

4. Constitutionalism in postwar Europe: revolutionary or counter-revolutionary?

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1. INTRODUCTION

Western Europe saw a wave of constitution-making after the Second World War, in defeated countries, notably Germany and Italy, and in countries that required political reconstruction, such as France. What kind of constitution-making was this, if it was of a kind at all? In *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law*, Bruce Ackerman argues that the Italian and French were both ‘revolutionary constitutions’, whilst the German was of a different type, an ‘elitist’ construction.¹ ‘Revolutionary constitutions’ are those where revolutionary outsiders, having gained power through an insurgent movement, translate high-energy politics into a new constitutional settlement, a process Ackerman calls the ‘constitutionalization of charisma’.² ‘Elitist constitutions’, in contrast, are those where a system of government is changed by political and social elites without the pressure of mass popular uprising but in collaboration with powerful external forces, due to the severity of the crisis experience. These are mapped as distinct constitutional pathways alongside a third ideal-type, exemplified by the UK’s settlement, which he labels ‘establishment’. Establishment constitutions are built through strategic concessions made by ‘pragmatic insiders’, who co-opt ‘sensible outsiders’ to join the political and constitutional establishment.³

Ackerman’s work on the first ideal-type of ‘revolutionary constitutions’ ranges far beyond European varieties of constitutionalism, offering comparisons with pathways to constitution-making as far afield as Iran, Israel and

¹ B Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Harvard University Press, 2019) (henceforth ‘RC’).

² RC, 4.

³ RC, 4.

India. This comparative method, and the invitation for constitutional scholarship to integrate interdisciplinary analysis and to consider the role of political mobilisation and social movements when mapping constitutional change enables Ackerman to avoid some of the worst platitudes associated with ‘global constitutionalism’ and rational actor models.⁴ But Ackerman also holds out the US path to constitutional government and judicial supremacy as a point of convergence, and in so doing his work exhibits a curiously ‘Whiggish’ history of liberal progress.⁵ This is not argued for but simply presupposed as a constitutional *telos*. Although commonplace in constitutional theory, liberal teleology is curious in a book purporting to track *revolutionary* constitutions, and, as the subtitle indicates, to consider charismatic leadership and the rule of law.⁶

It is remarkable that a book entitled ‘revolutionary constitutions’ says virtually nothing about the two great revolutions of the modern age in Europe, the French and the Russian.⁷ It is also remarkable that there is no sustained analysis of the interwar period in Europe, with its various constitutional breakdowns, including Germany’s, following its own ‘revolutionary’ but ultimately doomed constitution in the Weimar Republic. These revolutions, bookending the ‘long nineteenth century’, were not about the pursuit of liberal constitutional government but were aimed at radical political and social change. It is a startling omission in its own right. But more than that, it deprives the analysis of any *longue durée* narrative, of a backdrop against which to contextualise the democratic achievements of postwar European constitutionalism. Instead, we are offered standard (but essentially unargued) claims of ‘new revolutionary beginnings’, or *Stunde Null*, in the wake of the Second World War, claims which have been strongly contested elsewhere.⁸

⁴ RC, 39-40.

⁵ RC, 10.

⁶ RC, 2. It is worth noting in passing that this subtitle is highly misleading; Ackerman himself says at the outset that his project should not be confused with a more ambitious one to clarify the ideal of the rule of law and there is little discussion of it.

⁷ Ackerman makes much of a passing distinction between ‘total revolutions’ and ‘revolutions on a human scale’, but this distinction is not explained. In relation to the Russian revolution, Ackerman makes little differentiation between Lenin and Stalin, and occasionally conflates both with Mao. On the significance of Lenin’s theorising before it was contorted into official *Marxism-Leninism*, see M Goldoni and M A Wilkinson, ‘The Tradition of the Material Constitution in Western Marxism’ in Goldoni and Wilkinson (eds), *Handbook on the Material Constitution* (CUP, 2023 forthcoming).

