centres of formal and informal power through society.<sup>48</sup> Unlike the fascist regime in Italy, the regime pioneered by the National Socialists was a political order in which a political party began comprehensively to absorb the existing state apparatus, and to dissolve the conventional administrative integrity of the state. In Italy after 1922, as discussed, Mussolini's party had been ultimately (albeit haphazardly) integrated into the pre-existing state, and the Fascist Grand Council had been transformed into an institution not, in its institutional construction, categorically distinct from ministerial organs of late-liberal states. In Germany after 1933, in contrast, the formal structure of the state was far more dramatically dismantled, and power formerly concentrated in ministries of state was transferred into divisions of the NSDAP. Hitler's regime had the crucial distinction from other fascist governments that it used a highly orchestrated mass party to annex the state, it substantially abolished the existing lineaments of statehood, and, to a large degree, it forced departments of the state to interlock with originally independent organs of social mobilization. The state, in sum, lost its abstracted status of consistency and differentiation against private social actors, and it began to fuse haphazardly with an array of private associations and coercive personal networks.<sup>49</sup>

The regimes established by Mussolini, Hitler and other authoritarian rulers of inter-war Europe were thus marked by salient distinctions. However, all were regimes that emerged because democratic states created after 1918 had possessed insufficient integrative power to assume the highly expanded functions, necessitating the integration of irredeemably antagonistic social groups, imputed to them. Internally, these states had been unable to integrate potent private elites, they had reserved executive power for privatized interests, and they had struggled to build cohesive institutions to solidify the polarized constituencies from which they now derived legitimacy. Externally, these states had struggled to produce generalized legal responses to meet the societal demands placed on them, they had failed to apply power in relatively equal or inclusive manner across different social groups, and they had been unable to obtain a palpably legitimate monopoly of political

<sup>48</sup> For an account of this, which also still recognizes a persistent dualism in the relation between state and party, see Caplan (1988: 138). For still the best account of the governmental 'polycracy' established by Hitler, see again Broszat (1969: 363–402).

<sup>49</sup> This argument is made, in diverse fashion, in some of the classical literature on Hitler's regime (Schmitt 1995 [1938]: 118); Neumann (1944).

violence. All European states experienced a process of dramatic expansion and inclusion in the 1914–18 war and its aftermath, during which time they rapidly incorporated, and were required constitutionally to balance the material interests of, a number of (on occasions) intensely hostile collective actors. Ultimately, however, many states were incapable of maintaining an equilibrium between these groups, and as the economic terrain and balance of influence changed as a result of the economic traumas and conflicts of the 1920s, the integrative functions of states were widely re-privatized in favour of dominant economic interest groups, whose representatives availed themselves of weakly integrated state executives in order either to suspend or (more normally) to realign the corporate agreements which states had entered into during and after the war (Blaich 1979: 64). For each of these reasons, inter-war states commonly reacted to their inner inclusionary crisis by selectively devolving state functions to powerful or privileged private actors and by returning to loosely integrated neo-dualistic constitutions. As discussed, in authoritarian Austria and Portugal this occurred through a process in which representative procedures for legislation were suspended, and statutory force was ascribed to semi-private corporate groups, protected by an authoritarian executive. In fascist Italy, this occurred, paradigmatically, through a process in which the state executive was detached from parliament, and the executive at once relied on semi-integrated actors for maintaining social control and used prerogative powers to sustain and preserve elite economic positions throughout society. In Germany under the NSDAP, this occurred through a process in which the state executive was forced to conjoin with a broad-based totalitarian party. This party distributed coercive power through society by means of diffuse organs of local/private control, and it utilized originally private actors as privileged executors of violent political prerogative. In both major fascist states, however, fascism, beneath its ideological veneer of *totalism*, was formed as a system of *compensatory statehood*. In this system, the structural and inclusionary weaknesses of late-liberal states were counterbalanced through diffuse clientelistic support through society, the techniques of prerogative corporatism pioneered during the war were selectively and more coercively preserved, and a broad set of societal actors were co-opted in the margins of the state to perform quasi-political functions of regulation. In each case, the end of democracy meant that the state deprived itself of its most potent instruments of public inclusion, it began to sustain its power with far

more erratic, privatistic and locally applied techniques for organizing support, and it eroded its basic abstractive structures of public statehood.

