

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).

constitution), and it used its powers to support a powerful presidential executive. The Council of the Revolution was replaced in 1982 by a Council of State.¹⁹

Against this background, the democratic Portuguese constitution adopted in 1976 was also influenced both by the particular social conditions of the transition period and, more arguably, by the residual corporate configuration of Portuguese society under Salazar. At one level, the constitution created preconditions for the stabilization of a parliamentary-democratic state, and it sanctioned conventional rights and freedoms in respect of political activity, expression and movement. It also limited state intervention in private existence by guaranteeing personal security (Arts. 26–7), and it reduced political control of family life, marriage and belief: it crucially restricted the convergence between the state and the church (Art. 41). Most particularly, the constitution authorized free elections and enshrined principles of governmental accountability (Art. 48), and it recognized the existence of a number of political parties (Art. 47), represented in an independent legislature, standing beside and possessing a position inferior to, but not incorporated within, the presidential executive. Simultaneously, however, many classical functions of constitutional rule were not prominent in the 1976 Constitution. Even though the constitution was written after the defeat of the army radicals and the removal of military assemblies from the institutional structure of government, it still authorized powers of legislative and judicial control assumed by the army during the transition. Article 3 of the constitution stated that the Armed Forces Movement was a ‘guarantor of the democratic achievements and the revolutionary process’: it was, as such, entitled to share in the exercise of sovereign power. The status of the military forces was further cemented under Article 10. In consequence, although the constitution promised universal human rights (Art. 16), pledged itself to rights of free trial (Arts. 31, 32), and established a judiciary that was independent and subject to law (Art. 208), the judicial power of the state remained subject to external restraints, and the executive authority of the (non-civilian) president was intensified. Indeed, although the constitution formally established a supreme tribunal (Arts. 212, 215), separate interpretation of statutes by judges was restricted as long as the Council of the Revolution retained influence. In this respect, the constitutional text preserved a high degree

¹⁹ Throughout this paragraph I consulted Gallagher (1975: 203); Maxwell (1995: 159–60); Magalhães, Guarnieri and Kaminis (2006: 160); Costa Pinto (2006: 176; 2008: 272).

of institutional pluralism within the state, the judicial checks for hardening the state against inner pluralism were not firmly embedded and the state remained founded on a bargained 'diffusion of power', in which a number of prominent actors in the 1974 revolution claimed and retained a stake in state authority (Maxwell 1986: 132).

In addition to this, the system of social rights instituted in the 1976 Constitution also strongly reflected the influence of pre-1974 political structure, and in some respects the constitutional rights of this era looked back to the patterns of constitutional foundation typical of inter-war Europe. As in earlier parallel cases, the 1976 Constitution gave direct expression to the interests of the diverse parties involved in the constituent body, and on points of economic policy it contained palpably divergent stipulations. These divergences were particularly accentuated in the catalogues of rights in the constitution. Notwithstanding the fact that it enshrined the right of private ownership (Art. 62), for example, the constitution defined Portugal as a sovereign republic in transition towards a 'society with no classes' (Art. 1), and it instituted far-reaching provisions for economic redistribution and control. To reflect this, it pledged the state to a programme of 'economic and social planning'. It also guaranteed the right to work (Art. 52), it established an extended system of social security (Art. 63), and it recognized the right to reasonable habitation (Art. 65). Further, it guaranteed the rights of workers to labour under conditions likely to facilitate personal self-realization (Art. 53), to establish extensive free trade-union associations (Art. 57), to form workplace committees to defend their interests (Art. 55), to participate in legislation regarding workplace conditions and to negotiate collective bargains (Art. 58). As a result of these extensive social provisions, the 1976 Constitution preserved aspects of a quasi-corporate economic system that had prevailed before 1974. To be sure, the state now clearly abandoned the authoritarian capitalist design pioneered by Salazar, and it was re-formed as an actor whose regulatory powers were oriented towards material redistribution. However, the syndical legislation of the constitution built on and maintained informal continuity with prominent structures of the corporate system of the *Novo Estado*.²⁰