⁸ In relation to Germany, see e.g. H Kundnani, *Utopia or Auschwitz: Germany’s 1968 Generation and the Holocaust* (OUP, 2009); to Italy, see P Ginsborg, *A History of Contemporary Italy: Society and Politics 1943-1988* (Penguin, 1990); to France, H Chapman, *France’s Long Reconstruction: In Search of the Modern Republic* (Harvard

With the longer historical record in view, postwar constitutionalism appears more ambiguous than the label ‘revolutionary’ implies. It reveals a crucial blind spot in Ackerman’s theorising; although he declares that constitutionalism does not guarantee a better future, he does say it necessarily gains the ‘mobilised and self-conscious consent of fellow-citizens’.⁹ But what if constitutional development reflects *social de-mobilisation* and *de-politicisation*? In eliding this possibility, Ackerman’s story is flattened, a problem exacerbated by his use of ‘stagist’ dynamics, identifying abstract ‘Time’ periods instead of engaging in material constitutional analysis.

This chapter argues that postwar constitutionalism in the core of Europe was in significant respects *counter-revolutionary*, reversing course against movements of popular sovereignty and radical democracy that had grown in the 19th and early 20th centuries following the democratic revolution of the late 18th century. Although this counter-revolutionary thrust unfolds over time, particularly in conjunction with transnational projects of European integration, the elitist nature of postwar constitutionalism was evident from the outset, including in the two countries Ackerman focuses on, Italy and France. This helps to explain the puzzle of the eventual dominance of an ideal-type of elitist (German) constitutionalism in the European Union.

2. REVOLUTIONARY OR COUNTER-REVOLUTIONARY?

The distinction between revolutionary and counter-revolutionary has a long lineage within the Marxist tradition that cannot be fully rehearsed here.¹⁰ Instead, revolutionary developments are taken to be those that augment democratic power, understood as the political power and representation of the *demos* as a whole, which in the 20th century crucially comes to include the working class. ‘Counter-revolutionary’ is then taken to mean those constitutional developments which reduce or constrain democratic power and retreat from the idea of popular sovereignty. They may do so through a variety of means: institutional and extra-institutional, formal and informal, coercive as

University Press, 2018). More generally, on the myth of a ‘zero hour’ see M Conway, *Western Europe’s Democratic Age: 1945 – 1968* (Princeton University Press, 2020) 14.

⁹ RC, 226.

¹⁰ Beginning with Marx and Engels’ articles on the 1848 German Revolution (collected in book form as Karl Marx, *Revolution and Counter-Revolution: or Germany in 1848*) and Marx’s *Class Struggles in France 1848-1850*. For an overview of some of the different meanings of counter-revolution in Marxist thought, see Lewis Brownstein, ‘The Concept of Counterrevolution in Marxian Theory’ (1981) 22:3 *Studies in Soviet Thought* 175-192.

well as consensual. For example, by ‘empowering the judiciary and isolating it from political influence’, constitutionalism can be used to stabilise bourgeois power, with the aim to ‘immunise’ the order from democratic elements.¹¹ Other counter-majoritarian devices and institutions might be used to attain a similar objective. But constitutions, understood broadly, also have a framing function, establishing how political debate is to be organised and what its limits are.

Constitutionalism’s tendency to immunise established power against democracy has been periodically noted, and long before the perceived dominance of neoliberal rationality.¹² But it has gained renewed urgency over the last few decades. As Michael Mandel forcefully put it after a burst of constitution-making in the 1980s and 1990s, the *legalisation* of politics ‘increasingly moves the locus of political activity out of the parliaments and into the courts’. What he coined as the ‘new constitutionalism’ of his time ‘was intended to operate ... as an *antidote* to democracy, ... to preserve the oligarchy of private property from the mortal danger posed by representative institutions elected by people without property, a.k.a. the *demos*’.¹³ Other scholars in the same period noted how international and supranational institutions and legal systems were increasingly taking up the mantle of the ‘new constitutionalism’, shielding the economy from democratic interference with the goal of protecting the global market and capital investment.¹⁴ In the course of the last decade since the financial crisis, these ‘new constitutional’ regimes – and some much older ones – are threatened by populists, who invoke the language of anti-elitism and legal resentment. But these populist programmes are often, in turn, pursued through projects of constitutional change.¹⁵

