

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 In establishing a relatively hardened set of procedures, withdrawn from everyday political activities, to preserve and resolve issues related to constitutional rights, therefore, the Constitutional Court enabled the state to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

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

Federal Republic of Germany

In post-1945 West Germany, the process of constitution drafting also moved from a diffuse advocacy of relative political-economic pluralism towards a pattern of restrictive liberal consolidation. Some of the first post-war constitutions in the German regional states (*Länder*) were based on a social/legal democratic model, and they strongly reflected the concepts of material or economic democracy characteristic of German constitutional principles from the Weimar era. The more controversial clauses of these constitutions, however, were suppressed by the occupying armies and they ultimately became redundant.⁹ The ultimate character of the Basic Law of 1949, originally only intended to assume force as a provisional constitution until the united German people were able to establish a nationally legitimate constitution, was in fact specifically conceived as a remedy for the problems resulting from the Weimar Constitution. Strongly influenced by US antitrust law, the Basic Law aimed at once to avoid the executive-led presidentialism and the reliance on emergency laws of the inter-war polity and to restrict highly pluralistic convergence between economy and state. In the latter case, it endeavoured to reinforce the non-derogable status of singular basic rights, to limit the inclusionary allocation of material and corporate rights, and – primarily – to ensure that bearers of rights were strictly located outside, and not formative of, the state. Instead of the semi-corporate rights of the Weimar era, it gave primacy to a catalogue of rights that reflected classical ideas of subjective liberties and defined the primary spheres of human liberty as outside state power. Moreover, it categorically recognized political parties as organs for structuring the will of the people (Art. 21), and in so doing it helped to regulate the conditions of access to public institutions and to formalize procedures for the more consistent rotation of government and opposition. One consequence of this was that the emergent West German state of the post-war era was able, gradually, both to tolerate a higher level of pluralistic activity in society in general and to regulate the ways in which political parties used and appropriated power stored in the executive.

Despite this rejection of corporate constitutionalism, the Basic Law contained certain core ambiguities in its catalogue of rights, which, as in

⁹ The most important example was the 1946 constitution of Hesse, which contained a clause (Art. 41) that provided for the socialization of key enterprises. This was opposed by the US military, and, partly for that reason, never applied. For documentation of this see Berding (1996: 1068).

1919, resulted from the fact that the Parliamentary Council comprised representatives from a number of different political parties. For this reason, in addition to its provisions for rights of free expression, conscience, ownership and protection from the state, the Basic Law contained significant (although limited) provision for welfare rights, and it set an advanced standard for the institution of social-welfare rights as primary elements of constitutional order. Influenced by delegates of the SPD in the Parliamentary Council, Article 20 defined the new state as a 'democratic and social federal state', and it indicated that formal rights under law needed to be flanked by rights of material dignity: it thus expressed (albeit cautiously) the presumption that the state would evolve as a welfare state.¹⁰ This principle was reinforced, although not clarified, under Article 28. In these respects, the constitution clearly construed state legitimacy as arising from a modification of classical concepts of the democratic-legal state to include principles of material equality. In fact, subsequent legislation extended these principles by introducing rights of co-determination at the workplace in some industrial sectors and by establishing extensive mechanisms for collective bargaining. Notwithstanding this tendency, however, the Basic Law clearly configured its catalogue of rights in order to place limits on the political internalization of societal exchanges. Most significantly, it avoided binding the legitimacy of the state to regulation of conflicts over production and salaries, and, although presupposing moderate levels of state intervention in the economy, it largely removed industrial conflict from immediate state jurisdiction (Art. 9). Indeed, the commitment to material reallocation foreseen by the Basic Law presupposed that redistribution through the state was to be conducted, if at all, under fixed and prior legal terms: that is, it defined material distribution, not as an expression of the variable material will of the sovereign body contained within the state, but as an administered element of the more general rule of law dictated by the constitution. The rights structure of the Basic Law was far less inclined to promote a fragmentary re-privatization of state power than the rights catalogue in the constitution of 1919. Indeed, the construction of the welfare state, founded in social rights, emerged at this point as a model of legal statehood that acted to expand guarantees for classical liberal rights, yet also used the legal form of social rights to

¹⁰ On the origins of these ideas in the economic-democratic concepts of the Weimar era see Niclauß (1974: 35, 42).

evade the expansive *material republicanism* that had coloured the corporate proto-welfarism of the 1920s.