The period of constitutional reform in Portugal, however, ultimately approached conclusion in extensive constitutional revisions completed in 1982, and it was at this time that the state obtained a fully functional constitution. These reforms, implemented by the incumbent moderate

²⁰ This point is made in Bruneau (1984: 68) and Chilcote (2010: 78–9).

coalition, altered some of the provisions for basic rights in respect of production and distribution, and they loosened the link between executive and judiciary. In this respect, the constitutional revisions of 1982 accorded greater protection to private-economic enterprise (Art. 85), they gave equal status to private, public and corporate sectors of the economy (Art. 80), and they eliminated programmatic statements about the long-term goal of building a socialist economy. One crucial innovation in these revisions was that, in limiting the programmatic functions of the state, it reduced the powers of the president and the military, and it set preconditions for the relatively apolitical rule of law. In particular, these reforms put an end to the use of the judiciary as an instrument of military/political control and planning, and they established a separate Constitutional Court which placed review of statutes under full civilian control.²¹ In consequence, although a high level of societal corporatism persisted in Portugal after this time, the end of the protracted constitutional transition in 1982 reduced the inner pluralism and societal density of the state, and it saw the implementation of a rights regime that delineated stricter boundaries of internal and external state competence, placed activities covered by rights outside the state and concentrated the power of the state in internally controlled institutions.

Spain

The Spanish constitutional transition in the 1970s marked a further important example of societally adaptive and politically abstracted constitutional reform. Until the end of the Franco regime, the Spanish state preserved aspects of the corporatist legal order first instituted in the early years of Franco's rule. This constitutional apparatus had a number of highly deleterious consequences for the state, and by the time of Franco's death in 1975 the Spanish state, like the Portuguese state, was characterized by problems of low differentiation and abstraction, and it suffered from many classical structural problems of *weak statehood*. The constitutional reforms during the post-1975 transition acted in part to rectify this weakness and to raise the autonomous capacities of the state.

First, the structural problems of the pre-1975 Spanish state resulted from the fact that it assumed accountability for a large mass of social

²¹ It was only in the constitutional revisions of 1982 that the functions of de-controversialization attached to constitutional courts became clear. For expert analysis, see Magalhães (2003). Note also Opello (1990).

problems, and the factual legitimacy of the state was undermined through the diffuse politicization of society. To be sure, in its latter years the Franco regime differed from other salient one-party systems in that the economic responsibilities of the state were limited and the Spanish state, although authoritarian, did not aim comprehensively to control economic production and distribution. Up to 1958, notably, the state had assumed accountability for setting wage levels and it intervened in the economy to ensure that economic conditions were favourable for capitalist enterprise: it acted to suppress independent economic activity and economic conflict, and to regulate living standards and income. From the later 1950s onwards, however, Franco reduced his commitment to corporate economic control, and he accepted an increasing degree of private autonomy and private negotiation, including collective bargaining, in the economy. The official syndicalism of the early Franco period was diluted after this time, and prominent policymakers increasingly favoured more standard liberal modes of economic administration. Yet, despite this, the state continued to uphold extensive quasi-syndical arrangements for wage negotiations, it preserved a large number of unproductive subsidized industries, and it was burdened by heavy regulatory policies, a poor taxation system and a small state budget. Additionally, the latter years of the Franco regime witnessed only a selective, supply-side liberalization of social policy: independent economic organization and attendant patterns of trade-union mobilization and industrial conflict were still subject to intense state repression, and restrictive vetoes were placed on political parties and associations representing rival economic prerogatives. In consequence, the state was forced to internalize a high volume of social conflict, it was very heavily dependent on military support, it was vulnerable to the repercussions of economic violence and protest, and it was forced to exhaust its legitimacy in a very large number of societal exchanges.

