

## Constitutionalism and Warfare

### *Constitucionalismo e o Estado de Guerra*

**CHRIS THORNHILL<sup>1</sup>**

University of Manchester. Manchester, Greater Manchester. Reino Unido.

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### INTRODUCTION

This article is intended as part of a sociological defence of constitutional rule. It addresses some pressing challenges to constitutional order in contemporary society, considering both the causes and implications of these challenges, and it seeks to propose an analysis of constitutions that may help to understand and counteract such challenges. By way of definitional clarification, the article adopts an understanding of constitutional rule as government supported by a legal document that allocates powers within the state, that protects certain rights for citizens, and that – necessarily – guarantees some degree of popular representation. On this definition, a fully evolved constitution is a constitution that allows a high degree of political inclusion, or *full democracy*: that is, a constitution is the source of authority for a government whose mandate is based in full and equal electoral participation for all men and women, expressed in regular competitive elections. Accordingly, constitutional government only exists as a political order based, simultaneously, in rights and popular sovereignty. On this definition, there is no constitution that does not contain some strong representative aspect, and constitutional government is not fully realized if

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1 Orcid: <https://orcid.org/0000-0002-2286-5967>.

some groups, defined for example by gender, ethnicity or socioeconomic position, are not granted equal rights of political representation. In addition, this article is based in two historical preconditions. First, it assumes that it was only in the wave of democratic constitution making that took place after 1945 that constitutional government began to establish itself – in factual reality – as an evolved model of government, and from that time onward constitutional government gradually became a global norm. Following the above definition of democracy, there were very few constitutional democracies before 1945<sup>2</sup>. Second, it assumes that there occurred a second, more fully global wave of democratic constitution making, which began in the 1980s, and this wave of constitution making has currently, in some settings, run into difficulties. For reasons discussed below, this article proceeds from the claim that, globally, constitutional rule was created through two periods of constitutional-democratic solidification which, although partly convergent, can be distinguished on some key grounds.

The background to this article lies in the fact that constitutional order today is frequently perceived as subject to threat. Following the wave of euphoria that greeted the globalization of constitutional rule in 1980s, a new constitutional phenomenon has recently been identified – this phenomenon is *constitutional backsliding*<sup>3</sup>. This term is usually employed to describe polities that appeared to have reached the end of, or at least an advanced point on, a trajectory of constitutional-democratic consolidation, but which have now reverted (or appeared to revert) to a position on the spectrum of constitutional order that indicates some deterioration in the quality of democracy. Against this background, this article considers two primary matters. It considers the basic social premises and functions of constitutional law, attempting to explain the deep societal causes of constitutionalism. It also considers outlooks and problems for constitutional rule today. In light of this, the article advances the broad theory that if we wish to defend

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2 This article is an extended version of a lecture presented to inaugurate the Cátedra Celso de Mello at the Instituto Brasileiro de Ensino, Desenvolvimento e Pesquisa (IDP, Brasília) on 12<sup>th</sup> May 2022. The article is dedicated to all colleagues and students at IDP, as an expression of gratitude for their warm reception. Some research for this article was funded by the Norwegian Research Council: Grant LAW22JULY: RIPPLES (Rights, Institutions, Procedures, Participation, Litigation: Embedding Security).

If we follow the definition set out above, only Sweden and New Zealand had a relatively unbroken tradition of full democracy from 1918 onwards. Some other states, perhaps Ireland and Finland, qualify very marginally as uninterrupted democracies from the years after 1918.

3 See for some examples the chapters in Mark A. Graber, Sanford Levinson and Mark Tushnet (ed.), *Constitutional Democracy in Crisis?* (Oxford University Press, 2008); Tom Ginsburg and Aziz Z. Huq, *How to Save a Constitutional Democracy* (Chicago University Press, 2018).

constitutional law and understand the challenges to it, it is essential to understand its social and historical origins. On this basis, it seeks to outline a sociologically embedded account of constitutional order to isolate the exact nature of the challenges to which constitutional democracy is currently exposed.

## 1 THREE ELEMENTS OF CONSTITUTIONAL LAW

To reconstruct the social origins of constitutions, we can observe first, in broad terms, that constitutions contain three separate legal and legitimational dimensions, and their central provisions are constructed around three different modes of legal protection for citizens. Each of these three dimensions is connected to a different construction of citizenship, and, in each dimension, a constitution extracts and projects legitimacy for government by instilling a specific image of the citizen at the centre of the law.

First, constitutions contain a dimension that establishes and protects rights regarding access to legal procedures for citizens (rights of due process, equal treatment under law, fair judicial hearing, some protection from misuse of administrative power). In offering such guarantees, constitutions recognize citizens as *legal subjects*, and they extract legitimacy from the fact that each citizen is accorded certain (nominally) equal legal rights. Second, constitutions contain a dimension that attributes political rights to citizens (that is, the right to vote, to stand for election, to enter political associations). On this basis, constitutions recognize citizens as *political subjects*. Third, more variably, constitutions contain a dimension that protects some social rights for citizens (that is, the right to access some welfare resources, the right to health care and social protection, the right to public education). To this degree, constitutions construct citizens as *social subjects*, and they present the legitimacy of government by according some material provisions and corrective opportunities to citizens. In each respect, a constitution can be perceived as a part of a system of social integration. A constitution confers legitimacy on governmental functions by defining a government as the distributor of certain rights to citizens, by which citizens are drawn into institutional proximity to government, and, through this proximity, citizens are both bound to accept this government as legitimate and obliged to discharge certain duties to it.