In addition to this, the West German Basic Law, again responding to Allied pressure, contained potent protection for an independent judiciary, and for a strict separation of powers. Notably, the entire process of constitutional formation, from the first constitutional drafts of 1948 to the final text of the Basic Law, reflected an express presumption in favour of a powerful neo-Kelsenian constitutional court, situated outside the regular judiciary.¹¹ Once established, the court assumed designated functions in respect of federal questions: it was responsible for resolving conflicts of competence between highest federal organs, for ensuring the compatibility of new laws (either at the level of the *Länder* or at federal level) with constitutional law and especially with the provisions for basic rights that the constitution enshrined, and for deciding over conflicts of competence between state and *Länder* (Art. 93). However, it had wider normative functions, and it was intended to ensure that principles of international law were reflected in legal findings of ordinary courts (Art. 100), to integrate veto players in the political system to check laws against constitutional norms, and – most importantly at first – to protect the rights-based ‘free democratic basic order’ from any political party or group of actors which might reject or undermine it (Art. 21).¹²

As in Italy, this Federal Constitutional Court, established in 1951, brought several pronounced structural benefits to the emergent state of the Federal Republic. One benefit of the court, first, was that the statutory authority and judicial consistency of the federal state were increased. Indeed, although the Basic Law originally provided (Art. 95) for a further high court to guarantee unity in legal finding through the Federal Republic, this task fell in large part to the Constitutional Court, which acted as a *de facto* guarantor of federal legal integrity. This was particularly important in view of the inter-war background: the Weimar Constitution, although containing limited facilities for constitutional review, did not effectively provide for regulation of constitutional conflicts at national level, and statutory uniformity had been very difficult to maintain in the 1920s.¹³ After 1949, however, the Constitutional

¹¹ In Austria the Constitutional Court was reactivated shortly after the war.

¹² The power to prohibit anti-constitutional parties, on right and left, was assigned a key function in the original design of the court (see Laufer 1968: 48).

¹³ In fact, German states had a long history of judicial review. As early as 1815, Hardenberg proposed a court of last resort for the German Confederation (Klüber 1815: 53). Powers of review were also implicit in the Constitution of 1848–9 (§§ 52, 125–128). Review functions

Court succeeded in enforcing the primacy of federal law over state law without provoking the deep conflicts that had marked the Weimar era, and the technical bolt-tightening functions of the court contributed in quiet yet structurally vital manner to the consolidation of a state with unitary statutory and judicial force (Blair 1981: 112). The fact that the state of the Federal Republic was endowed with a formal corpus of basic rights and a constitutional court to apply these rights and to check legislation contributed greatly to the consolidation of a strong central state, and it both supplemented and augmented the provisions made in other articles to cement the primacy of the federal state over regional legislators (Arts. 31, 70–75). The most influential early theoretical account of the functions of the court, in fact, tellingly defined the court as a ‘constitutional organ’ equal in status to legislature and executive, which played a vital role ‘in the process of state integration’ (Leibholz 1957: 149–50).

A further benefit of the court, second, was that the activities by rights allocated by the state to social agents were subject to a process of secondary reflection in singular acts of legislation, and access to and contestation over rights were governed and filtered by an institutionally independent judicial body. Externally, this tended to harden the function of rights in stabilizing the boundaries of the state, and it helped to prevent social agents claiming or disputing rights in haphazard or erratically unsettling fashion. Indeed, in conjunction with the fact that the Basic Law only endorsed weak material rights, the functions of the court served to ensure that rights were located outside the state and were not enacted as elements of a societal will expressed through the state. Internally, this acted (albeit counter-intentionally) to strengthen the legislature against the executive and, in ensuring a strict division of competence between legislative and executive operations and strict procedures for statutory ratification, it protected legislative functions from interference by private actors able to gain access to the executive. This also meant that many vital decisions of state could be referred to the

were transferred to the Bundesrath in imperial Germany. But the Weimar Constitution contained multiple provisions for review by a confusing array of courts, which possessed overlapping remits. The powers of the Reichsgericht were primarily determined under Art. 13. Art. 108 provided for a further high court, the Staatsgerichtshof, which had competence both for administrative and for statutory review. The controversy over review (*richterliches Prüfungsrecht*) had defining status among public lawyers in the 1920s. However, the Weimar Constitution did not create a single constitutional court with powers of abstract review. In keeping with the spirit of the period, advocates of strong powers of review often viewed the power of courts as a means for guaranteeing (if necessary against the will of parliament) strong political direction (Trieppel 1929: 8).