The assumption that successful revolutionary paths all lead to the same promised land of legitimate US-style constitutionalism thus fails to consider the democratic *costs* of such a process.¹⁶ To be clear, the balance-sheet of constitutional development can be drawn up in different ways; democratic engagement may not be the only metric. The point here is to highlight what is missing from Ackerman’s account, not to offer an ‘all things considered’

¹¹ See N Sultany, ‘Marx and Critical Constitutional Theory’ in O’Connell and Oszu (eds), *Research Handbook on Law and Marxism* (Edward Elgar, 2021) 209–242, at 231.

¹² Kyong-Min Son, *The Eclipse of the Demos: the Cold War and the Crisis of Democracy Before Neoliberalism* (University Press of Kansas, 2020).

¹³ M Mandel, ‘A Brief History of the New Constitutionalism, or “How We Changed Everything so That Everything Would Remain the Same”’ (1998) 32:2 *Israel Law Review* 250–300, at 252–253.

¹⁴ For a representative overview of essays on this theme, see S Gill and C Cutler, *New Constitutionalism and World Order* (CUP, 2014).

¹⁵ M Tushnet and B Bugaric, *Power to the People: Constitutionalism in the Age of Populism* (OUP, 2022).

¹⁶ See e.g. RC, 31.

normative conclusion about the desirability or otherwise of any particular constitutional settlement.¹⁷ Measuring a successful constitution only in terms of American-style judicial review and consolidation of judicial authority elides the counter-revolutionary aspect of this trajectory.¹⁸ It misses the regressions in the flow of democratic power, even within regimes characterised as ‘constitutional’ and precisely *because* they are increasingly constitutionalised in a legalistic fashion. This is not, or not only, about how the constitution was drafted or by whom it was ratified; it is about the type of regime that develops from it. It requires more than formal analysis of the constitutional text or the initial institutional interpretation of it. It requires examination of the ‘material constitution’.¹⁹

From this perspective – which, beyond the Marxist tradition, includes radical democrats, political constitutionalists, republicans and even some self-styled liberals – constitutional development in postwar Europe looks ambiguous. The form of democracy adopted was remarkably controlled and limited, as many historians have recounted. In a retrospective of the re-founding of Europe after 1945, Martin Conway notes that although bringing ‘unprecedented stability and uniformity’ to the politics of the western half of the continent, it inaugurated a democracy that ‘was always circumscribed by the stability it would achieve and the interests it was constructed to serve’. In ‘creating a top-down democratic order’, he notes, ‘the architects of post-1945 European democracy limited the opportunities for popular control of rulers and for expressions of dissent at the same time as they enhanced the freedom of action of state officials’. The consequence, in his view, was the construction of a *formal democracy*, ‘founded on the regular rituals of parliamentary elections and negotiation with a range of interest groups, but from which the people, and something of the noise and vibrancy inherent to a pluralist democratic culture, was at times strangely absent’.²⁰

Any periodisation, of course, is fraught with difficulty, and the starting points are always to some extent arbitrary. To avoid or reduce the charge of *presentism* (the tendency to interpret past events with current sensibilities), it can be noted that the diagnosis offered here had been made by others without the benefit of hindsight. The counter-revolutionary aspect of postwar constitu-

¹⁷ For a recent full-bodied argument against constitutionalism, see Martin Loughlin, *Against Constitutionalism* (Harvard University Press, 2022).

¹⁸ See also R Gargarella, ‘Bruce Ackerman’s Theory of History’ in Albert (ed), *Revolutionary Constitutionalism: Law, Legitimacy, Power* (Hart, 2020).

¹⁹ M Goldoni and M Wilkinson, ‘The Material Constitution’ (2018) 81:4 *Modern Law Review* 567-597.