## 2 WAR AND CONSTITUTIONS

Striking in each of these dimensions is that, in their original form, each set of constitutional rights and each construct of constitutional subjectivity assigned to citizens was defined by warfare, or by the risk of warfare. At different historical junctures, we can trace the growth of these constitutional dimensions to the fact that national governments reacted to warfare, or to pressures related to the possibility of warfare, by generating legal orders within their domestic societies that expanded the rights allocated to citizens. In many respects, of course, warfare and the exercise of political roles by military actors have clearly deleterious outcomes for constitutional democracy. Periods of warfare usually strengthen executive institutions and lead to the curtailment of the rights of citizens, and the militarization of politics, either through the intervention of the regular army or through the intensification inter-factional conflict, rarely enhances democracy. Yet, over a longer historical period, it was warfare that created the momentum for the consolidation of constitutional law, and each primary dimension of constitutional law was brought into being by warfare and by the fact that governments integrated their citizens in societies affected by war. In most contexts, constitutional law developed as an instrument for attaching citizens more closely to the state, and this usually occurred in environments in which states integrated citizens as potential soldiers, so that increased constitutional recognition of citizens was connected to military conscription.

### I. LEGAL SUBJECTS

The relation of constitutional norm formation to warfare can be clearly observed in the procedural or judicial aspect of constitutional law, defining the citizen subject to law as a legal subject. This aspect of constitutional law began to acquire reality before the rise of fully formulated modern constitutions, which occurred in the revolutionary decades of the later eighteenth century. By circa 1750, many states in Europe had begun to establish legal codes with some constitutional functions, protecting the basic procedural rights of legal subjects, before they had acquired recognizably constitutional systems of representation and administrative regulation<sup>4</sup>.

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4 In Prussia, for example, Samuel Cocceji's theory of natural rights acted as the template for the systematic construction of legal procedure and legal subjectivity, which were enforced in judicial reforms from the 1740s onwards. Cocceji applied principles of natural law to insist on the need for a formally independent judiciary, separate from the executive body of the state, which could ensure that procedural rights were systematically

The construction of such early legal codes was very strongly linked to a process in which national governments endeavoured to centralize their basic institutional structures, replacing the local judicial and administrative functions of aristocratic families, so that the codification of law brought subjects in society into a direct legal relation to central institutions, in which resources of clearly public authority were vested. Such codification was usually a product of the exposure of national governments in Europe to increased military pressures, as governments typically conducted processes of centralized institution building in order to increase fiscal capacity to address growing military needs. This in turn was linked to the growth of inter-Imperial warfare, gaining pace in the middle decades of the eighteenth century, in which rising military costs placed new fiscal burdens on governments. Importantly, most processes of legal codification were implemented at the same time as legislation designed to impose some element of mandatory military recruitment in society. Indeed, legal codification usually coincided with early patterns of conscription, which allowed regents to extract military personnel from society without the assistance of local aristocratic families<sup>5</sup>. Importantly, legal provisions that solidified procedural rights as core aspects of public law were introduced in France around 1800, under Napoleonic influence, as military conscription expanded exponentially.

## II. POLITICAL SUBJECTS

The link between constitutional law and warfare is strikingly evident in the aspect of constitutional law focused on the citizen as a political subject. The growth of political citizenship, lying at the centre of modern constitutional law, was almost invariably the result of warfare. This is most clearly exemplified by the French Revolution, standing at the origins of modern constitutionalism. The French Revolution formed a central moment in a long structural trajectory, in which – across Europe – labourers originally held as serfs, working in unfree labour systems, were released from coercive

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defined and implemented. See Samuel de Cocceji, *Jus civile controversum*, new edition, in 2 vols. (Leipzig: Weidmann, 1799 [1713-18]), I: p. 159.

5 One historian describes the eighteenth century in France as the “century of militias”: Jacques Gebelin, *Histoire des milices provinciales (1688-1791). Le tirage au sort sous l'ancien régime* (Paris: Hachette, 1882), p. 73. Militia recruitment increased significantly in late eighteenth-century England, following the Militia Act of 1757. Mandatory military recruitment was established in Prussia through the imposition of the cantonal system, finalized in 1733, which enforced a system for raising armies that had some features of general military conscription. Variants on the cantonal system were introduced in other German-speaking regions, including some Habsburg territories from 1771.

employment regimes. Through the constitutions of 1791, 1793 and 1795, serfs obtained some political rights, and they became, with variations, citizens. However, this process of citizenship formation was not primarily the result of simple emancipation. On the contrary, it was inextricably linked to military dynamics. The release of serfs from modes of involuntary labour was driven, causally, by the weakening of aristocratic economies, as regents reached deeper into such economies to raise fiscal revenue and to extract soldiers from society. Ultimately, as serfs gained rights of citizenship under revolutionary constitutional law, such rights were integrally attached to military duties, and serfs acquired such rights on condition that they performed military service for governments that legitimated themselves by constitutional law<sup>6</sup>. At the historical core of modern society, therefore, we can see a process in which persons living in social contexts defined by involuntary labour became citizens. However, such persons usually became citizens and soldiers at the same time, as military service was both the price and the justification for citizenship. The transformation of the serf into the soldier was usually reflected and administered through constitutional law. Most early constitutions in Europe established forms of political citizenship by enshrining rights of electoral participation and duties of military service at the same time<sup>7</sup>. This process was reproduced slightly later in Latin America. In the longer wake of independence, slaves in most Spanish-speaking states in Latin America began to acquire the status of citizens, and this process was strongly linked to their assumption of military duties<sup>8</sup>.

These military origins of constitutional law resonated through most later constitutional processes. Before the 1980s, in fact, virtually all constitutions with a democratic political emphasis were created under circumstances determined by warfare, and by actors whose influence was linked to military organizations. Up to the 1980s, each great wave of democratic constitution making – that is, the wave around and after 1789, the wave after 1860, the wave after 1918, and the wave after 1945 – was caused by war. Virtually all partly democratic constitutions created before the 1980s can be aligned to one, and sometimes simultaneously to more than one, amongst a series

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6 The French Constitutions of 1793 and 1795 prescribed obligatory military service. Conscription was made permanent in France in 1798.

