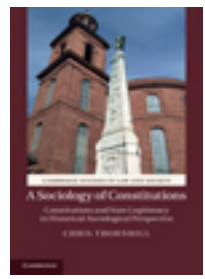

A Sociology of Constitutions

Constitutions and State Legitimacy in Historical-Sociological Perspect

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Book DOI: http://dx.doi.org/10.1017/CBO9780511895067

Online ISBN: 9780511895067

Hardback ISBN: 9780521116213

Paperback ISBN: 9781107610569

Chapter

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Chapter DOI: http://dx.doi.org/10.1017/CBO9780511895067.006

Cambridge University Press

5

Constitutions and democratic transitions

The first wave of transition: constitutional re-foundation after 1945

The period after 1945 witnessed a wave of constitution drafting in many of the states that either converted to fascism in the 1920s or 1930s or were subject to fascist occupation before or during the Second World War. In many instances this process of constitutional reform reflected the extension of Soviet influence across eastern and central Europe, and it was initiated by the government of the Soviet Union. Key examples of constitutions written at this time were the constitution of Hungary of 1949, the constitution of Czechoslovakia of 1948, the Polish constitution of 1952 and the Bulgarian constitution of 1947.

Constitutions reflecting the political dominance of the Soviet Union contained substantial distinctions, and each of them retained elements of indigenous legal culture. However, these constitutions derived some elements from the 1936 constitution of the Soviet Union, and they had important common features. First, they organized the state as a one-party regime committed to a high degree of economic control. Second, they rejected the separation of powers, which was commonly derided in post-1945 eastern Europe as characteristic of bourgeois constitutionalism: they provided for an integrally unified state structure, founded in the notional principle of full popular sovereignty or 'unitary popular power' (Skilling 1952: 208), in which both legislative and executive authority was concentrated in a unicameral legislature, dominated by a single (non-elected) party – this effectively tied legislative power to the prerogatives of a party executive. Third, they rejected judicial independence and strict judicial review (of these states, in fact, only Czechoslovakia had possessed an independent constitutional court before 1945). Indeed, these constitutions ascribed far-reaching political functions to the judiciary, and they often identified judges as custodians of the political will of the people – that is, as instrumental organs of the executive. For example, the Bulgarian constitution of 1947 (Art. 25) laid down that only the National Assembly could

decide on questions of statutory constitutionality and that judges were accountable to the legislature and so, effectively, to the party executive. Similarly, the Hungarian Constitution (Art. 41) stated that judges were required to 'punish the enemies of working people'. In these respects, these constitutions condensed all power in a party-based legislature, they relativized the higher-law principles underpinning many earlier constitutions, and in key matters they made the constitution subordinate to regular legislative functions. Fourth, these constitutions instituted a rights structure that simultaneously stipulated extensive declamatory portfolios of material rights and subordinated civil and political rights to restrictive laws. The Polish constitution exemplified this by establishing a sequence of clauses guaranteeing social and material rights (Arts. 57–65). Yet it also prohibited the exercise of certain political rights (Art. 72). The Czechoslovakian constitution, similarly, placed legal sanction on the exercise of rights likely to cause a 'threat to the independence, integrity and unity of the state' or to undermine 'popular-democratic order' (§ 37). Analogously, the Bulgarian constitution allowed the exercise of political rights only on condition that they did not obstruct the material objectives of the constitution (Art. 87).

In select respects, the constitutions of eastern Europe were proclaimed as legal bulwarks against the constitutional preconditions of fascism, and they employed (in remote and residual fashion) a neo-Jacobin legislative model to impede (or to claim to impede) pluralistic or neo-patrimonial fragmentation of state power. First, for instance, the strongly integrated concept of the state was promoted in these constitutions as a template for preserving a compact polity against semi-independent political forces in society. Second, in the same way that constitutions of pre-fascist states had aimed to co-opt plural economic associations in the state by granting flexibly interpreted corporate rights, the constitutions of the East European states after 1945 gave collective/material rights primacy over singular subjective rights: indeed, like fascist constitutions, they employed material rights as institutes of coercive social integration and planning. However, their essential design differed from fascist constitutions in this respect as they reserved rights of economic co-ordination to a strictly organized political party, which from the outset monopolized the state executive, and, at least in intention, they were constructed to avoid the fragmentation of state power through the uneven concession of rights in the form of corporate group rights. This redefinition of collective rights was intended, in part at least, to solidify the state against the patterns of erratic inclusion and political diffusion that had been characteristic of fascist rule.

The constitution of the Fourth Republic in France, introduced in 1946, possessed, albeit in a democratic setting, partial similarities with the post-1945 constitutions of Eastern Europe, and it was also devised as the foundation for a strongly integrated state, centred on a powerful legislature. A first draft of the constitution, which was rejected by referendum in May 1946, contained a very strong presumption in favour of legislative sovereignty and, echoing Jacobin ideas of 1793, it contained provisions for a unicameral parliament (Shennan 1989: 129–30). This vision was tempered in the final constitution of October 1946, which endorsed a somewhat diluted principle of legislative authority, reinforced presidential powers, instituted a (still weak) second chamber and established an (also weak) Constitutional Committee (Art. 91) to review the constitutionality of statutes. However, this constitution was supplanted through a process of revisions in the 1950s, used to strengthen the government against shifts in parliamentary formation, and it was finally replaced by the 1958 Constitution, which founded the Fifth Republic. The Gaullist constitution of 1958 deviated paradigmatically from earlier French constitutions. It greatly strengthened the power of the cabinet and the president against the legislature, and it established a Constitutional Council (Conseil Constitutionnel) as a horizontal check on legislative power. Not originally conceived as a review court, the Council initially acted to oversee distribution of competences between legislature and executive. By the early 1970s, however, the Council had unsettled the principle of untrammelled legislative sovereignty, and in 1971 the Council was formally recognized as a protector of rights (see Vroom 1988: 266). Although differing from conventional constitutional courts in that it retained a position within the legislative process and it was not open to appeal by citizens or regular courts, it began, acting both within and outside parliamentary procedures for legislation, to assume a priori powers for judicial review of statutes and to promote non-derogable standards of human rights as legislative norms.[1]

Like the constitutions in Eastern Europe, the strategies of post-1945 constitutional transformation in Germany and Italy, pursued under the influence of the US forces, can also be seen as intended correctives to the constitutional crisis induced by fascism and its social preconditions. These constitutions represented alternative patterns of response to the corrosion of statehood and the depletion of political power affecting societies exposed to fascist governance.