²⁰ M Conway, *Western Europe’s Democratic Age: 1945-1968* (Princeton University Press, 2020) 8. See also J Habermas, *Legitimation Crisis* (Polity Press, 1988) 36-37.

tions in Europe (and elsewhere) was for example, identified by Hannah Arendt in the 1950s and early 1960s. They were attempts to arrest the progress of the democratic constituent power, 'to stem the tide of revolution', in her words.²¹ If certain constitutions 'served to limit power, it was the power of the government as well as the revolutionary power of the people whose manifestation had preceded their establishment'.²² Arendt long argued that the goal of liberal constitutionalism was not to claim a share in government but to safeguard 'against government'. This more general recognition ended in her warning that constitutional government may even 'spell the end of public freedom'.²³

Also writing in the 1950s, after his own experience with interwar collapse, Frankfurt school associate and labour lawyer Franz Neumann observed that citizens' 'alienation from democratic political power was increasing in Europe at a tremendous speed'.²⁴ Neumann identified this trend psychologically with various types of apathy. Various symptoms and causes of political alienation were diagnosed by Neumann, including the 'growing complexity of government', the 'growth of bureaucracies in public and private life', the 'concentration of private social power' and 'the hardening of political parties into machines'.²⁵ For Neumann, the only antidote was a renewal of political freedom based on representative democracy.

Neumann's Frankfurt-school compatriot, Otto Kirchheimer, detailed the counter-revolutionary tendencies more thoroughly, theorising the emergence of a 'catch-all' party, predominantly led by the extension of Christian Democratic support beyond its traditional constituency. This new formation would be professional, elitist, and able to tap into new strata of middle-class citizens. In conjunction with the de-radicalisation of the political left and right, and the emergence of powerful non-partisan interest groups, parties across the political spectrum became more centrist in the attempt to transcend social cleavages, and turned to the personal appeal of political individualities. Kirchheimer was not only offering a description of postwar politics; he was offering a warning that this phenomenon would make politics 'devoid of substance, conflict and choice'. The consequence of 'vanishing opposition,

²¹ H Arendt, *On Revolution* (Penguin Books, 1990) 144. On the demoralisation of the working class after the Second World War, see H Arendt, 'The Aftermath of Nazi Rule: Report from Germany', *Essays in Understanding 1930–1954: Formation, Exile, and Totalitarianism* (Schocken Books, 1994).

²² Arendt, *On Revolution*, above (in a note added after the original edition of the book she references Loewenstein's 1961 study of the 'flood of constitutions' after the Second World War based on a 'deep distrust of the people').

²³ Arendt, *On Revolution*, above.

²⁴ F Neumann, 'The Concept of Political Freedom' (1953) 53 *Columbia Law Review* 901–935, 932.

²⁵ *Ibid*, 932.

cartelisation and professionalisation’ would then lead to concerns not only of ‘depoliticisation’ and ‘political apathy’ but also of ‘the erosion of the classic separation of powers’.²⁶

3. WEIMAR: THE MISSING LINK

Arendt, Neumann and Kirchheimer were all theorising the domain of ‘the political’ on the cusp of a transformative epoch and against the background of their close personal involvement in interwar turbulence in general and the collapse of Weimar in particular. This brings us squarely to confront a major deficit in Ackerman’s work. The Weimar constitution of 1919 hardly features at all in *Revolutionary Constitutions* and its absence leaves a lacuna at the core of his account.²⁷ This is first because it is an example of the highly contingent nature of constitutional development relative to constitutional form, and second because of the significance to postwar constitutionalism of the dominant liberal myth that Weimar collapsed due to an excess of democracy and politicisation.

Weimar was a highly constitutionalised and ambivalent regime, in the sense that its written document covered liberal, socialist and republican elements, as well as maintaining symbolic links with the previous monarchical-imperial order. The Weimar Constitution coincided with the birth of universal suffrage in Germany, and saw the emergence of mass political parties of the working class. Yet Weimar failed in a catastrophic fashion, its regime facilitating the transition to Presidential cabinets from 1930, and then permitting the takeover by Adolf Hitler and the Nazi party in 1933.²⁸ This occurred not in conditions of democratic excess but of the harsh repression of democracy.