7 The Spanish Constitution of 1812 introduced military conscription and it was partly designed as a new constitution for the army. See Manuel Ballbé, *Orden público y militarismo en la España constitucional* (Madrid: Alianza Editorial, 1983), p. 82.

8 The abolition of slavery began in much of Spanish-speaking Latin America during the wars of independence. In many contexts, slaves were offered liberty in order to persuade them to fight for pro-independence armies.

of models that can be reconstructed in the form of a typology of *military constitutionalism*.

*First*, many constitutions were established in settings in which provisions for political rights were designed to cement a post-bellum political order, allowing enhanced democratic roles for social groups that had attained new influence because of war, and often granting rights to soldiers as contractual recompense for military sacrifice. Many constitutions created in processes of democratic or semi-democratic transition can be aligned to this model. For example, salient examples of constitutions implementing post-bellum reforms and establishing compensatory recognition for soldiers are found in the USA (1789), Colombia (1821), France (1875), Russia (1906), UK (1918), Germany (1919), Austria (1920), Poland (1919, 1921), Czechoslovakia (1920).

*Second*, in many settings, constitutional systems were introduced in environments marked by the growing threat of war, and constitutions were designed to expand the structural solidity of governmental institutions in face of external (and internal) military threats. Some of the most important constitutions in world history fall into this category – for example, the constitutions of France (1793, 1795, 1875), Spain (1812), Denmark (1849), Austria (1867), Germany (1871).

In some contexts, *third*, constitutions and deep constitutional reforms were implemented at the end of wars of unification, or of wars leading to the increased geographical integration of nation states. Examples are found in the USA (1789/1865), Germany (1871), Italy (1860-1870), Colombia (1886), Japan (1889), Brazil (1891), Poland (1919, 1921). Constitutions of this type were normally created for manifest military purposes. One of their most frequent functions was to introduce laws, or to legitimate subsidiary laws, that imprinted a unified structure on national armies and that integrated citizens of new nations into cohesive military orders. In many such instances, for example Germany in 1870-71 and Poland in 1918-20, national armies pre-existed nation states, and they acted as *de facto* constituent, nation-building units.

In some cases, *fourth*, constitutions were established by foreign occupying armies, or under the gaze of occupying armies. In this bracket, we can also place some of the most important constitutional texts in global history. These include the constitutions established in France (1814), Cuba (1901), Panama (1904), Japan (1946), Italy (1948), the Federal Republic of

Germany (1949), India (1950), as well as more recent occupation constitutions such as those created in Iraq and Afghanistan. Such constitutions clearly performed military functions, and one of their purposes was to pacify the societies in which they were implemented.

*Fifth*, in many post-colonial settings, constitutions were created by actors linked to independence movements, sometimes assuming the form of resistance armies and insurgent groups, and they often took shape in the context of endemic multi-polar conflict, very close to civil war. The military functions of such constitutions are self-evident. They were usually crafted by military actors, and they typically served both to consolidate independent political institutions in their polities and to strengthen the national military apparatus. Important examples are USA (1789), Colombia (1821), Chile (1822), Finland (1919), Poland (1921), Kenya (1963), Algeria (1963).

Of course, *sixth*, some constitutions were simply put in place by military leaders that led successful military take-overs, often linked to civil wars. Such occurrences often did not lead to the creation of constitutional texts, and they frequently simply resulted in dictatorship. However, some military coups gave rise to constitution-making moments, in which constitutional laws served to increase democratic entrenchment. Important examples are Brazil (1930-34), Bolivia (1949-56), Portugal (1974-76). Such constitutional laws usually created a legal-political system in which the military assumed a privileged, if not dominant, position.

Overall, constitution-making processes before the 1980s were generally connected by one underlying contractual motivation. Most modern constitutions evolved, in essence, as texts, in which citizens obtained enhanced political rights because of military pressures and military requirements, and most constitutions formalized agreements designed to stabilize the exercise of military violence by the state. In fact, most constitutions simply expressed military contracts in public law, in which states granted certain rights subjects under law in order to purchase violence from citizens. Virtually all major constitutions either contained provisions for mandatory military conscription or they were flanked by laws imposing conscription on male citizens elevated into the system of constitutional rights. The list of such constitutions includes the constitutions of the USA (1789), Poland (1791, 1921), France (1793, 1795, 1875), Denmark (1849), Germany (1849, 1870/71), Prussia (1848-50), Austria (1867), Colombia (1886). Constitution-making acts that did not dictate conscription as a legal obligation were usually constitutions whose drafting and enforcement were



subject to external military influence, reflecting the military anxieties of foreign powers (Germany 1919, Japan 1946).

One striking general point in this analysis is the fact that, with the exception of constitutions imposed by foreign occupying armies, most constitutions established before the 1980s were created in situations in which, at one moment, a particular military group had assumed a position of relative dominance in society as a whole. Many of the most important constitutions were established in settings that had been shaped by war, and in which hostilities resulting from war – latent or manifest – still persisted between inner-societal factions. In fact, before the 1980s, a large proportion of major constitutions failed to hide the antagonisms between the different groups which they were supposed to incorporate, and they created polities that often moved towards civil war. In most cases, the fact that constitutions were created in conditions marked by militarization meant that divisions between social factions were expressed in incendiary fashion. In particular, the fact that constitutions were established in settings in which military organizations acquired prominence meant that contests between rival citizenship groups could easily assume military dimensions. This frequently led to the intense politicization of political interactions covered and ordered by constitutional law. Throughout history, prominent examples of the causal relation between military constitutionalism and subsequent civil war or near civil war are visible in the constitutional conditions created in the USA (1789), France (1791), Russia (1906), Germany (1849, 1919), Colombia (1863, 1886), Poland (1921), Spain (1812, 1931).