[1] For samples of the immense literature on this ambiguity see Stone (1992: 4); Bastien (1997: 399); Delcamp (2004: 82).

Italy

In Italy, for example, the process of constitution writing after 1945 proceeded from a position of substantial political heterogeneity, in which a number of parties contributed to preliminary constitutional drafts. For all their differences, however, the main parties in the first stages of constitutional formation in Italy concurred in advocating the retention of some elements of quasi-corporate constitutionalism, and they sought to preserve aspects of pre-war Italian constitutional ideals.[2] In each stage of the drafting process between 1946 and 1948, delegates of the Italian Communist Party, allied with the PSI, urged the inclusion of a substantial body of material rights in the constitution: they projected a constitutional order committing the state to far-reaching policies of redistribution and trade-union involvement in legislation, and they even defined the exercise of political rights as correlated with the material formation and collective enrichment of society. At the same time, the newly founded Christian Democratic Party opposed these designs, and it placed emphasis on singular subjective rights as the 'preconditions' of the state (Gonella 1946: 38). However, in their constitutional stance the Christian Democrats, or some of their more reactionary elements, also retained a corporate stance: some members of the party sought both to preserve the regional structure of the Italian polity and even (in extreme cases) to form a corporativist Senate, elected both by universal suffrage and by regional and professional councils (Einaudi 1948: 662–4).[3] On these counts, therefore, the primary parties in the constituent body in Italy both originally aimed, in diverse fashion, to institute a diffusely broad-based and societally inclusive system of government.

Through the course of the ratification process, however, the inclusionary demands of different parties in Italy were either weakened or eliminated. The more corporate elements of Christian Democratic theory were not reflected in the final constitution of 1948, and the Senate was finally constituted as a body elected by universal direct suffrage (Art. 58). Moreover, although the partial autonomy of the regions obtained definitive recognition through the establishment of a regional council (Arts. 114, 121), regional competences were strictly

[2] The origins of the modern Italian constitution can be traced, first, to the decree laws passed by the interim government in summer 1944, Art. I of which provided for a constituent assembly to establish a new constitution for the state, and, second, to legislation of 1946, which set precise procedures for elections to the assembly.

[3] Irene Stolzi advised me on this. See email exchange, 27 October 2010.

circumscribed in the constitution,[4] and objects falling under the exclusive legislative power of the state were clearly determined (Art. 117). In addition, the 1948 Constitution sanctioned a very extensive bill of rights, which reflected some objectives of the Communist Party and the PSI: this comprised roughly one third of the entire document. These rights included the classical rights of personal and domestic liberty, freedom of assembly, expression and conscience, access to impartial legal hearing, and protection from non-legitimate acts of public administration (Art. 113). Moreover, these rights included key distributory rights, such as rights to medical care (Art. 32), the right to a fair wage (Art. 36), rights to welfare support (Art. 38), and limited rights of union action (Art. 40) and collective bargaining (Art. 39). Despite recognizing the freedom of private economic enterprise (Arts. 41–2), the constitution contained prescriptive provisions for the partial regulation of private-sector economic activity and for state control of enterprises (Art. 43), and it stipulated that workers had rights of consultation in industrial enterprise (Art. 46). In fact, the constitution created a national economic council, comprising representatives of 'productive categories', to perform consultative functions regarding draft bills submitted to it by the government (Art. 99). In these respects the 1948 Constitution, reflecting the policies of the Communist Party, manifestly preserved core aspects of material constitutionalism. Despite this, however, the left-corporate principles implied in this catalogue also fell substantially short of the primary ambitions of the Communist Party, and they marked an attempt, influenced by US economic orthodoxy, to restrict the role of the state in the economic arena. The rights enshrined by the constitution specifically avoided the construction of a full corporate constitution: they preserved clear distinctions between actors in the private economy and in the state, they ensured that private conflicts were not immediately internalized in the state (i.e. that collective agreements were not dependent on state intervention in the bargaining process), and they guaranteed that the state was not forced endlessly to assume full regulatory responsibility for economic interactions through price setting and income stabilization. In this respect, the 1948 Constitution was designed, within broad limits, to delineate the boundaries of the state and to ensure the societal primacy of a strong, central, yet also functionally circumscribed, state.

Of crucial importance in the drafting process in Italy was the fact that the constitution placed particular emphasis on preserving the

[4] The new state was thus both 'centralized and decentralized' (Tesauro and Capocelli 1954: 48).

independence, impartiality and normative accountability of the judiciary (Arts. 101, 104, 111), and it consolidated constitutional rights as external to the sphere of immediate politicization around the legislature and the executive. In this respect, the constitution broke with stricter Italian traditions of Roman law, based on literal interpretation of written codes, and it provided for the institution of a Constitutional Court (established in 1953 and operative from 1956). In the first instance, it was the Christian Democrat members of the constitutional assembly whose programme advocated the creation of a Constitutional Court. This was because they saw the court as an eventual counterweight to the left-oriented bloc which they (erroneously) viewed as a probable feature of the first legislatures of the new republic (Furlong 1988: 10–11; Volcansek 1994: 494). After its institution, the court was empowered to decide on the constitutionality of laws of state, to resolve conflicts of legislative and judicial competence between central state and regions, to settle jurisdictional disputes between regions, and to act as final court of impeachment for cases brought against the president of the republic (Art. 134).[5] However, although lacking powers of abstract review in respect of rights,[6] the court also acted to determine normative compatibility of laws with the constitution and its provisions for fundamental rights and to conduct concrete review where cases from ordinary courts were referred to the court for query or confirmation.