Like so many other commentators, Ackerman blurs the various aspects of the Weimar breakdown through caricaturing the controversial figure of Carl Schmitt. Ackerman takes a typical liberal-moralistic approach, presenting Schmitt as a straightforward proto-Nazi, when the reality is much more

²⁶ A Krouwel, ‘Otto Kirchheimer and the Catch-All Party’ (2003) 26 *West European Politics* 23, 24 (there was contemporary description of the ‘depoliticization’ of the 1950s, see various articles in Georges Vedel (ed), *La Depoliticisation, mythe ou realite?* (Armand Colin, 1962)).

²⁷ After a brief discussion of postwar Germany as representing the ideal-type of ‘elite construction’, Ackerman announces that the German Basic Law of 1949 will be dealt with in his next book. At this stage we don’t know whether Weimar will feature as a backdrop to explaining the nature of the Bonn constitution.

²⁸ There is considerable debate about the legality and constitutionality of the Nazi transition. See e.g. L Vinx, ‘The Material Constitution of the Dual State’ in Goldoni and Wilkinson (eds) above.

complex, and in many ways more troubling.²⁹ In the Weimar years, Schmitt was an authoritarian conservative, and could even be described as an ‘authoritarian liberal’ when it came to making sense of his defence of the bourgeois *Rechtsstaat* against the movements of democratic and revolutionary socialism.³⁰ That, at least, was Hermann Heller’s view of Schmitt. By the eve of the Nazi seizure of power, Heller described him as a key intellectual figure behind the formation of ‘authoritarian liberalism’.³¹

In the Weimar period, Schmitt was emphatically not a totalising revolutionary but a *counter-revolutionary*, fearful of the democratic revolution (as well as the Bolshevik version) and its capacity to transcend the liberal regime of private property.³² Along with other conservative jurists such as Heinrich Triepel, Schmitt turned to US-style judicial review in early Weimar in an attempt to frustrate social legislation by parliament. Through a revival of a natural law it was hoped that the judicial empowerment of the *Reichsgericht* could fulfil ‘counterrevolutionary functions’, obstructing the expropriation of private property following interventions in response to the hyperinflations of the early 1920s.³³ When this failed to arrest movements of democratic socialism, Schmitt would then turn to an executive-led formation in an attempt to protect the bourgeois order.

Was Weimar a ‘revolutionary constitution’ in Ackerman’s terms? It certainly followed the revolutionary overthrow of the Monarchy, and its replacement with a parliamentary republic after the ‘November Revolution’ of 1918. But the transition to the Weimar Republic also involved the crushing of the Spartacist uprising and brutal murder by the Freikorps of its left-wing revolutionary leaders, Rosa Luxemburg and Karl Liebknecht. This harsh repression of revolutionary socialist currents was taken under the direction of the first President of the Republic, social democrat Friedrich Ebert, who fiercely opposed a social revolution and entered into a pact with the military to prevent any Bolshevik-style political breakthrough. For the Marxist and

²⁹ Ackerman succumbs to a crude reduction of Schmitt to a rabble-rousing Hitler fanatic, RC, 42.

³⁰ R Cristi, *Carl Schmitt and Authoritarian Liberalism* (Cardiff University Press, 1997).

³¹ H Heller, ‘Autoritärer Liberalismus’, 44 *Die Neue Rundschau* (1933) 289-298 (in English translation ‘Authoritarian Liberalism?’ 21 *European Law Journal* (2015) 295-301 (translated by S Paulson)). See also K Tribe, *Strategies of Economic Order: German Economic Discourse 1750–1950* (CUP, 1995) 175.

³² Cristi, above.