### III. SOCIAL SUBJECTS

Vitally important in this survey is the fact that, historically, the military contracts formalized in constitutional law typically formed a substructure to sustain the administration of welfare provisions for constitutionally integrated citizens. Most trajectories of constitutional formation ran through a process in which, once citizens had gained political rights, they also gained some social-welfare rights, and both stages in this process of rights allocation were triggered by war.

Before the emergence of the first national constitutions, national armies were important providers of welfare services, and many soldiers joined the army in order to obtain some social or material protection. Through the growth of constitutional law, however, the social rights offered by armies

were legally internalized in the broader administrative systems of national states, and states slowly began to include welfare rights in the catalogues of entitlements that they offered to their citizens. In the nineteenth century, most states that assumed pioneering roles in the allocation of welfare rights had high levels of military conscription, and the construction of social rights, especially those related to education, usually gained momentum in periods marked by the risk of inter-state conflict<sup>9</sup>. Early welfare state formation began to take off in the age of high Imperialism, as states in a process of economic and territorial expansion established welfare systems to integrate their populations, and to ensure the physical wellbeing of their male citizens in preparation for possible military conflict<sup>10</sup>.

The great leap forward in the construction of social rights occurred during and after World War I. After 1918, welfare-related institutions became, incrementally, part of the substance of constitutional government in most national democracies. Some post-1918 societies, for example Germany, Poland, Sweden, the UK and (from 1933) the USA, created social institutions that formed important precursors for modern welfare regimes. At this point, the causal link between war and social citizenship shaped the formation of welfare states at a number of levels. Structurally, the first growth of the welfare state was only possible because the war led to the reinforcement of national fiscal regimes and it increased the executive powers of governments, which facilitated the assumption of distributional responsibilities by national governments. Functionally, the purpose of post-1918 welfare systems was, in essence, to reward soldiers for military sacrifice, to dissuade potential soldiers from adopting counter-systemic political affiliations (Bolshevism), and to ensure that persons likely to serve as soldiers possessed adequate physical and mental capacities to discharge their duties. In some polities, the establishment of welfare rights clearly articulated bargains forged in warfare, and welfare regimes were designed to protract patterns of inter-class collaboration that took shape in World War I and structurally to sustain the transition from a war-time to a peace-time

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9 Education reforms were introduced at the same time as military conscription in parts of Austria as early as the 1770s. In Prussia, educational reforms were implemented after the introduction of full male conscription, after the defeat by Napoleon in 1806. See general discussion of this connection in Herbert Obinger and Klaus Petersen, *Mass Warfare and the Welfare State: Causal Mechanisms and Effects*. *ZeS-Arbeitspapier*, n. 02/2014, Universität Bremen, Zentrum für Sozialpolitik (ZeS).

10 The beginnings of the dominant pattern of modern welfare state construction can be found in Imperial Germany in the 1880s, which followed Prussian integration of Germany and preceded a period of exponential Imperial expansion by the new German state. Social spending in the UK increased rapidly in the years before World War I.

social order<sup>11</sup>. In such processes, integrational functions assumed by armies were directly transferred to welfare institutions.

Importantly, however, in interwar Europe, welfare states remained deeply connected to the wider fault-lines of social conflict, and the patterns of militarization that generally marked society at this time were sharply refracted through the institutions of welfare states. In fact, contests over welfare provision became fundamental to the general disposition towards civil conflict in the period after 1918. It was only in very few societies (e.g. Sweden) that governments were able to construct a trans-sectoral coalition to support welfare state formation, and overarching consensus about the need for cross-class distribution of resources was rare. Although conceived as instruments for building inter-group consensus, for promoting general integration, and for effecting social pacification, inter-war welfare states did not often suppress social conflict. In many settings, in fact, the opposite occurred, especially after the onset of global recession in 1929. By this juncture, many societies had experienced visible polarization, often in military form, along social fissures defined by attitudes to welfare, and national governments increasingly used military violence to implement welfare retrenchment. Authoritarian regimes created inter alia in Italy, Germany, Spain, Poland, Portugal, Yugoslavia, Austria, Hungary, Romania, Bulgaria, Lithuania, Latvia all repositioned the army, as an alternative to the welfare state, as the basic unit of social integration. In such contexts, the army was frequently mobilized – in effect – as a bulwark to enforce reductions to welfare systems, usually legitimated by anti-Bolshevik rhetoric. Other less authoritarian interwar polities, such as the UK, were structured around an anti-Socialist consensus, and they were governed by parties that utilized the army to countervail political dissent. Overall, in the years after 1918, welfare states began to take shape as organizations for building social peace. Typically, however, the construction of welfare regimes stimulated deep social conflict, usually resulting in either high- or low-level civil war, in which military engagement protected the interests of anti-welfarist blocs.

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11 See my discussion in Chris Thornhill, “A Constituição de Weimar como constituição militar” in Gilberto Bercovici (ed.), *Cem anos da Constituição de Weimar (1919-2019)* (São Paulo: Editora Quartier Latin do Brasil, 2019), p. 243-272.

### 3 CIVIL WAR AND CONSTITUTIONS

On this basis, it is possible to observe the constitutions of modern democratic states as variations on a broad pattern of *the security constitution*, created by imperatives linked to warfare and designed to guarantee security resources for national governments. Generally, however, it is also possible to observe that the connection between military factors and constitution making often had highly unsettling consequences for domestic political organization in constitutional polities. Both in their political and their social-welfare dimensions, national constitutional systems usually gave rise to social conditions likely to induce civil war, or at least to conditions afflicted by the inherent risk of civil war. The importance of military forces in creating constitutional law created the potential for civil conflict in multiple ways, some of which are outlined below:

#### I. WAR BECOMES THE SOURCE OF LEGITIMACY

In many constitutional contexts, the fact that governments interacted with their citizens as providers of military force meant that they connected their legitimacy to military ideologies, and ultimately to practices of military mobilization. Before 1945, most constitutional systems were underpinned by militarized patterns of nationalism, which were used to attach citizens to their governmental institutions and to motivate them to accept the legitimacy of governmental actions. In consequence, the constitutional ordering of society of itself led to heightened risks of interstate conflict, and many constitutional polities depended on military enthusiasm for their survival. After 1789, indicatively, few constitutional states survived unsuccessful military conflict without collapse, or at least far-reaching, semi-revolutionary transformation<sup>12</sup>. Loss in warfare, thus, almost invariably brought deep depletion of governmental legitimacy.