The Constitutional Court performed important functions for the emergent republican state in Italy, and it served partially to rectify conventional weaknesses of Italian statehood. This became manifest, first, in the fact that it played a key role in countervailing endemic tendencies towards fragmentation and regional centrifugality in Italian politics (Evans 1968: 603). Although clearly defining spheres of separate regional jurisdiction and giving protection to the regional council, the constitution ensured that proper objects for central legislation were determined and preserved as such, and it enabled the government to question and control the legitimacy of laws made in the regions by referring these to the court (Art. 127). In addition, in appointing the court to clarify the relation between different levels of the legislative

[5] This was a matter of key importance. See Farrelly and Chan (1957: 316); Luther (1990: 78).

[6] This extent to which judicial review in Italy entails ensuring compatibility of laws with rights is often disputed. For different views see Bonini (1996: 65); Cappelletti and Adams (1966); Pizzorusso, Vigoriti and Certoma (1983: 504–5). The primary role of concrete review appears to mean that in Italy rights play a less significant role than in Germany.

system, the constitution weakened residual corporate counterweights to the state: it acted to ensure that the central state reserved the power to terminate laws, it abrogated laws, especially repressive public-order legislation dating from before 1948 that ran counter to the constitution or dispersed the power of the state, and – by these means – it raised general confidence in the legal order.[7] Indeed, as a normative forum standing apart both from earlier state institutions and the (deeply tainted) regular judiciary, the court generated a significant reservoir of legitimacy for the new state, which enhanced its ability to concentrate the fullness of power in its acts. One key example of this was in the realm of constitutional relations between church and state. In the aftermath of the war, parts of earlier ecclesiastical legislation, derived from Mussolini's Concordat of 1929, had initially been absorbed into the state. This had significant bearing on the state's capacity for legislation over questions of family and matrimonial law. The Constitutional Court ultimately played a significant role in stripping out this legislation, and it intensified the legislative independence of the state in these spheres of regulation. Furthermore, the court permitted the newly founded state to recruit technical assistance in determining proper objects and procedures for legislation, and this made it possible for actors within the state, under the approval of second-order observers, substantially to assert their sole right to perform specifically allotted legislative functions. In stipulating exact principles for the ratification of statutes, therefore, the constitution created guarantees to make sure that all formative legislative power was condensed in the state administration, and that edicts or prerogatives not emanating from the central state (i.e. perhaps from regional parliaments or corporate groups) could not easily assume the technical force of law and could not dissolve the (albeit socially limited) cohesiveness of state power.[8] In particular, the constitution as a whole aimed specifically to restrict the formation of private/public corporations assuming quasi-state functions in the localities (Bartole and Vandelli 1980: 180). The Constitutional Court, thus, acted as an important block in a process of constitutional state building, and it substantially enforced the capacity of the emergent Italian state for the positive and abstracted use of power.

[7] This was a very important feature of the Italian court. See Volcansek (1994: 495); Franciscis and Zannini (1992).

[8] Separately from my argument here, the role of judicialization in consolidating states against fragmentation, especially in post-fascist environments in which trust in legislatures and regular courts was low, has been observed in Ferejohn (2002: 55–7).

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 (Triepel 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 underevolved 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).

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 Kaminis (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

principle of rights-based *societal pluralism* so fundamental to the laws of the post-1975 democratic transition in Spain thus acted, like more formal elements of the new constitutional system, dramatically to intensify the usable power of the state. The acceptance of society as an aggregate of private exchanges, delineated by rights, outside the state effectively decreased the pluralism and the quasi-privatistic use of political resources within the state itself, and it acted as a precondition for the adaptive and effective use, and indeed the heightened positive production, of political power.[24]

The third wave of transition: constitutional transformation in the 1990s

In Russia and other countries in eastern and central Europe in the late 1980s and 1990s a related set of adaptive processes of state building and political abstraction through constitutional formation was observable. In this context, the process of constitutional transition again reflected functional exigencies within different states and it adjusted the political power of states to a new level of articulation. Indeed, although the constitutions of the east European communist states founded in the aftermath of 1945 were in many ways created in antithesis to fascist governance, the fact that they were marked by weak systems of political rotation, by the absence of an independent parliamentary opposition and by a lack of judicial autonomy meant that these one-party states also began to degenerate into a condition of highly interlocked political privatism. As in other settings, they eventually used constitutional remedies to extricate their power from this condition.

Poland

When analysing the constitutional dimensions of the third wave of democratic transition, it is helpful to focus first on Poland, which in many respects both initiated the longer period of reform and established a legal template that legitimized the subsequent reform process in different countries. The Polish state began a long process of reaction against its post-1945 constitutional structure in the second half of the 1970s. The Polish constitution of 1952 (approved personally by Stalin) reflected the Leninist constitutional doctrine that favoured a highly

[24] On the commitment to pluralism in Spain during the transition see Cotarelo (1992: 169–70).

integrated executive/legislative structure, and in which the parliament (Sejm), dominated by one party, monopolized all legislative and executive powers and subordinated constitutional laws to statutory legislative acts. In this constitution, as mentioned above, a catalogue of rights, providing for partial political inclusion of economic activity, was appended as a body of normative rules or *programmatic aspirations* to be objectively applied by the state. As in other Soviet-influenced nations, however, these rights were not placed externally to the state, and they were not applied by an independent judiciary: Article 52 of the constitution stated that judges were independent, yet Article 48 maintained that courts were 'custodians of the social and political system' of the People's Republic of Poland. By the later 1970s, however, the high structural density and inclusionary social centricity of the Polish state made it vulnerable to very diverse social protest. Actors in the executive began progressively to respond to increasingly intense sociopolitical unrest and, especially, to independent trade-union activity by implementing constitutional reforms that gradually transformed and disarticulated the more densely integrated elements of the political system. In particular, primary actors in the state reacted to the social pressures of the late 1970s by accepting (tentatively and in limited fashion) principles of judicial independence and so altering the factual constitution of the state both to incorporate an acknowledgement of human rights as institutes external to the legislature and to endorse a partial separation of powers. This was influenced by the (at least notional) acceptance of the Helsinki Accords throughout eastern Europe, and by the resultant recognition of formally normative standards in human-rights legislation (Procházka 2002: 22).