³³ P C Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Duke University Press, 1997).

radical democratic left, Weimar, and the way it unfolded, thus represented a *counter-revolutionary* aspect.³⁴

The broader point is that whatever its initial status, the *meaning* of the Weimar constitution, as well as its eventual fate, can only be fully grasped in the context of the long-19th century struggle for democracy, for revolutionary socialism, and the transition from political to human emancipation. In those terms, Weimar also contained a reactionary element, frustrating the radical democracy of the workers' councils that were key to the socialist path in the view of Rosa Luxemburg and others.³⁵ The bypassing of the *Reichstag* through presidential dictat and decree under Article 48 of the Weimar Constitution, by the formation described by Heller as 'authoritarian liberalism', was then a counter-revolutionary project against parliamentary democracy itself.³⁶

Attention to the unfolding of Weimar's constitutional order thus also exposes the liberal myth, so dominant after the Second World War, that excessive democracy led to democracy's collapse and that democracy must therefore 'protect itself' by militant means. On the contrary it shows how liberals turned away from democracy when it presented a threat to their ideas and interests. And Weimar, although unique in significant respects due to Germany's economic and geopolitical situation in the 1920s and 1930s, was not unique in seeing liberals turn away from the path of democracy and towards authoritarian responses to the social question. As Karl Polanyi documented, liberals across Europe, and indeed across the globe, turned to authoritarian solutions to protect against the threats posed by movements of democratic socialism.³⁷ Far from democracy 'committing suicide', it was often simply abandoned by political elites. This was exemplified by the meeting of the Walter Lippmann colloquium in 1938, uniting American and European liberals and conservatives, and establishing a new consensus that liberalism needed to be restored on a very different footing from the ideological *laissez-faire* of its classical

³⁴ Its association with defeat in the First World War meant it was also rejected by large segments of the conservative right and the military establishment, but they would eventually make their peace with Weimar, considering it to be compatible with their projects of capital accumulation, at least until the early 1930s.

³⁵ On the significance of Luxemburg's radical democracy for constitutional theory, reuniting it with Machiavellian republicanism, see C Vergara, *Systemic Corruption: Constitutional Ideas for An Anti-Oligarchic Republic* (Princeton University Press, 2020).

³⁶ This transition had been politically 'tolerated' by social democrats, including Heller himself, for fear of the 'greater evil' of National Socialism. See further M A Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (OUP, 2021) chapters 2-3.

³⁷ See K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press, 2001).

version (giving birth to the ideology of neoliberalism long before it is commonly dated).³⁸

In conjunction with new liberal ‘thought collectives’, constitutional scholarship promoted the view that interwar democracy failed as a result of democratic excesses, often through the ubiquitous notion of the ‘tyranny of the majority’, which constitutionalism could safeguard against. Despite this depending on a mis-reading of Weimar, it came to have enormous purchase as a justificatory discourse in the postwar period, and on both sides of the Atlantic. The myth would be instrumentalised to justify various checks on majoritarian government, such as those presented by constitutional courts and independent central banks, as well as those presented by international and supranational institutions.³⁹

Against this backdrop, postwar constitutionalism can be understood as constituting a series of reactionary responses, aimed at taming the perceived threat of popular democracy and rising class consciousness that had been unleashed in the interwar period after the march of the masses onto the stage of history. This fear of popular sovereignty and decline of the notion of a revolutionary constituent power is appositely captured in Christoph Möllers phrase, ‘we are (afraid of) the people’,⁴⁰ a fear not only directly relevant to Germany’s development, or in Ackerman’s terms, the ‘elitist path’ that characterises it, but far more widespread, including in Italy and France.

4. DOMINANCE OF THE ELITE PATHWAY IN POSTWAR EUROPE

There are, of course, differently coloured constitutional paths among the countries of Europe, which can be identified at a lower level of abstraction, requiring granular analysis to map in close detail. But at the risk of sacrificing a degree of detail, we can identify some commonalities and even something resembling a hegemonic path. So despite the differences in constitutional culture, the gradual hegemony of the ‘German model’ can be discerned in the unfolding of the postwar settlement, consolidated by the project of European integration

³⁸ This meeting united American conservatives, German ordoliberal, Austrian-school neoliberals and French liberals, see e.g. Arnaud Brennetot, ‘The Geographical and Ethical Origins of Neoliberalism: The Walter Lippmann Colloquium and the Foundations of a New Geopolitical Order’ (2015) 49 *Political Geography* 30.