#### II. REBELLION AGAINST MILITARY SERVICE

From the outset, constitutional governments were threatened by the fact that the purpose for which they integrated their citizens – military service

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12 Obvious examples are France in 1814/15 and 1870/71, Russia in 1856, 1905/6 and 1917, Austria in 1866 and 1918, Germany in 1918.

– induced great hostility amongst large numbers of their citizens. This could be seen as early as the Vendée uprisings in France beginning in 1793, in which newly enfranchised citizens declared war on their government to avoid conscription. However, military insubordination, mass desertion and broader anti-militarism remained persistent threats to constitutional systems from 1789 onward. The thickening of rights that underpinned the developments of constitutional systems usually served, at least implicitly, to make conscription more palatable, and to reduce the likelihood of military rebellion.

### III. THE ARMY BECOMES A LEADING ACTOR IN SOCIETY

In most polities, the rise of constitutional government created conditions in which military units and military leadership groups assumed salience in nation building and social integration. At a general level, this meant that basic patterns of social integration possessed a strong military emphasis. More specifically, this meant that elite factions in the army were able to occupy protected positions in the state, tending to operate at a relatively high level of autonomy in or at the margins of government. This had the frequent outcome that rival groups in the state became allied to different military factions, allowing the military to impact on public policy and governmental direction. In some cases, this meant that partisan structures in the state and society interlocked with inter-group contests in the army, and the convergence between military leaderships and particular political interest blocs was reinforced. In extreme cases, such as Spain or Colombia, rotation of government often entailed conflict between military units.

### IV. MILITARIZATION OF SOCIAL DIVISIONS

Most importantly, in virtually all societies, constitutional formation created conditions in which conflicts between antagonistic groups in society became strongly militarized. Through most classical constitutional lineages, it is possible to observe processes in which citizenship itself, the basic unit of constitutional legitimacy, became an object of intense inter-group contestation, and fissures between socio-economic and ethnic constituencies in national societies generated volatile, often unmanageable, conflict. In many cases, volatility in the expression of inner-societal divisions was directly attached to the militarization of society for external purposes, and conflicts between hostile domestic groups often acquired greater intensity

as societies were integrated in their constitutional systems by organizations responsibilities for external military conflict<sup>13</sup>.

Seen from a long-range perspective, in sum, the formation of national constitutions had the result, in most social contexts, that state institutions were undermined by conflicts resulting from their own constitutional structure, and from the constructions of citizenship to which they attached their legitimacy. The reliance of national governments on military organization for the construction of citizenship often meant that, up to 1945, states frequently lost the monopoly of violence in their societies. In many instances, national governments transferred the integrational functions performed by constitutions to military units (either formal or informal), and the sets of rights provided by national constitutional laws were unstitched. Importantly, at the core of many modern societies was an unclear division between inter-state war and civil war. Inter-state war often triggered civil war; civil war often fed into inter-state war; and most wars combined some elements of both types of warfare.

#### **4 CONSTITUTIONS AFTER 1945: WELFARE CONSTITUTIONS**

After 1945, a distinct and rather paradoxical occurrence can be observed, which is vital for analysing the constitutional centre of modern democratic statehood. The years after 1945 saw a deep reorientation in constitutional law, and the premises for enduring models of constitutional democracy were put in place at this time. As mentioned, this period witnessed the first gradual consolidation of constitutions with electoral systems allowing equal voting for all citizens, and, from this time on, it became unusual for constitutions to exclude particular social groups from the system of political rights allotted to citizens. Importantly, this period was also marked by the beginning of a global welfare-state revolution, which proved fundamental to the long-term stabilization of democracy. The incremental consolidation of democracy after 1945 was accompanied, vitally, by a concerted reinforcement of national welfare systems, gaining deepening effect over subsequent decades, in which the constitutional dimensions of social rights were rapidly thickened and expanded.

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13 In much of pre-1914 Europe, the integration of society determined by external conflict clearly coincided with increased inner-societal polarization. After 1918, in many European settings conflicts between domestic factions, incubated by war, became uncontrollable. This spilled over into Latin America, where even societies not strongly affected by war between 1914 and 1918 experienced acute inter-factional antagonism and strong military engagement in politics.

Salient in this process is the fact that, in the aftermath of 1945, welfare states were brought into being by war, so that the construction of constitutional law continued to articulate the deep causal thread between warfare and constitutional rights. In many cases, agreements formed in World War II were the main determinants of the growth of post-1945 welfare states<sup>14</sup>, and welfare states often reflected shared solidarities and collective risks experienced in wartime<sup>15</sup>. Indeed, many welfare states were expressly designed to avoid the patterns of civil war that had preceded World War II.