constitutional court and subject to external review, so that at critical junctures contests over macro-societal direction could be articulated and addressed in relatively formalized procedures. In this respect, the court created a legitimating framework in which the state could withdraw its power from incessant contest and reflect its authority as secured under formally extracted norms. The construction of the Constitutional Court as a custodian of rights, in short, performed the beneficial function that it enabled the state to presuppose the law as a stable normative condition of its legitimacy, so that express legal support could be invoked to implement contested political rulings. The Constitutional Court thus helped to separate the public order of the state from its day-to-day actions, and it provided a body in which the state could articulate and control a legal order to accompany its use of power. This meant in turn that the political system was not obliged endlessly to generate independent foundations for its legitimacy, it internalized an instrument to de-personalize and facilitate the processes of statutory legitimization, and it greatly alleviated the statutory operations of the state. These functions were of particularly vital importance in Germany as they assumed effect in a socio-historical setting traditionally marked by acute lack of parliamentary stability and state integrity and by an acute excess of political privatism and personalism. The fact that the state could explain itself as obtaining a strongly internalized constitutional order standing alongside or above particular persons bearing power enabled the state to avoid personal monopolies in the use of power, and, for the first time in German history, it permitted the state fully to differentiate itself from persons factually exercising governance and to rotate power between different persons, organs and parties. By creating a facility that allowed the state to displace and internally to control its power and to avoid the concentration of full sovereignty in one highly politicized legislative system, the constitutional court substantially reinforced the factual, positive and effective powers of the state, and it practically enhanced the monopoly of political control and reserves of usable power possessed by the state.¹⁴ The normative construction of power within the state, in short, factually multiplied the volume of power which the state contained.

¹⁴ The opposite is usually argued (see especially Waldron 2006). However, in my view, the argument that judicial review weakens democracy revolves around the rather absurdly counter-factual assumption that democracy entails one set of sovereign practices, concentrated in a discursive legislature. The normative case against judicial review usually exemplifies *extreme sociological under-reflection*.

In both West Germany and Italy, in consequence, it is arguable that the constitutional design adopted after 1945, although partly imposed by occupying regimes, marked an important leap forward in the inner-societal process of state construction. In each case, the new constitution substantially consolidated the power of traditionally weak states. In the case of Italy, in fact, it is arguable that it was only with the formation of the 1948 Constitution that the state began to assume reliable features of statehood and gradually to exercise a monopoly of national force. To be sure, this process remained tentative: throughout the 1960s the Italian democracy still resorted to personalistic techniques of consensus manufacture that recalled the strategies of *trasformismo* concluded by Giolitti. The use of state power remained precariously balanced in relation both to the social groups that it represented and to the regions over which it applied power, and the Italian political system remained conditioned by endemic lower-level clientelism. In West Germany, the process of state construction, solidified by the constitution, was more rapid. Although it was widely asserted through the 1950s that the state executive remained in thrall to powerful lobbies and that political power retained a partly privatized core,¹⁵ the federal state evolved quickly to a high level of functional abstraction, and it was capable of establishing inclusive and general bases of support. The double-checking of power by a constitutional court was a core innovation in this respect, and it created the basis for a strongly abstracted and internalized body of public law, for an abstract de-personalization of statehood and for a controlled rotation of governmental power which had not been fully established before 1945. In both settings, the constitutional order augmented the generality of state power, and it stabilized the structure of the state as a relatively autonomous actor. Indeed, it was specific to the functions of constitutional courts in these polities that, although designed to resolve problems of federal and regionalized states, they exercised vital functions of abstraction in post-fascist settings. In tracing the limits of statehood against private regional actors and providing constructed de-politicization for traditionally precarious executives, they hardened the public order of the state against the danger of internal collapse and re-privatization.