³⁹ See J-W Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (YUP, 2011).

⁴⁰ C Möllers, ‘“We are (afraid of) the People”: Constituent Power in German Constitutional Discourse’ in Loughlin and Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP, 2007).

and its own constitutionalising mission. In Ackerman's terms, German-style constitutionalisation reflects an 'elite' construction, an ideal-type which, he himself concedes, comes to 'predominate' in the European Union as a whole, despite the claimed revolutionary heritage of countries such as France and Italy.⁴¹ But this trajectory was in fact set in place from the very beginning of postwar reconstruction, combining a de-radicalisation of social democracy, elite-led politics, and a highly restricted view of freedom. The project of US-style constitutionalism played a key part.

Ackerman makes much of the role of revolutionaries in the Resistance movements in the Second World War and their influence in constitution-making in its aftermath. There was, to be sure, a brief resurgence of the radical left towards the end of the Second World War, buoyed by its key part in the Resistance, the prestige acquired by the Soviet Union and its Red Army through military victories over Hitler's armies, and the reuniting of social democracy and Communism in broad coalitions and fronts in the fight against fascism and national socialism.⁴² This briefly opened up a space for new democratic forms of communism and solidarity to flourish, a 'rare moment of European history', whose 'opportunities compared with 1917-18'.⁴³ The result of this moment would be a 'wave of communisation', particularly in Eastern and Central Europe, with Communist parties becoming leading national forces in Yugoslavia, Albania, Greece and Czechoslovakia, major electoral players in France and Italy and even making significant gains in the Benelux countries and Scandinavia. In France, Belgium and the Netherlands, there would be a spectacular renewal of socialist political parties.

But although a period of mass mobilisation and radical political opportunity briefly surfaced, political elites in France and Italy (and elsewhere in the 'founding six' states of the European Economic Community) soon turned to the task of 'demobilizing' popular movements.⁴⁴ The opportunities for radical transformation were quickly lost.⁴⁵ The honeymoon which united left and centrist political forces would be short and swift, and the divorce eventually one-sided. Social democracy would rapidly pivot back to the anti-Communism of the 1920s as the Cold War set in, and communist parties themselves would soon disavow any revolutionary constituent ambitions. Resistance groups were

⁴¹ RC, p 23

⁴² See G Eley, *Forging Democracy: The History of the Left in Europe 1850 – 2000* (OUP, 2002) 287-291.

⁴³ Ibid, 288.

⁴⁴ J Heartfield, 'European Union: A Process without a Subject' in Bickerton, Cunliffe and Gourevitch (eds), *Politics Without Sovereignty: A Critique of Contemporary International Relations* (Routledge, 2007) 137.

⁴⁵ Eley, above, 288-295.

dismantled, the potential of ‘dual power’ exercised by Resistance committees abandoned, and governments of broad national unity formed.

De-mobilisation of the masses and a ‘retreat to privatism’ was pushed by many public intellectuals, particularly those associated with Cold War liberalism.⁴⁶ A characteristic of postwar democracy ‘was its reliance on the individualist and essentially negative definitions of freedom’, as reflected by the intellectual prominence of anti-Communist liberals such as Isaiah Berlin and Raymond Aron.⁴⁷ Their highly restrictive view of freedom was also pushed by Cold War ‘propagandizing organizations’ such as the US-funded Congress for Cultural Freedom and aided by the transatlantic migration of ideas from Weimar intellectuals, particularly through the notion of ‘militant democracy’, which recommended a tightly constrained domain of political freedom.⁴⁸ External influence also played a significant role, particularly the US’s involvement, through the Marshall Plan and its military presence on the Continent.⁴⁹