At the same time, however, prevalent models of welfare state construction after 1945 deviated markedly from earlier state-building pathways. Although rooted in experiences of warfare, the welfare rights created for national citizens at this time were constructed in institutional forms that slowly separated such rights from their military origins. After 1945, the basic resources distributed by democratic welfare states (primarily income security, health care, pensions, and public education) were placed on new foundations, such that their formative attachment to military interests was obscured, and almost effaced. This was not invariably the case. For instance, in the USA, welfare reforms were promoted against the backdrop of the Vietnam War in the 1960s, and the US army remains today an important welfare provider<sup>16</sup>. Generally, however, after 1945, welfare states were increasingly patterned on a semi-universal model, access to welfare was spread more evenly through society, and military participation lost prominence as a path to welfare. Indicatively, new post-colonial states, created after 1945, tended to emulate some aspects of welfare state designs formed through warfare, and welfare commitments, with clear variations depending on the availability of fiscal resources, were generally internalized in explanations of governmental legitimacy. Most vitally, however, parties at different points on the political spectrum showed increasing willingness to recognize the importance of welfare state construction, and in much of Europe the commitment to the promotion of social rights reached beyond particular historical milieux and constituencies, forming something close to a shared social compact. In the UK, the Federal Republic of Germany,

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14 On ways in which transnational welfare designs, created during the war, served as premises for later welfare state formation, see my analysis in Chris Thornhill, *Democratic Crisis and Global Constitutional Law* (Cambridge University Press, 2021), p. 152.

15 See John Dryzek and Robert E. Goodin, "Risk-Sharing and Social Justice: The Motivational Foundations of the Post-War Welfare State". *British Journal of Political Science* 16(1) (1986): 1-34.

16 See Brian Gifford, "The Camouflaged Safety Net: The U.S. Armed Forces as Welfare State Institution". *Social Politics: International Studies in Gender, State & Society* 13(3) (2006): 372-399.

Italy and Austria, some responsibility for building welfare institutions was assumed by parties or movements traditionally on the political right, whose acceptance of social spending obligations before 1945 had been limited. In these respects, the form of the welfare state broke – or at least rendered tenuous – the formative link between welfare and war, which had structurally defined modern states from the earlier nineteenth century. Very importantly, the heightened and increasingly universal distribution of welfare resources also served to sever the deep causal thread between contest over material goods and inner-societal conflict, which had characterized the rise of modern states. Rights allowing common access to material resources played a vital role in the pacification of society in most post-1945 democracies, and the growth of welfare states tended to demilitarize interaction within domestic polities.

In summary, the promotion of social rights in national constitutional provisions was originally brought into being by war and war-time experience. However, post-1945 welfare states also managed to place a deep dividing line between the constitution and war. The social shift in constitutional law after 1945 tended to reduce the extent to which interactions within national societies were susceptible to militarization. Eventually, the welfare state formed an integrational alternative to military constitutionalism, and it transferred the basic function of socio-political integration from the army to a diffuse set of institutions providing welfare for citizens (including pension funds, hospitals, public schools and universities). The differentiation between military organizations and welfare institutions (including educational organizations) can be seen as a vital transformational fact underlying post-1945 democracies.

The basic structure of national constitutions created in longer wake of 1945 depended on the fact that, on one hand, they resulted from war and deep experiences of social militarization yet that, on the other hand, they separated the apparatus of social integration from the military. Through this process, the welfare state replaced the army as a primary source of social integration. Across modern human history, this process of differentiation appears as the secret prerequisite of modern democracy. The fact that constitutions of this time were both determined by and separated from military pressures, which was achieved through the creation of welfare states, appears to lie at the heart of successful and sustainable constitutional democracy.



## 5 CONSTITUTIONS IN THE 1980S: CONSTITUTIONS WITHOUT WAR

After the years following 1945, the period beginning in the early 1980s formed the second wave of fully democratic constitution making. At this time, the number of polities allowing equal voting rights to all citizens was very substantially widened, notably in Latin America and Eastern Europe, but also in some parts of Africa. In this process, however, the configuration of constitutional law established after 1945 was altered, at least in some cases and in some respects. Significantly, from the 1980s onwards, the formative link between actors involved in making constitutions and actors brought to prominent roles by military conflict became weaker. In most constitution-making settings of this period, the social background to constitution making was not immediately affected by war. One major exception to this is the process of democratic reorientation that began in South Africa in the late 1980s, which, with qualifications, could be aligned to the fifth type set out above; that is, the constitution created by insurgency. A further exception is the 1991 constitution of Colombia, which possessed a distinct relation to a military agreement, arising from civil war. Clear exceptions to the prevailing tendency can be found in the former Yugoslavia. Some observers may argue that the line of constitutional redirection in Poland in the 1980s occurred against a background of intense military engagement, such that organized insurgency influenced the constitutional trajectory.

Generally, nonetheless, a broad feature of constitutions or constitutional orders created in and after the 1980s was that they were constructed through lengthy transitions, in which military or semi-military regimes came to an end, military actors withdrew from government, and military strategies lost much of their relevance. Typically, with variations, such constitutions or revised constitutional orders were designed to curtail the autonomy of military actors and of organizations acquiring influence through military operations. Clear examples of such processes are Argentina (post-1983), Brazil (1988), Uruguay (post-1984), Benin (1990), Ghana (1992). New constitutions in Eastern Europe only partly conformed to this model. Most pre-transitional regimes in Eastern Europe were based in the supremacy of a political party, which controlled the army. However, such parties typically utilized the military for purposes of domestic control, and these regimes had some characteristics of military government. In general, therefore, constitutions at this time were created without military conflict, and they were intended to depoliticize military bodies. To be sure, military actors remained important in Chile. The military was able to exert some

influence, and it retained direct constitutional protection, in transitional Brazil. Despite this, most constitution-making processes at this time were defined – uniquely – by the weak force of military factors and by relatively low societal militarization.