¹⁵ For example, Otto Stammer warned about a 'structural transformation of parliament' resulting from the power of economic associations to influence political parties (1957: 597). Werner Weber defined economic associations as forming a 'para-constitutional system of forces with public claim to validity' (1985 [1957]: 67).

Of the most critical importance in these processes of state reinforcement was the fact that the establishment of strong procedures of judicial review was tied to the increasing recognition of an international rule of rights. This meant that national legislation was progressively determined, not only by national constitutions, but by wider normative standards, which impacted on specific statutes and rulings of specific courts. In particular, the aftermath of the Second World War witnessed the institution of the International Court of Justice (1946) as successor to the Permanent Court of International Justice. It also saw the ratification (1950) and enforcement (1953) of the European Convention on Human Rights, which fostered the presumption that single states were obliged to act in accordance with universal norms in respect of rights, and that legislation should be passed in conformity with international standards. Overall, although in principle placing external checks on the power of single states, these conventions brought deep functional advantages and heightened factual autonomy for post-war democratic states. Specifically, they established a set of norms to which single states could refer in order to accompany and control the different stages of their legislative processes and insulate themselves against destabilizing movements and temporary interests installed within their executives. The emergence of a strong prejudice in favour of international higher-law review that accompanied the democratic transitions of the post-1945 era thus directly reinforced the authority of states, and the emergent multi-levelled, and increasingly trans-societal, normative order of rights provided a complex legal defence through which states could counteract the inner-societal usurpation or fragmentation of their power. Indeed, the broad presumption in favour of rights that accompanied the post-1945 transitions might be seen, like earlier rights revolutions in the eighteenth century, as a societal occurrence that facilitated the abstract inclusive and generalized application of power, and controlled the contingency involved in statutory legislation in uncertain or evolving political environments.

The second wave of transition: constitutional re-foundation in the 1970s

In contrast to these cases, some European societies preserved an under-evolved rights fabric after 1945, and their adaptive political structures and levels of autonomy were strongly and detrimentally marked by this fact. Generally, states that had not followed the pattern of constitutional transition and rights-based political abstraction after 1945 and still

retained constitutions integrating a high volume of social functions into the political system struggled to mobilize power effectively across society, and they proved particularly susceptible to crises of legitimacy. These states, consequently, were also ultimately compelled, normally through loss of political autonomy and quasi-revolutionary transitions, to adopt alternative constitutional forms to react to and manage these crises.

Portugal

The first prominent example of this was the authoritarian regime in Portugal under Salazar and, in its last years, Caetano, which collapsed in 1974. In certain respects, the constitutional transition in Portugal commencing in 1974 reflected the wider causal patterns underlying constitutional formation, and it had its preconditions in a societal condition determined by acute levels of political convergence and structural inflexibility. To illustrate this, for instance, it has been widely argued that the Portuguese turn to a closed corporate economy under Salazar in the 1930s was superseded in the later years of the regime through a process of economic restructuring and international opening, and it was replaced by a technocratic style of capitalist growth management.¹⁶ Owing to this change, the 1960s also witnessed a consolidation of liberal economic design in Portugal: specifically, this period saw an increase in labour mobility, emigration and inflows of foreign capital, which altered the configuration of Portuguese society and disrupted existing patterns of industrial control and highly sedimented stratification. It is also widely documented, however, that Salazar's *Novo Estado* struggled to accommodate these social changes, and in some respects it preserved a political-constitutional structure adapted to a less fluid system of authoritarian corporate capitalism. Indeed, until 1974, many political dimensions of the corporate structure remained in place: in particular, political activity and opposition remained strictly controlled, opposition remained (at best) only semi-legal, and the repressive, vertically ordered executive/judicial apparatus of the Salazar regime was recurrently utilized for political and economic supervision. This simultaneity of progressively liberalized economic policy and persistent neo-corporate political order had a number of implications for the state. It had the consequence, first, that the state apparatus became highly isolated and