The reform of the Polish constitution began with measures in the 1970s that assigned to the Council of State responsibility to oversee the constitutionality of new laws. This was followed in 1980 by laws establishing a High Administrative Court, which was designed normatively to review administrative regulations. In 1982, the 1952 Constitution was modified to establish a separate Constitutional Tribunal, which was authorized to ensure the constitutional compatibility of statutes and other normative acts issued by parliament and other state organs. This tribunal was not originally conceived as a horizontal check on the legislature. However, after protracted dispute, the position of the tribunal was established under legislation of 1985, and it began to adjudicate cases in 1986. After 1987 it was supplemented by the powers of an Ombudsman for Citizens' Rights, and in 1989 it began to assert itself

more fully as a body empowered concretely to review statutes in the light of provisions for rights, and to restrict both legislative and executive powers: it struck down seven statutes in that year, and by then it had struck down almost all substatutory acts that it reviewed.[25] Finally in 1989, the 1952 Constitution was again amended, and the scope of the review powers held by the court was significantly expanded.

In Poland the separation of judicial power from combined legislative and executive power by means of the Constitutional Tribunal was, in its functional dimensions, a reaction to the difficulties encountered by the pre-1989 state in its attempts to police a large mass of social exchanges. It was one aspect of a process in which the state utilized legal-constitutional reform to reduce its conflictual intensity, to increase its options for policymaking and more effectively to control its societal position and its intersection with other social spheres. In the first instance, the tribunal, increasingly patterned on the Austro-German model of the Constitutional Court, acted as a mechanism that allowed the state to deflect and defuse deeply controversial questions. As in similar transitional settings, rights-based judicial review of statutes enabled the state to place objects of legal inclusion outside the state, and to displace and depoliticize many conflicts previously requiring resolution through highly condensed use of state power. Generally, the tribunal began to operate as a filter through which a unified state could transfer highly charged political conflicts into a legal dimension and utilize the law to reduce the controversy attached both to these conflicts and to its own reactions to them. In addition, however, the fact that actors in the state began to explain their actions through reference to stable juridical norms meant that the state could gradually use the law to release itself from its dense administrative integrity with a single political party, and that the law began to articulate normatively constructed boundaries to determine the state's integrity and consistency. In the Polish setting, and in eastern Europe more generally, the emergence of a tribunal with powers of constitutional review brought about a deep functional division within the state, in which the state could gradually account for itself as normatively distinct from single persons or party officials, and in which it could imagine itself, in distinct normative categories of public law, as an independent positive bearer of power. As a result, these changes in the judicial provisions of the Polish constitution ultimately created an

[25] For analysis see Brzezinski and Garlicki (1995: 22); Schwartz (1998: 103; 2000: 56). Generally, see Brzezinski (2000).

environment in which, in 1989, a fundamental recasting of the constitution could be undertaken. In mid 1989 the existing electoral system, strongly favouring one party, was abandoned. In 1992 a new provisional constitutional package was established for Poland: this, although lacking a distinctive catalogue of rights,[26] endorsed full provisions for conventional rights and for constitutional review of statutes, and it accepted a fully pluralistic party landscape (Arts. 18, 23). This was ultimately replaced by the full Polish constitution of 1997, which preserved extensive powers of judicial review (Arts. 79, 122).

In the constitutional interim between 1992 and 1997, the Polish Constitutional Tribunal assumed extensive functions in preserving and securing the transitional apparatus of state, and it played a key role in bringing stability to the state despite the incomplete and at times ambiguous fabric of the legal/constitutional order prior to the final constitution and the catalogue of rights introduced in 1997.[27] In this period, the Constitutional Tribunal interpreted the 1989 constitutional amendments and then the 1992 provisional constitution as instituting a factual commitment to the preservation of a legal state (*Rechtsstaat*), and it construed itself as entitled to apply this presumption to check and at times overrule parliamentary statutes. In this respect, the court served during the transition to insulate the legislative process, to generate normatively stabilizing filters to secure the actions of legislators in an uncertain legal terrain, at once to project and to consolidate continuous guidelines for a transitional constitutional order, and to construct a consistent legal identity for the state, which separated it from its particular acts and positively authorized its legislative rulings.[28] Indeed, in a societal environment marked by relatively weak legislative-democratic legitimacy, the Constitutional Tribunal acted as a legitimating pillar for the state, in reference to which the state could, both functionally and symbolically, increase and incubate its autonomy. The institution of a Constitutional Tribunal provided a vital mechanism for initiating and presiding over longer-term processes of reform, and the devolution of key functions of normative control to the Constitutional Tribunal, even before a fully sanctioned constitution was in place, enabled the Polish state to remove existing legislation, to legislate with externally protected

[26] Lech Walesa in fact tried to introduce a Bill of Rights in 1992.

[27] On the weak constitutional position of rights during the interim in Poland, see Osiatynski (1994: 121, 114, 150).

[28] For commentary see Procházka (2002: 207, 209–10); Weber (2008: 275).

legitimacy and to increase the probability of acceptance for new legislation. In this process of transition, therefore, the separation of the judicial apparatus from the executive and the creation of a strong Constitutional Tribunal allowed the state flexibly to isolate its power from highly entrenched interests and personal groups, it enabled the state to produce and preserve a sphere of relative autonomy and positive legitimacy to support its everyday decisions, and it distinctively augmented the *effective power* of the state.