It is possible to speculate about the reasons why so many polities that had otherwise possessed a long history of internal intergroup militarization were able to embark on such distinctive, peaceful constitutional trajectories in the 1980s. The role of international human rights law as a normative system for steering democratic transition can be assigned great importance in this regard. In most constitutional transitions taking place in and after the 1980s, even the most radically opposed socio-political factions were able to agree on normative principles, usually set out in the international arena and closely attached to international human rights conventions, which protected transitional processes from uncontrolled militarization. For example, in transitional Argentina, different factions were able to agree on the importance of human rights law as a matrix for democratic stabilization<sup>17</sup>. In Colombia, where social pacification long proved elusive, some shared orientation around human rights law became central to democratic consolidation<sup>18</sup>. The role of human rights law in framing a residual consensus between otherwise deeply hostile parties in constitution-making experiments acquired clear articulation in South Africa<sup>19</sup>.

These facts provide a distinctive lens for assessing the role of constitutions in some contemporary societies. These facts allow us, in some respects, to identify particularities in the constitution-making processes of the 1980s and 1990s and the constitutions that they established. To some degree, these facts provide a perspective in which we can now interpret the manifestations of constitutional crisis in some polities.

On one hand, the limited impact of war and military actors on the constitutional transitions in the 1980s had self-evidently propitious results for democratic stability, creating conditions for democratic institution building

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17 See Alison Brysk, *The Politics of Human Rights in Argentina. Protest, Change, and Democratization* (Stanford, CA: Stanford University Press, 1994), p. 125-26; Jonathan M. Miller, "A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process". *The American Journal of Comparative Law* 51 (2003): 839-886.

18 Jorge González-Jácome, "The Emergence of Revolutionary and Democratic Human Rights Activism in Colombia between 1974 and 1980". *Human Rights Quarterly* 40(1) (2018): 91-118.

19 Brice Dickson, "Protecting Human Rights through a Constitutional Court: The Case of South Africa". *Fordham Law Review* 66 (1997): 531-566; Raylene Keightley, "Public International Law and the Final Constitution". *South African Journal on Human Rights* 12 (1996): 405-418.

which avoided some crises experienced in earlier waves of constitutional transition. Discernibly, for example, polities in Eastern Europe that recommenced the democratic experiments that had been brutally interrupted in the 1920s and 1930s possessed, relative to the pre-1939 period, much more robust control of their military forces and much more solid capacities for managing social conflicts. Consequently, the strong overlap between democratization and the risk of civil war that had characterized constitutional experiments after 1918 was not repeated. Likewise, polities in Latin America that had historically shown propensities to hyper-politicization generally developed on pathways in which such antagonisms were dampened<sup>20</sup>.

On the other hand, however, the absence of overt militarization in the wave of constitutional transitions that began in the 1980s had, in some respects, less favourable implications for democratic institution building. Some of the distinctive features of these transitions, which specifically differentiated them from earlier transitions and generally promoted peaceful institutional reorientation, caused quite particular legitimational problems for new democracies.

For example, the reliance on human rights law as a normative framework for steering democratic transition meant that some patterns of social consensus that had supported earlier transitions did not acquire prominence. As states in the 1980s and 1990s traversed the boundary between authoritarianism and democracy, they often generated legitimacy for their functions in externalized fashion – that is, by signalling compliance with external normative expectations regarding recognition of human rights and guarantees for secure rule of law. Often, this policy was driven by inter-elite pacts and accords<sup>21</sup>. On this premise, external standards

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20 See Marcelo Cavarozzi, "Politics: A Key for the Long Term in South America" in William C. Smith, Carlos H. Acuña and Eduardo A. Gamarra (ed.), *Latin American Political Economy in the Age of Neoliberal Reform. Theoretical and Comparative Perspectives for the 1990s* (New Brunswick: Transaction, 1994), p. 127-155; Peter Ranis, *Argentine Workers. Peronism and Contemporary Class Consciousness* (Pittsburgh: University of Pittsburgh Press, 1992), p. 38-39; Silvio Borner and Markus Kobler, "Strength and Commitment of the State: It Takes Two to Tango: A Case Study of Economic Reforms of Argentina in the 1990s". *Public Choice* 110(3/4) (2002): 327-350.

21 One example of this is the Brazilian transition beginning in 1985, where representatives of the military retained key roles prior to and during transition. See the presentation of the views of military actors involved in the transition, clearly revealing the persistent influence of their concerns on the thought and actions of President Sarney, in Celso Castro and Maria Celina D'Araujo (ed.), *Militares e política na Nova República* (Rio de Janeiro: Ed. Fundação Getulio Vargas, 2001), p. 75. On the case of Chile as a pacted transition, in which the military retained prominence, see Patrick S. Barrett, "Labour Policy, Labour-Business Relations and the Transition to Democracy in Chile". *Journal of Latin American Studies* 33(3) (2001): 561-597; Fernando Durán-Palma, Adrian Wilkinson and Marek Korczynski, "Labour Reform in a Neo-Liberal 'protected'

were internalized in national government policies as primary tokens of effective democratic transition. By consequence, new or transitioning democratic governments explained their legitimacy, in part, not on the grounds of robust expression of inner-societal solidarities, but as the result of externally dictated norm conformity. One outcome of this fact was that new democratic governments were less reliant on resources of legitimacy extracted directly from their populations – this is the reason why they were less inclined to trigger volatile hostilities. However, one further outcome of this fact was that new democracies were less intensely pressured to establish deep integrational foundations, and they were less likely to establish comprehensive welfare regimes to support their legitimacy. The essential commitment to the integration of national populations through welfare systems, which had underpinned post-1945 democracies, was less strongly declared in democracies established from the 1980s onwards. Indeed, the fact that the transitions in and after the 1980s were not directly determined by warfare meant that the need to pacify deep-lying social conflicts was less fundamental to the construction of new institutions, and the need to provide compensation for social groups adversely affected by military conflict was far less intense than in previous contexts. This was reflected in the fact that the transition to democracy in and after the 1980s was not accompanied by an immediate repeat of the post-1945 welfare state revolution.