### **Rights and the Constitution of Fascism**

The constitutional trajectory of many inter-war European states, to summarize, described a transition from expansive statist corporatism, pioneered in the First World War, to semi-privatistic authoritarianism, cemented in the fascist and quasi-fascist regimes of the 1920s and 1930s. Notably, both the corporate system of the war years and the fascist systems of the 1920s and 1930s were established by extensive use of emergency laws: in both cases governments used prerogative powers to bind corporate arrangements together. The use of emergency laws to stabilize the economy and the labour market marked a key thread connecting the wartime political economy of 1914–18 and the post-democratic regimes of fascist Europe. In this respect, fascism evolved as a direct continuation of the authoritarian corporatism pioneered in the First World War, and the wartime political-economic structure was the main antecedent for fascist government. In addition to this, however, the democratic constitutions established after 1918, in themselves, created very propitious circumstances for the later formation of authoritarian regimes, and some features of fascist rule evolved directly from the constitutional models of semi-corporate democracy created after 1918. Indeed, the second precondition of fascism might be identified in the constitutional structures with which post-1918 states sought to manage their newly expanded inclusionary obligations. Naturally, it must be re-emphasized here that not all post-1918 European states adopted fully corporate constitutions. However, as discussed, throughout Europe the ideals of corporatism and the quasi-corporate experience of the war engendered a widespread corporate constitutional orientation: this created a social, legal and political terrain in which the solutions to problems of economic management and societal inclusion offered by fascist parties were able to gain resonance and appear plausible, and, as such, corporate constitutionalism itself vitally prefigured fascist governance.

In general, as discussed, the link between corporate constitutionalism and fascism resulted from the fact that, in tying state legitimacy to very expansive material/volitional inclusion and programmatic provisions, corporate constitutions of necessity at once overburdened the state and obscured the functional boundaries of statehood. This then led to the

co-opting of private actors as supports for the basic functional operations of the state, and it allowed members of private elites to obtain secure positions in the extended peripheries of the state. Corporate constitutionalism thus eroded the resources of political abstraction and proportioned inclusion around which states had historically constructed their functions. This created a fertile terrain for the half-privatistic clientelism that marked fascist rule. More specifically, however, the transformation of the *rights fabric* of classical constitutional law in the corporate constitutions promulgated after 1918 also played a particularly significant role in the process of democratic-constitutional collapse in the 1920s and 1930s. The fact that the post-war constitutional landscape involved an immediate inclusion of singular and collective social actors in the periphery of the state as claimants to, and volitional producers of, material rights did much both to over-expand the functions accorded to the state and to render state power susceptible to authoritarian re-particularization. Above all, the fact that these constitutions, within certain constraints, defined rights as institutions bringing legitimacy to states as expressions of an overarching societal will, and construed state legitimacy as obtained through the identity of state and society effected by collective claims over rights, led to an over-taxing of the inclusionary capacities of states. In consequence, the widened and pluralistic rights structure in the constitutions created after 1918 eroded the abstracted structure of the state, and it weakened the ability of states to construct their political power in relatively autonomous and internally consistent political fashion. The corporate/pluralist constitutional models evolving from the First World War, to be sure, were partially based in the assumption that, in mass-democratic societies, states required highly inclusive reserves of legitimacy: this legitimacy could be obtained through the allocation of different sets of rights, and the exercise of multiple rights, some of collective character, acted to create a substantial and solidifying will to legitimize the power of the state in all its dimensions as a potent inclusionary force. These models presupposed that the construction of citizens as bearers of objective corporate rights would allow the state to incorporate the plural components of society and consolidate the state *from below* as a powerful apparatus integrating, representing and sustained by, a strong social will, structured around powerful organizations of societal and material interest. As the political-economic landscape and balance of societal influence changed throughout the 1920s, however, the principles of corporate constitutionalism underwent a deep transformation, and corporate pluralism began to evolve in a categorically authoritarian direction. From



1922 onwards, in fact, corporate ideals became the basis for new constitutions in which the integrative force of collective objective rights was still retained, but in which corporate rights were now applied as instruments of strict and exclusive integration *from above*. Corporate constitutional ideals, in constructing plural private activities as objects of programmatic inclusion in state power, thus obstructed the classical restrictive and politically measured functions of rights, and they helped to generate a constitutional system in which the executive could utilize objective rights as elements in an apparatus of socially coercive and semi-privatistic integration and control.