The Polish Constitutional Tribunal was not the first constitutional court to be founded in an east European state. Yugoslavia established constitutional courts in 1963. Czechoslovakia also pursued a short-lived experiment with a constitutional court in 1968, although the court never became fully operative.[29] In the 1980s, the move towards judicial review became more widespread. In 1983 a Constitutional Law Council, with rather more limited powers than in Poland, was established in Hungary. However, the Polish tribunal assumed exemplary significance at a crucial transitional juncture, and it impacted substantially on the widening reformist policies of other east European states, which also began to relinquish the highly integrated constitutions obtained under post-1945 communist regimes. By 1989, for instance, in Hungary, the constitution was amended (or effectively refounded) so that it adopted a Constitutional Court with extremely far-reaching powers of review. Soon the powers of the Hungarian Constitutional Court outreached those of other transitional states: the Constitutional Court defined itself specifically as a guardian of the agreements supporting the peaceful transition in Hungary,[30] it committed itself to the powerful enforcement, in concrete individual cases, of principles of legal statehood, and it struck down a substantial number of the laws that came before it. As in Poland, the Hungarian Constitutional Court was able to oversee the process of transition, solidly to entrench normative/democratic principles, to absorb contest over most controversial aspects of new rights-based legislation, and – where required – to suspend existing laws through reference to core invariable rights (Sólyom 1994: 223, 228). In Bulgaria, similarly, the 1991 Constitution established an important Constitutional Court enjoying full judicial independence. The Czechoslovakian Republic established a Constitutional Court in 1992. Even Latvia, which reverted in part to its constitution of 1922, progressively

[29] On the failure of the Czechoslovakian court see Cutler and Schwartz (1991: 519–20); Hartwig (1992: 451, 464).

[30] Scheppele has described Hungary in transition as a 'courtocracy' (2003: 222).

amended the original constitution to create provisions for constitutional review. Throughout the east European transition, the institution of a constitutional court thus played a vital normative and functional role in the process of democratic consolidation (Brunner 1993: 883, 865).

Notable in the third wave of constitutional transition, further, was the importance of international human-rights norms in cases brought before the constitutional courts. In this respect, first, the transitions were driven, in part, by an increasing recognition of transnationally binding human-rights agreements, and standards concerning human rights first promoted in the Helsinki Accords formed a repository in which demands for political de-concentration could be expressed and enacted. Indeed, the increasing consolidation after the 1970s of an international legal domain, which placed emphasis both on singular/personal rights and rights of judicial integrity, acted as a normative matrix to which reformists could refer in order to obtain legitimacy for reforms, to separate the interlocked elements of party-led regimes and, above all, to prise apart judicial and executive functions of statehood and generally to separate the apparatus of state power from its intersection with private actors. During the transitions of the 1980s and early 1990s, then, most new states brought their constitutions into line with international treaties in respect of human rights, and they were keen to obtain legitimacy from the growing international legal order by signing the European Convention on Human Rights. None of this, naturally, is to suggest that each of the transitional post-communist regimes spontaneously implemented a full apparatus of guaranteed human rights. In many transitional states, certain basic freedoms, such as freedom of speech, assembly and conscience, were subject to restrictions, and in more nationally conflictual societies, such as Romania and Bulgaria, many particular minority rights were exposed to constraint (Elster 1991: 465–7). Nonetheless, these societies shared a broad tendency to borrow strict norms from international conventions in respect of human rights. Through this, standard provisions over rights acted clearly to simplify processes of political reorientation and to enunciate guidelines and precedents for rescinding old, and implementing new, acts of legislation. This allowed emergent democratic political systems to unburden themselves of much legislative/constitutional controversy, and, in settings where existing statutes were unreliable and legislative-democratic reserves of legitimacy were fragile, to draw legitimacy and heightened autonomy from acceded general norms over rights. International legal standards exercised a potent unifying function in the consolidation of transitional states

after 1989,[31] and international provisions over rights, normally internalized and applied by constitutional courts, once again acted to limit the number of social objects that states internalized, to intercept social conflicts before they entered the state apparatus or required legislative resolution, and to augment the reserves of publicly constructed, usable power contained within the state. Indeed, the central position of international catalogues of rights in post-1989 constitutions was vital for their ability to separate many aspects of political exchange from the state, and, as in Spain in the 1970s, the legal salience of rights even allowed a rights-based 'civil society' to emerge, in which political activities, freed from the concentration around the state, could be performed outside the state and at a lower degree of political intensity.[32] The civil-political pluralism arising through the implementation of normative rights structures was thus also one dimension in a process in which state power was concentrated at a manageable and specified level, and it eliminated excessive or internal pluralism in the state itself and was normally correlated with a rise in state autonomy.

In addition to promoting state legitimacy through courts and international legal standards, most post-1989 constitutions in eastern Europe opted to include extensive provisions for positive social and material rights, and they widely dispensed the 'maximum number of constitutional rights' in respect of socio-economic state performance (Sadurski 2002: 233). For example, the amended Hungarian Constitution of 1989–90 carried many material rights from the post-1945 constitution. The amended Czechoslovakian constitution, replaced in 1992, preserved rights of material security fo those unable to work. The Bulgarian Constitution of 1991 enshrined the right to work, the right to welfare and the right to material support (Arts. 48, 51). The Polish constitution of 1997 then placed work under state protection (Art. 24). These rights performed varied legitimating functions for emergent democratic states. In the first instance, they brought symbolic legitimacy as they committed states to recognition of partly embedded societal values and, in transitions marked by extreme economic adversity, they preserved stability by perpetuating definitions of state legitimacy in material categories. However, these rights were not uniformly enforceable and,

[31] See for example Cutler and Schwartz (1991: 534, 537); Sólyom (2003: 144).

[32] On this account, civil society is formed as a result of the political system's need for pluralism. Note my simultaneous critique of and agreement with theories that see rights as institutes protecting 'civil society' (Sunstein 1993: 919).

unlike general civil rights, they were not accorded evenly justiciable status. Most constitutions were in fact endowed with restrictive clauses to ensure that material rights could only be claimed subject to exemptions specified by law (Rapaczynski 1991: 610–11; Sadurski 2002: 235). Many such rights were phrased as general directives to governmental institutions, and they were not easily usable as a basis for litigation or action. To be sure, exceptions to this are identifiable, and some courts took pains to apply weaker positive rights, such as environmental rights, and to insist on environmental duties (Halmai 1996: 352). In general, however, even those rights that aimed to secure transitional state legitimacy by preserving a high degree of societal convergence between the state and other spheres of society served to police and limit the inclusivity of the state, and they reinforced the legitimacy of the political system through a restrictive specification of its operations.