Second, as it lacked the inner flexibility in policymaking obtained by states recognizing political organization by more than one party or more than one person, Franco's state, like Salazar's regime, had the paradoxical quality that, simultaneously, it concentrated power in the hands of a few particular persons and state ministries and devolved far-reaching political responsibilities to semi-private groups. Indeed, Franco's political system was deficient in several basic characteristics of statehood, and it even lacked the capacity for reliably regimenting administrative power in the offices of a hegemonic political party. Instead of this, political power was exercised by Franco, his ministers

and a loose aggregate of associates and ideological supporters, and the regime as a whole relied on highly particularistic 'channels of interest articulation', existing outside the state administration, to connect the state executive with areas of society relevant for specific policies (Gunther 1980: 259). At one level, in consequence, the regime suffered from an intrinsic lack of policy options, as the personal preferences of individual ministers or privileged interest groups determined key aspects of policymaking (Gunther 1996: 167). Additionally, however, the allocation of power to external groups meant that these groups brought their own unsettling legitimating patterns into the state, and they employed state power for objectives not fully internal to the state. A key example of this was the relation between Franco's regime and the church. During the early part of the regime, Franco had repeatedly sought to obtain legitimacy for his government by recruiting support from the Vatican and by associating his policies with the visceral anti-communism of the Roman Catholic church. Indeed, in return for ideological support Franco ensured that members of the episcopate obtained high political standing, and he even ceded powers of state jurisdiction to the church, notably in marital cases and family law. Throughout the 1950s, moreover, the administration of the state became increasingly porous to Roman Catholic pressure groups, particularly representatives of the Opus Dei movement, who advocated policies of technocratic economic liberalization and assumed responsibility for many aspects of public policy. In each of these respects the state constructed preconditions for societal compliance by borrowing legitimacy from the church. In the 1960s, however, Franco's regime suffered critical ideological deflation through the rulings of Vatican Council II, which underlined the increasing support of the Holy See for human rights and constitutional democracy. As a result of this, the ideological assistance that the state had assimilated from the church began to evaporate, and the state struggled internally to manage its reserves of legitimacy. While repressively restricting levels of pluralism throughout society, in consequence, the Franco regime, like that of Salazar, was shaped by a moderately high level of internal or personalistic administrative pluralism (Rodríguez Díaz 1989: 223), and vital decisions were contested by factions within the state and delegated to groups with only tenuous claim to state authority. Owing to its inner personalistic pluralism, in fact, the state lost the ability autonomously to control its motivational basis, and the absence of open and external competition over ideological resources finally led to a depletion and erosion of its authority.

Third, as the state did not possess a fully independent judiciary, questions of legal contravention were absorbed in intense form into the political system, and this overstrained the legal capacities of the state and overtaxed the resources of legitimacy that it possessed.²² This was particularly the case because the Franco regime subjected political and ideological dissent to high levels of criminalization, and it used the judiciary as a potent repressive tool. After 1945, to be sure, the status and functions of the Spanish judiciary had been gradually formalized. In particular, the jurisdiction of military courts, prominent in the wake of the civil war, was curtailed through the consolidation of the regime in the 1940s, and the law courts, although their power and competence were limited by the executive and the police, acted less frequently as immediate protagonists of political violence and generally obtained a moderate degree of independence. Despite this, however, the moderating shift to legalism and judicial neutrality was never complete. In 1963, for example, a Tribunal de Orden Público was established, which was responsible for the prosecution of political malfeasance. Even with the institution of this body, however, the state was not easily able to prosecute all deemed guilty of political crimes. After 1963, the military continued to exercise some (although limited) judicial functions, and the state was required to create numerous specialized tribunals for dealing with different categories of crime. The state suffered a number of grave functional disadvantages through its persistent politicization of criminal law: it struggled to sustain all its judicial functions, it was required to rely on personal support from the military for the enforcement of law and it was unable to uphold a controlled unitary legal order in all spheres of jurisdiction. The traditional problem of weak judicial unity that defined Spanish statehood in earlier periods of history persisted at this time, and legal rulings were handed down by a bewildering range of official and semi-official tribunals, some linked to the church and the army (Beck 1979: 297). In addition, the state's criminalization of political opposition meant that the law was applied throughout society as a medium of volatile contestation, so that judicial processes and outcomes were endlessly re-internalized in the state, many judicial findings raised far-reaching questions about the overall construction of the political system, and the state was consequently obliged to translate social conflicts into immediately politicized and disruptive exchanges. In particular, owing to its economic directives, the state

²² For an important study that stresses the independent attitudes of judges under Franco, see Toharia (1975b: 476, 482). See also Magalhães, Guarnieri and Kamini (2006: 144–7).