In this light, the fact that democratic systems were not established during or after warfare meant, paradoxically, that they did not acquire the benefits resulting from the military structuring of constitution-making processes – in particular, they were not marked by the orientation towards cross-class distribution of material risks. The emergence of the welfare state as new system of integration, decisively replacing the military in this quality, was not as prominent at this time as had been the case in post-1945 Europe.

One consequence of this bundle of factors was that welfare-state structures in many democracies created in and after the 1980s remained fragile and unstable. This claim can of course be exaggerated. Many earlier democracies, especially the UK and the USA, only established relatively weak welfare states after 1945. Moreover, in the decade after 2000, several

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Democracy: Chile 1990-2001". *The International Journal of Human Resource Management* 16(1) (2005): 65-89.

societies in Latin America initiated a belated welfare state revolution<sup>22</sup>. Uniquely, in this period, a number of polities approached welfare-state construction on the basis of peacetime compromises and intergroup accords that were not driven by war. This was an event of the highest global importance. Prior to this, as mentioned, concerted welfare construction had usually been driven by commitments to social integration resulting from or responding to war. Nonetheless, the robustness of welfare regimes amongst democracies created since the 1980s is, on average, relatively low.

A further consequence of these factors was that, in constitutional systems emerging after the 1980s, welfare agreements were not very deeply embedded in society. The fact that social agreements were not constructed through shared experiences of military devastation meant that commitments to social rights remained localized in society. Importantly, the promotion of social rights was frequently the prerogative of specific social groups, specific political parties, or even specific political leaders, and the capacity of societies for articulating a pro-welfare stance able to traverse traditionally hostile groups often remained limited. By consequence, welfare-state construction was commonly not sustained by deep solidarities, and welfare investment was frequently exposed to sharp variations or retrenchment following changes in government<sup>23</sup>. Owing to this fact, in many societies, there persisted a propensity for the intense re-politicization of welfare commitments, and, in some cases, conflicts regarding such matters generated deep social polarization. In some polities that assumed democratic constitutional form in and after the 1980s, the fact that constitutions did not originate in war left a fateful twofold legacy. This background meant both that military elites were not fully discredited and that welfare arrangements were uneasily negotiated and subject to opportunistic violation. In extreme cases, of course, this

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22 See Jennifer Pribble, *Welfare and Party Politics in Latin America* (Cambridge University Press, 2013); Wendy Hunter, "Making Citizens: Brazilian Social Policy from Getúlio to Lula". *Journal of Politics in Latin America* 6(3) (2014): 15-37.

23 Brazil can be cited as a primary example of this, especially after 2015/16. The years before Bolsonaro witnessed an intensifying politicization of debate about social welfare arrangements, as a result of which welfare policy was subject to deep retrenchment before Bolsonaro appeared as a presidential candidate. Since 2016, anti-welfarist policies are reflected in decreases in federal investment in health care and education. Current federal investment in education represents a strongly retrograde tendency. The source for these data is: Siga Brasil Dataset, at <http://www9.senado.leg.br/QvAJAXZfc/opendoc.htm?document=Senado%2FSigaBrasilPainelEspecialista.qvw&host=QVS%40www9&anonymous=true&select=LB137,2019> (last accessed 08.10.2021).

configuration meant that remnants of the pre-transitional military could be mobilized to promote the retrenchment of welfare arrangements<sup>24</sup>.

## CONCLUSION

To conclude, from the late eighteenth century onwards, modern democratic constitutions were, dialectically, the products of war. Until recently, most constitutions resulted directly from warfare. However, the ability of constitutions to frame conditions of democratic government depended on their ability to integrate citizens through constructions of citizenship not attached to war. In essence, this means that the success of democratic constitutions in framing democracy revolved around their ability to incorporate and to stabilize processes of social integration linked to warfare, yet also, at the same time, to redirect the primary emphasis of social integration from the military system to the welfare system. In some contemporary societies, constitutional rule is showing a clear tendency to reverse this integrational process, as armies acquire new influence and welfare states are eroded. In some contemporary cases of manifest constitutional crisis, it is usually possible to observe a shift in the integrational focus of the constitution, in which welfare-based integration is weakened and integration functions are transferred back from welfare-related institutions to conflictual organizations, often at least partly connected to the army. This process is common in, although not exclusive to, constitutions created in the 1980s, in which the construction of welfare systems was only infrequently sustained by deep cross-sectoral support and agreements. On this basis, attempts to understand current tendencies towards constitutional backsliding may draw benefit from a sociological reconstruction of constitutional, law, and consideration of the effects of war in shaping and preserving constitutional democracy may acquire explanatory value in this context. One important step towards democratic reinforcement in polities formed as democracies since the 1980s may be to reproduce the construction of welfare systems that resulted from warfare after 1945, and so to renew again and to perpetuate

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24 On the longer-term persistence of military authority in post-1988 Brazil see Jorge Zaverucha, "(Des)Controle civil sobre os militares no governo Fernando Henrique Cardoso". *Lusotopie* 10 (2003): 399-418. On the deepening nexus between the presidency and the army under Temer see Emilio Peluso Neder Meyer, "La Militarización de la política en Brasil" in José Antonio Guevara Bermúdez (ed.), *Experiencias sobre justicia, verdad i memoria. Frente a crímenes de estado*, p. 57-74; 61 (Open Access at <http://www.cmdpdh.org/publicaciones-pdf/cmdpdh-justicia-transicional-experiencias-justicia-verdad-y-memoria.pdf>).

the peaceful welfare revolution that initially began in some states in Latin America after 2000.

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**Sobre o autor:**

**Chris Thornhill** | E-mail: [chris.thornhill@manchester.ac.uk](mailto:chris.thornhill@manchester.ac.uk)

Professor in Law at University of Manchester. Research interests lie in the following areas: Sociology of Law; Comparative Constitutional Law; Law and Social Theory; Legal History.

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