Russia

It was in the Soviet Union under Gorbachev that, in the third wave of democratic transition, the functionally adaptive state-building elements of legal/constitutional transition were most comprehensively observable. The era of *perestroika* as a whole was a period in the Soviet Union in which both the constitution and the legal system were reformed, and this acted to reduce, or restrictively to focus, the mass of power that, owing to the one-party political monopoly established under the Soviet constitutions, had accrued around the state. Indeed, one key cause of the reforms was that the executive apparatus around the Communist Party had become overburdened by the extent and dimensions of its power, and the constitutional monopoly of coercive force granted to one set of actors under the Soviet regime conferred an excessively personalistic form on political power: this, at different levels, drained the reserves of legitimacy in the state, and it diminished the volume of *usable power* possessed by the state. The process of legal reform in the Soviet Union was thus conceived as a means for reducing private/personal control of power, for hardening the procedures for the use of state power against 'centrifugal forces' (i.e. actors in administrative bureaucracies and party hierarchies) incorporated within the political system through its dense attachment to one political party (Hausmaninger 1992: 330), and for liberating the state from the 'network of informal alliances' that had attached to it under the Soviet system (Devlin 1995: 38). In the *perestroika* era, in other words, a strategy of reform was pursued to raise the

positive autonomy and the general capacity of the state by using the law to separate it from parasitic semi-private centres of power and to clarify its limits and functional objectives.[33] Central to this was the introduction of a more ordered legal system, which was designed to suppress the structurally hypertrophic corruption in the Soviet Union, to create a barrier against the quasi-patrimonial transacting of public offices, and in so doing to heighten the operative power of the state.

The first decisive point in the *perestroika*-era constitutional reforms in the Soviet Union occurred at the end of 1988, when fifty-five of the 174 articles of the Soviet Constitution of 1977 were amended (Smith 1996: 72–3). This act of reform, effectively creating a new constitution, coincided with provisions for an elected multiparty national parliament in the Soviet Union, and it was flanked by legislation that altered the position of the Communist Party under the Soviet constitution and cemented a functional fissure between state and party. It was declared at this juncture that a stricter 'division of labour' between the party and the state was required, and that the party should assume less responsibility for providing direction in political affairs (White 1990: 33). These measures were in fact accompanied by a proposed amendment to Article 6 of the 1977 Constitution – which had defined the Communist Party as the guiding force of society – thus envisaging an end of one-party rule. This was finally enacted in 1990, in legislation that ended the party's monopoly of state power.

Alongside these most prominent events, however, the reforms in Russia were strongly focused on the legal and judicial dimensions of the political system. As early as 1986 the Communist Party of the Soviet Union passed a resolution 'On the Further Strengthening of Socialist Legality and Legal Order', which was designed to restructure the courts and protect rights of citizens. The year 1987 saw the introduction of a Law on Appeals, enabling citizens to appeal against actions of court officials. In 1988, Gorbachev committed himself at the annual party conference to the implementation of a legal revolution of the existing political apparatus, to the building of a socialist state based in the general rule of law and to the consolidation of judicial independence (Kahn 2002: 87). The year 1989 then saw the introduction of laws enabling judicial review of administrative acts, laws designed to ensure the independence of the courts and a Law on the Status of Judges, to increase

[33] On the pre-1989 Soviet Union as a weak state with restricted policy-making autonomy, see McFaul (1995: 221, 224); Easter (1996: 576).

the material independence of judges (Quigley 1990: 67). In the same year, a system for trial by jury was created for the most serious criminal cases. Moreover, the legal reform brought a crucial reduction in the scope of criminal law, so that many activities related to economic exchange and production were removed from criminal-law statutes. The political import of criminal law characteristic of totalitarian regimes was substantially reduced at this time, and the number of political or political/economic crimes was diminished.[34] In parallel, these legal changes included provisions both for the curtailment of political encroachment on judicial functions and for the establishment of a Constitutional Supervision Committee (1989–91), which was designed to promote judicial integrity and to perform constitutional review of normative acts. Members of the committee were elected in 1990, and it assumed functions analogous to those of a constitutional court. Throughout, these pieces of legislation were designed to place a legal apparatus above the everyday acts of the state and to guarantee greater accountability of state officials. At the same time, however, these processes were also intended to prise apart the conventional privatistic attachment between singular persons and political and judicial offices, and to distil the power of the Soviet state as distinct from, and positively usable against, those incumbent in office. The formation of a separate parliamentary legislature and the reform of the judiciary and the state administration were thus designed, in conjunction, to raise the autonomy of the state and, above all, to curtail the centrifugal power exercised by actors obtaining public office by private or clientelistic means, mediated through the party (see Solomon 1990: 185). In many respects, in fact, the legal reforms in the Soviet Union under Gorbachev bear comparison with functional dimensions of much earlier processes of reform, and their basic function was to reduce the privatism of the state apparatus by separating structures of office holding from personal control.[35]

Furthermore, the early move towards constitutional rule under Gorbachev involved, centrally, an expansive concession of rights of economic autonomy, and it was driven by far-reaching goals of economic reform. By 1990, a raft of legislation was introduced in respect of

[34] On these changes in criminal law see Feldbrugge (1993: 30).