was required to prosecute a very large number of cases in the sphere of labour law, and it was forced to engender and confront an erratically politicized mass of labour conflicts (Toharia 1975a: 162). Through its close coupling with the judicial apparatus, therefore, the political system lost its ability to limit its political intensity through law, and it dramatically inflated its vulnerability to socio-political conflicts. Indeed, as the state was unable sensibly to regulate its relation to society through singular rights and uniform laws, it was compelled to register a large number of social contests as posing in principle quasi-totalistic questions about the legitimacy, the political form and the direction of society as a whole. For this reason, the Spanish state under Franco had the defining characteristic that it was exposed to extreme and ideologically intensified conflicts over regional autonomy and identity, it was forced to use repressive legislation to preserve territorial control and it was easily destabilized by the separatist ambitions of the regional/national groups that it incorporated.

The inability of Franco's state to abstract itself from, and to accommodate itself to, a pluralistic external social reality, in short, placed the political system in a condition of high personalism and weak adaptivity, in which it was required to generate and consume large quantities of legitimacy, and it was marked by a shortage of political alternatives in its attempts to address emergent social themes. The process of democratic constitutional transition in Spain after Franco's death in 1975, consequently, marked a reaction to these predicaments of structural density, over-inclusion and pluralism in the Spanish state. One of the key outcomes of the transition was that, although both at a socio-economic and at a political/structural level the transition did not end the prevalence of corporate modes of organization in society,²³ it generally alleviated the political apparatus of the expansive burdens of inclusion that had previously characterized it. Like other democratic transitions, the process of political transformation in post-Franco Spain used constitutional devices to locate objects of political inclusion outside the state and to reduce the intensity of society's material and volitional convergence around the state. The process of constitutional reform was initiated by the Law for Political Reform in late 1976, which abolished the corporatist and highly circumscribed form of the Cortes surviving from the Franco regime. This was followed by a raft of reformist legislation, providing, among other

²³ During the failed coup of 1981, for example, it was not primarily parliament, but partners in corporate socio-economic concertation, who stood up for the democratic order (Foweraker 1987: 67).

innovations, for the legalization of independent political parties, the establishment of free trade unions and the introduction of an electoral law allowing all parties equal access to governmental power. On this basis, then, a democratic Cortes was assembled in 1977, whose chief duty was to write a new constitution for the transitional state.

The constitution drafted by the Cortes and approved in 1978 was a key example of the structural re-articulation of a political system by constitutional means. In the first instance, the 1978 Constitution sanctioned a number of plural rights, and it extracted the areas of practice covered by these rights from immediate state jurisdiction. Prominent among these rights were rights of ideological and religious liberty (Art. 16) and rights of free expression of political opinion (Art. 20). As corollaries, the constitution also included rights of free political activity, association (Arts. 21–22) and trade-union activity (Art. 28), so entailing a conclusive sanction for the liberty of political parties and free political formation through society. In addition, while enshrining the right to work and to earn a living wage (Art. 35), the constitution restricted the state's internalization of economic conflicts: it endorsed rights of private ownership of property, rights of inheritance (Art. 33) and rights of entrepreneurial activity (Art. 38), and it abandoned the partly syndicalist model of economic organization utilized under Franco. Notably, the constitution specifically recognized the right of both workers and employers to engage in free collective negotiation regarding conditions of labour (Art. 37) and to exercise, within certain limits, policies of collective bargaining. In this respect, the constitution reflected the influence of the socialist and communist parties in Spain, which had been legalized in 1976. However, rather than fully integrating unions into the state, it used recognition of free trade unions as an instrument for ensuring that the state was not defined or forced internally to act as an organ for industrial control or even as a primary regulator of industrial conflict. In each respect, rights acted as institutes of abstraction within the state which separated the state from the pluralistic aggregate of personal arrangements and intersections fundamental to the Franco regime, and they created far sharper lines of public-legal and private-legal articulation and externalization to support the state.