### *Italy*

In Italy, for example, the pre-eminent project of the early years of the Mussolini regime was the transformation of the late-liberal polity into a state with a corporate constitution, based in objective integrative rights. In addition to its reconstruction of the state around a detached executive, in fact, the Italo-fascist constitutional ideal contained a pronounced corporate dimension, which was centred around a deep revision of classical theories of rights: it was founded on the principle that under fascist governance the regulatory functions of the state extended beyond the limited objectives of liberal states, and the state obtained legitimacy by integrating all elements of society as inner/organic constituents of its *total* constitutional apparatus. Underlying this model was the idea that the fascist constitution suspended classical distinctions between private law and public or constitutional law, and it utilized structured syndicates to integrate all societal exchanges – public, private and personal – to elaborate one total unitary legal order, so obtaining legitimacy from an absorptive allocation of rights to organized social collectives. Fascist constitutionalism had its practical centre in the principle that left-oriented syndicalism had to be recast as a model of state-centred corporatism, in which all syndicates were vertically integrated in, and formally responsible to, the state executive, enabling the state to acquire legitimacy as a totalistic legal organization of all *categories of production* existing in society.<sup>50</sup> For example, Ugo Spirito claimed that the fascist

<sup>50</sup> Vincenzo Zangara demanded a type of syndicalism designed to serve the ‘fortification of the state’ (1931: 125). Dario Guidi advocated a corporate system in which syndicates acted in ‘subordination’ to the state (1931: 139). Nicola Palopoli stressed the interwoven nature of syndicalism and corporatism, but argued for a corporate system as a state-centred ‘system of mediation’ between different economic groups (1930–1: II, 55).

state necessarily 'extends, through the life of the syndicates, to all individuals', thus founding a political order based in an inclusive 'identity of state and individual' in all societal functions (1932: 45–6). Giovanni Gentile expressed this in more philosophical terms: he defined the fascist state as a state obtaining legitimacy by reflecting that 'immanence of the state in the individual person' which he construed as 'the proper essence of the state' (1929: 50). The Italian fascists thus rejected the traditional constitutional view that the 'juridical personality' of the state was derived from a statically public legal/normative order, under which particular private agents obtained prior or stable rights outside or prior to the state. Instead, they defined the constitution of the state as a total volitional personality or a 'dynamic reality' of inclusion and active/voluntaristic formation, in which all particular social agents were integrated and harmonized by collective-associative involvement in syndicates and corporations, and in which membership in half-public, half-private groups and associations formed the basis of entitlement to rights guaranteed by the state (Bortolotto 1931: 14, 221).

Reflecting these constitutional ideals, the earlier part of Mussolini's regime in Italy saw the introduction of legislation to provide for a new system of labour regulation, designed to subordinate the labour market and the production process to state control, and to integrate and minimize conflict over issues of production. The early part of the regime, for example, gave rise to an accord, the Pact of Palazzo Chigi, between the confederation of fascists and the largest industrial lobby (Confindustria), in which it was agreed that industrial organization in Italy should reflect an endeavour, under the supervision of the party government, to promote co-operative relations between business and labour and to avoid class conflict for the sake of national development. These corporate ideas were then expressed, in highly authoritarian fashion, in the Rocco Law and other pieces of labour legislation of 1926. These laws organized all deputations of organized labour in one vertical syndicate, they created labour courts to settle industrial disputes, and they subjected trade union activity to strict control and repression. They also instituted a National Council of Corporations (consolidated under legislation of 1930 as an 'organ of state'), possessing powers to represent professional interests and shape economic legislation (Palopoli 1930–1: II, 400–5). The corporate orientation of fascist economic and constitutional policy had its centrepiece in the Labour Charter (*Carta del Lavoro*) of 1927. The Labour Charter, the focus of Mussolini's ambition for a fully corporatistic system of political-economic direction, granted rights of

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

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