[35] For a good recent study of patrimonialism and weak statehood in the Soviet Union see William Tompson (2002: 936–8). For brilliant analysis, stressing weak central control and neo-patrimonial brokering of public office as features of the Soviet system, see Anderson and Boettke (1997: 38, 43–4).

proprietary rights: this legislation renounced the principle that municipal or state-owned property could be legally differentiated from private property, and it stipulated that neither private property nor private enterprise were bound by the state (van den Berg 1996: 119, 124). These rights were reinforced by the law on the Principles of Civil Legislation of 1991, which afforded protection under civil law to personal rights and other rights vital for independent economic activity. In 1990, anti-monopoly legislation was introduced, which released enterprises from control by the state ministries, and reduced the degree of immediate convergence between the state and independent economic concerns. In 1991, further, wage agreements were removed from state jurisdiction, so that, outside certain general parameters, the state was not required to act as full guarantor for wage levels or industrial settlements. Importantly, at the end of 1991 the old system of taxation, in which revenue had been transferred directly from public enterprises to the state, was replaced by a fiscal apparatus that enabled the state to raise revenue on economic activities outside its immediate control (Feldbrugge 1996: 288). In these respects, the diffuse process of constitutional reform served to detach the state apparatus from its previous economic obligations, and it provided legal means through which the state could begin to stabilize its relation to the economy as a social field external to itself. Placed alongside political rights, the recognition of independent economic rights immediately restricted the social centrality of the state, and, in allowing the state to position itself in more differentiated manner towards other social spheres, rights also began to evolve as institutions that controlled the boundaries of the state and heightened the autonomy and positive flexibility of state power.

In the first instance, in consequence, the concept of government by general constitutional laws, articulated at once under public and private law, served in the Soviet Union *perestroika* era as a multi-faceted normative principle. The insistence on the rule of law as a normative goal of political transformation acted as a lever in the process of severing the political apparatus from its attachment to government by a single party, and it acted to construct the state as personally distinct from the particular mechanics of governance and functionally to liberate actors committed to reform. Tellingly, by the early 1990s legal elites had assumed a distinctively powerful position in the process of transformation (Trochev 2008: 26–7). In fact, as well as acting to isolate the state as a relatively free-standing and autonomous order, the principle of legal rule also formalized the obligations of the central state within the federal system of the Soviet

Union: this meant that the states within the union could (notionally) be regulated by uniform laws and their relations with the central state simplified. The evolution of the constitutional ideal in the Soviet Union, thus, as in other transitions, formed (or was designed to form) a normative response to the undifferentiated and pluralistic density of the state. The construction of a separate constitutional order within the state formed a reaction in the political system to its relative loss of autonomy and excessively personalized social convergence, and the reinforcement of constitutional provisions over rights and legal uniformity was intended as a principle for substantially intensifying state autonomy.

The constitutional situation in the Soviet Union changed dramatically in 1991 when the Soviet Union collapsed and fifteen independent states withdrew from the union. At this point, government was repeatedly conducted by decree, as Boris Yeltsin assumed extensive emergency powers in order both to introduce further economic reforms and to organize the executive. In 1992, however, a new constitution was drafted for the reformed state of Russia. The 1993 Constitution ultimately consolidated a balanced arrangement between executive and legislature, which concentrated extensive powers in the hands of the president, but also accorded important countervailing, albeit subsidiary, powers to the elected Duma. This constitution also sanctioned a very comprehensive catalogue of basic rights: indeed, it accepted that in cases of legal conflict international law was to take precedence over domestic legislation. The rights acknowledged in the constitution included classic rights of personal integrity, especially rights of ownership, expression, privacy and movement. However, as in other transitional states, the catalogue of rights differed substantially from classical liberal constitutions: it guaranteed the right to shelter and social housing (Art. 40), the right to social security in cases of deprivation (Art. 39), and the right to freedom from racial or religious abuse (Art. 29). Vital for the legitimating role of this constitution was that it guaranteed political freedoms and (formally) decriminalized political dissent (Arts. 29–30), and it stipulated rights of protection against the state in cases of unlawful actions committed by state officials (Arts. 52–53).

Of particular importance in this was the fact that the 1993 Constitution contained strong provisions to support a separate and independent judiciary, and it placed under express protection the independence of the courts (Art. 120), the inviolability of judges (Art. 121) and the right to open trials. The constitution also prohibited irregular judicial proceedings: in Article 118, it eliminated the judicial power of the Communist Party.

After 1996, the traditional dependence of courts on political and logistical control through the Ministry of Justice was (in principle) eradicated. Further, as in earlier transitions, the constitution provided for regulation of the functions of the judiciary by a separate Constitutional Court. This court was in fact established in 1991, and it decided its first case in 1992. However, its position was formalized in the 1993 Constitution. Notably, the Constitutional Court had some distinctive features. Although initially endowed with very strong powers, including the power to initiate cases for review, its status was altered in 1994, owing to its involvement in the struggle between parliament and president: this led to its suspension by Boris Yeltsin, after which its powers were substantially constrained and it was less eager to engage in fractious political dispute. Moreover, unlike other post-communist judicial systems patterned on the Austro-German design, in Russia a model of dual judicial control developed, in which the Constitutional Court existed alongside a Supreme Court, which gradually asserted responsibility for judicial decisions and protection of rights in ordinary courts.[36] Nonetheless, the Constitutional Court remained (notionally) authorized to conduct review (although this repeatedly came under siege). It retained strong powers for ensuring constitutional conformity of federal statutes and for resolving disputes over jurisdiction between federal state bodies and between supreme state bodies of subjects of the Russian Federation (Art. 125). In its original conception, in fact, it created the basis for a thorough legal rationalization of the political order, in principle placing powerful rights-based normative constraints on the operations of government, and it reinforced an abstractive structure for the dislocation of the state executive from private actors assuming state power through party-mediated influence (Fogelklou 2003: 186; Thorson 2004: 196).