¹⁶ For analysis see Lewis (1978: 639); Baklanoff (1992: 6–7); Machado (1991: 19); Chilcote (2010: 60).

rigidified, and it was expected to perform regulatory functions to which it was not adapted and which exceeded its rather inflexible steering capacities.¹⁷ It also had the consequence that, owing to the persistently close links between economic and political co-ordination, the state was deeply susceptible to destabilization caused by economic conflict and unrest: economic instabilities were of necessity internalized as political conflicts, and the failure of government to provide for wage increases or satisfactory settlements over changing production conditions necessarily consumed and drained its legitimacy. In response to this, the government was forced further to suppress independent labour activity, to heighten its policies of economic control and generally to place extreme burdens on its legitimacy in questions of economic direction (Wiarda 1979: 111). The Portuguese state in the last years of the corporate era might thus be seen as suffering classically from a lack of political differentiation or excessive structural convergence: this had the result that material conflicts migrated easily into the state, and it meant that the state lacked autonomous capacities for resolving the economic problems that it assimilated and it was routinely forced to over-consume political legitimacy.

In addition, even in its latter years, the Portuguese regime was still characterized by a high degree of internal pluralism. Notably, it remained characterized by deep interpenetration with prominent private/economic groups, it failed fully to integrate actors based in the military, it was compelled to negotiate bargains with the military as a semi-independent body, and it relied on diverse personal arrangements with the church. Indeed, the fact that the state lacked formal mechanisms for the distribution of power and the control of access to the executive meant that it was sustained by half-internal, half-external support from representatives of different social organizations, and it was obliged to pacify groups only loosely assimilated in its institutional apparatus to preserve practical and ideological legitimacy. The dense yet pluralistic intersection between the state executive and these organizations meant that internal or personal conflicts with or between these groups had the potential to acquire extremely destabilizing consequences for the integrity of the state as a whole. Notably, the connection between the executive and the military gradually became the Achilles heel of Salazar's regime: after an attempted coup in 1961, the degree of military representation at ministerial level declined, and the dependence of the regime

¹⁷ Excellent here is Schmitter (1975: 14).

on military support became more uncertain. Moreover, although the majority of clergy remained loyal to the *Novo Estado*, the regime suffered a weakening of its legitimacy when confronted by opposition within the church, and it remained sensitive to alterations in political orthodoxies sanctioned by the Vatican.¹⁸ By 1974, in short, the Portuguese state struggled to use or apply power in inclusive and abstracted form, it solidified its authority through precarious processes of piecemeal personal inclusion and ideological borrowing and it was susceptible to both external and internal delegitimization. The regime collapse of 1974 was thus an event that responded to these weaknesses and drew impetus from the structural and inclusionary deficiencies of the state.

It is evident that the Portuguese constitutional transition of 1974 did not mark an immediate breach with principles of social organization characterizing the Salazar regime, and some structural features of the *Novo Estado* remained pronounced throughout and after the Portuguese revolution. In the first instance, the revolution was initiated from within the state machinery – that is, by insurgent corps in the army, supported by diverse anti-dictatorial forces inside and outside the state – and, as a result, the interim revolutionary regime preserved some elements of the pluralism and loose institutional integrity of the old order. After its moderate inception, the revolution veered leftward, and the Armed Forces Movement (MFA), centred around a corps of insurrectionist officers, was, despite a counter-coup in 1975, the dominant force in the provisional governments of the period 1974–6. During this time the MFA provided support for the interim state, and the supreme body of the MFA, the Council of the Revolution, functioned as a transitional political vanguard by purging government departments of those sympathetic to Caetano, by controlling the economy through the cleansing of banks and the nationalization of key industries, and by assuming vital judicial functions. Only gradually was the transitional process brought under the regular rule of law: a central element in this consolidation was a law of 1976 that declared void ideologically driven purges of public-sector institutions (Costa Pinto 2006: 192). However, it was not until 1982 that immediate military supervision of judicial, legislative and executive actions was terminated, and that the state executive was fully detached from the army. Until 1982 the Council of the Revolution assumed final powers of veto over legislation (in fact, it acted as a final court of appeal and served as guardian of the quasi-revolutionary

¹⁸ On this point, I consulted Cerqueira (1973: 495, 513).