In addition to these rights, further, the transitional reforms in Spain after Franco's death included crucial regulations to reduce the catalogue of political crimes, to control exchanges between the executive and the judiciary and to guarantee equal personal standing before the law and legal ruling by relatively impartial judges. On one hand, the guarantees

over rights of expression, conscience and political action diminished the politicization of criminal law, and the constitutional protection of basic rights ensured that the judicial consumption of legitimacy by the state was limited and the ideological burdens placed on the state were curtailed. The relative depoliticization of criminal law was in fact a key element in the reform process. Additionally, however, the constitution established a fully separate judiciary (Arts. 117, 124), it consolidated a unitary basis for the judicial system, it brought military jurisdiction under full control of the state and it prohibited all independent or exceptional tribunals (Art. 117). The traditional judicial weakness of the Spanish state was partly rectified under the terms of the 1978 Constitution, and the heterogeneous sharing of legal authority between the state, the church and the military was terminated. In this legislation again, therefore, the establishment of rights-based legal uniformity played a key role in preserving the monopoly of state power and in allowing the state to obviate the private contestation and borrowing of power through the legal order.

Furthermore, like other transitional democracies at this time, Spain followed the German and Italian precedent in adopting a Constitutional Court (operative from 1980). This court, unlike in Portugal, was founded at a relatively early stage in the transition, and it played a significant role in the process of stabilization. The institution of the court meant, first, that laws passed by the Cortes were subject to both concrete and abstract review, and that laws could be appealed either by judicial organs or by ordinary citizens. As in post-1945 cases of democratic transition, the court enabled the state to establish and entrench the general rule of law across its territories. Indeed, as in Italy after 1956, the court created a legitimating structure in which residues of earlier legislation, if in violation of formally declared constitutional laws, could be swept away and an effective legal *tabula rasa*, promoting increased confidence in the state, could be instituted. Moreover, as in other post-authoritarian states, the establishment of the Constitutional Court meant that cases reflecting fundamental-rights questions could be referred to special procedures and removed from both ordinary courts and the state executive. Through this function the central state was able, once again, to deflect conflictual decisions to a separate judicial body, and the law both provided resources of political de-concentration for the state and impeded the emergence of legal cases in which private actors used the law to unsettle political power. In each respect the court extracted a body of public law above the functional operations of

the state: in so doing, it greatly reinforced the inclusive power of the state and it contributed substantially both to the internal structuring of the state and to the consolidation of the state as the primary bearer of political authority. Of particular significance in this was the fact that the court adjudicated in contests over competence between the central government and the regions (Arts. 161–162), and it did much to weaken the traditional potentials for extreme political conflagration that resided in region/centre antagonisms.

Overall, the emergence of a new constitutional reality in Spain after 1975 brought substantial structural advantages for the state order, and, in using a rights apparatus to split many activities from the state, it facilitated a significant simplification and inclusionary intensification of state power. The societalization of the diffuse regulatory functions previously ascribed to the state, for instance, meant that the state, although still bound to certain corporate functions, was less extensively compelled to incorporate the conflictual dimensions of society, and it could relieve itself at once of the programmatic obligations, the ideological requirements and the attendant conflicts involved in extensive societal planning. Primarily, this had the result that the state was not expected to generate absolutely monopolizing ideological patterns to support all its political acts, and the ideological pluralization of the political landscape established through the constitutional transition meant that societal conflicts could be articulated in a number of different procedures and registers, which did not invariably necessitate direct or centric conflict over state power. Furthermore, crucially, the fact that the reforms also severed the direct link between the state executive and criminal law meant that contested legal cases were referred to separate courts, the law was less widely subject to politicization, and the resources of legitimacy possessed by the state were not incessantly implicated in everyday judicial findings. Additionally, the fact that the new constitution sanctioned independent party-political activity and recognized a number of different parties as protected under law had similar consequences. This meant that the state acquired a legal structure that enabled it increasingly to rotate power and to ensure that its power was distinct from the persons and milieux in which it was temporarily invested. In turn, this had the consequence that the state was not required to condense all its legitimacy into solitary manifestos or highly exclusive political programmes, that it obtained flexibility and adaptivity in responding to new contents or themes in society, and that it assumed new capacities for proposing and legitimizing points of policy. The