In this respect it needs to be stated unequivocally that, naturally, the Constitutional Court in Russia was not able to act with even near impunity, and it could not sidestep serious political restriction. Its provisions for a rights-based *Rechtsstaat* were subject to endemic neglect, and minimum thresholds of respect for rights were, throughout the longer reformist period in the 1990s, barely preserved. Moreover, it needs quite expressly to be emphasized that the development of a constitutional order in Russia only selectively restricted private control of public office, and at different points in the longer transition legal/constitutional regulation of access to political and judicial power failed

[36] For excellent analysis see Krug (1996).

almost entirely. It has been widely diagnosed that in the earlier 1990s Russia suffered sporadic collapse of state autonomy, and it witnessed such rapid and comprehensive usurpation of state power and administrative resources by private actors and neo-patrimonial oligarchs that it lost the ability to impose reforms: this was also reflected in a consonant decline in legal order (McFaul 1995: 242; Gel'man 2004: 1024). The constitutional preconditions of integral statehood were thus only formally instituted in transitional Russia: the constitution offered only a partial solution to the internal weaknesses of the state, and it was not strong enough to detach the state structure from private control. Indeed, it has also been widely argued that the presidential system remained very susceptible to lobbying and retained a high porosity to informal groups, that the civil service was not formally brought under constitutional rule and both the civil service and the judiciary remained beset by corruption, and that the federal structure often facilitated violations of general legal rules (Fogelklou 2001: 233–4). In each of these respects, the constitutional system that evolved after 1989 provided for only an incompletely regulated pattern of statehood, and it offered only a precarious normative framework of legitimacy for the state. In short, it would be evidently counterfactual to suggest that the Russian constitution consistently performed the functions attached to other constitutions in maximizing state autonomy or abstracted power.

As in earlier transitional settings, however, the judicialization of political procedures in Russia brought longer-term, although distinctively attenuated, functional benefits to the emergent state, and it acted both to simplify the processes through which the state obtained legitimacy and, ultimately, to perform an overall consolidation of state power. First, for instance, the Constitutional Court gradually led to clarification of the relation between executive and legislative powers within the state, it obstructed the endemic arrogation of legislative power by private persons, and it acted rudimentarily to ensure procedural integrity in legislation. In particular, it opposed the practice of passing joint 'executive-legislative decrees' that had typified Soviet-era legislation and had underpinned the control exercised over the state by the party (Trochev 2008: 105). The court also ultimately, albeit in rivalry with the Supreme Court, established the principle that it alone should have powers of 'binding interpretation' of the constitution, and it subordinated ordinary, regional and subsidiary courts to the directives issued by a clear centre of jurisdictional authority (Sadurski 2007: 20–1). In this respect, the court at once enhanced the general application of the law,

ensured that state power was not diluted by conflicting patterns of legal interpretation and enforcement, and impeded personal acquisition of power. Moreover, in assuming responsibility for particularly controversial political contests, the court progressively made sure that the state's requirements for factual coercive power were subject to selective limits and that power was only exceptionally used outside a small group of functions. Indeed, in preserving economic and contractual rights, the constitutional court ensured that the state itself was not forced to intervene in disputes between potent economic actors (for example between banks and clients), it reduced the responsibility of the executive for legal planning and implementation, and it meant that the state's need to politicize its economic policies in a newly differentiated and precariously balanced society was limited (Trochev 2008: 167).

In consequence, the transition to a constitutional system in Russia noticeably, over a longer period, strengthened the positive structure of the state apparatus. The existence of a constitutional court, although less politically interventionist than in Poland or Hungary, was an ultimately important innovation in this respect, and it at once cemented the apparatus of the state as distinct from the particular processes in which its power was consumed and ensured that the deepest legitimating resources of the state were extracted above its factual operations and only exceptionally called into question or directly politicized. In Russia, in fact, the constitutional court assumed a distinctive strategic state-building function, and its technical utility in abstracting and cementing the superstructure of the reformed state outweighed its contribution to preserving social pluralism or socio-political freedom. To illustrate this, it has been widely noted that in Russia the acceptance of an international rights regime and the neutral functions of a Constitutional Court sat easily alongside, and in fact commonly reinforced, a tendency towards selectively authoritarian governance (Kahn 2004: 2). The fact that the dynamic of constitutional reform first originated within the state apparatus and reflected strategies of political consolidation meant that, from the outset, the reforms centred on a highly legalistic and semi-prerogative refinement of state power. Indeed, it has been widely noted that during the early period of constitutional reforms in Russia the state acted as both the object and the initiator of liberalization, and the state reformed itself in order, in part, not to generate conditions of effective socio-political or rights-based inclusion, but to obtain a heightened degree of infrastructural power in society (Weigle 2000: 272). Under Vladimir Putin, finally, a very distinctive model of constitutional order

began to emerge. Putin repeatedly took notable steps to reform the judiciary: these included measures to increase the financial independence of courts, to introduce new procedural codes, to expand trial by jury and to harmonize laws between federal government and regions. Rather than enhancing the democratic structure of the state, however, these reforms created a political system in which a rationalized judiciary, centred around the Constitutional Court, acted as a semi-authoritarian instrument of state consolidation. Although at crucial junctures in Putin's presidency the Constitutional Court acted to limit the political branch of government, at other times, and in fact more consistently, the court provided a formal framework to consolidate and solidify a powerful executive and to facilitate Putin's policy of government founded in authoritarian executive-led and judicially rationalized legalism (see Fogelklou 2001: 225; Trochev 2008: 185–7). Indeed, if in the earlier periods of transitional reform the consolidation of state autonomy was insecure and the state was fragmented by privatistic usurpation of offices and benefits, Putin pursued legal and judicial reform as a technical policy for rigidifying public authority against private actors and for consolidating central administrative power against personal corruption and fragmentation. The pattern of constitutional reform in Russia, in fact, had its most obvious antecedent in the minimal executive constitutionalism of the softened Bonapartism of many later nineteenth-century societies, and it produced a model of contemporary constitutionalism *sui generis*, in which regular judicial order and legal constraints on private authority acted, not primarily to check, but rather to underpin a semi-detached executive.

Despite this, nonetheless, during the periods of legal reform in Russia under Gorbachev, Yeltsin and Putin techniques of constitutional transformation were employed partly as a normative framework for the construction of a state that at once was differentiated from other functional spheres and possessed internal checks and legal constraints to preserve it against internal/particularistic fragmentation. The rule of law, however imperfectly, acted as an instrument which ultimately strengthened the power of the state, and the principle of the separation of the powers, governed by a Constitutional Court applying general catalogues of rights, provided a mainstay for the relative stabilization of state functions. If the rule of law, constitutional review and the application of rights were only weakly obtained in Russia, Russia remained an example of the classical sociological functions of constitutional reform. The case of Russia, above all, exemplifies the fact that one-party