The counter-revolutionary and elite-led path was not forced onto the masses in an entirely coercive fashion. After ‘the rush of liberation had passed’, many Europeans were ‘all too eager to disengage from wider political and ideological agendas, in order to “return” to the private sphere’.⁵⁰ The desire to escape from politics into individualism and lifestyle choice was symbolised by the icon of the ‘consumer’, displacing the political citizen. The relative equalising of conditions in the so-called ‘Golden Age’ of political economy thus occurred not through enhanced democratisation but through US-led global economic growth and technocratic leadership, which had facilitated a redistribution of the social product, and ‘fridges and motor cars for the masses’.

After having won the right to suffrage, the working class of Europe, although the ‘incontrovertible social victims of the war’ were ‘strangely invisible’ in much of the political life of postwar Europe.⁵¹ The language of class struggle disappeared, subdued by the security of the bureaucratic ‘iron cage’ and a paternalistic politics in social democratic as well as Christian Democratic milieus.⁵² The de-politicisation of state-society relations functioned not only

⁴⁶ Müller, above, at 126.

⁴⁷ M Conway, ‘Democracy in Postwar Europe: The Triumph of a Political Model’ (2002) 32 *European History Quarterly* 59, 67.

⁴⁸ See U Greenberg, *The Weimar Century: German Émigrés and the Ideological Foundations of the Cold War* (Princeton University Press, 2014) ch 6.

⁴⁹ See P Sweezy, ‘Is the Marshall Plan an Instrument of Peace?’ (1949) 1 *Monthly Review* 80.

⁵⁰ M Conway, ‘The Rise and Fall of Western Europe’s Democratic Age, 1945-1973’ (2004) 13 *Contemporary European History* 67, 76; See also Müller, above, 130.

⁵¹ *Ibid*, 76.

⁵² *Ibid*, 75. Conway views this as in significant ways continuous with movements from the 1920s onwards.

through class compromise, and the rise of the national corporatist and welfare state, but also through the de-radicalisation of the trade union movement and left-wing parties. After 1945, bourgeoisie Europe did not cease to exist, but it ‘faded from concern’.⁵³ ‘Stratification, inequality, and corporatist power remained’, but, unlike in the interwar era, few sought to abolish them.⁵⁴

Yet this was not only a retreat; it was an abandonment. The German SPD’s modernisation programme announced at Bad Godesberg in 1959, which combined a renunciation of Marxist class struggle with an embrace of Christian ethics and acceptance of free market principles with the European Economic Community, represented a more general revisionism of social democracy across Europe. The loss of momentum of working-class politics, which can be traced back to socialist policies in the interwar period, consolidated by the onset of the Cold War, was a deliberate strategy on the part of its representative institutions. By the 1960s, in most European countries, social democracy had ‘given up the notion of representing the class interests of workers’ and ‘abandoned the idea that it must replace capitalist private property of the means of production with social ownership’.⁵⁵

Elite-led politics pushed forward projects of modernisation, which empowered technocracy and executive governance. In France, major economic initiatives – including the development of electricity and transport infrastructure, nuclear power, urban planning and rebuilding, the new social security system and agricultural innovation – concentrated power in the state administration.⁵⁶ A range of specialists, ‘economists, demographers, engineers, medical professionals, and a legion of policy experts trained in the law – acquired outsized authority in a nation whose leaders were hell-bent on “modernizing” their country’.⁵⁷ With De Gaulle’s centralisation of power in the executive, signalled in his referendum on direct election of the President, the constitution of the Fifth Republic was transformed, continuing the drive towards technocracy and bypassing parliamentary democracy.

The path to constitutionalism thus came at a high institutional cost to the public sphere and to the legislative branch of government. Throughout the postwar period, the authority of parliamentarism would steadily decline, with political power shifting structurally towards the judiciary, as well as

⁵³ C S Maier, *Recasting Bourgeois Europe: Stabilization in France, Germany, and Italy in the Decade after World War I* (Princeton University Press, 2016) 14.

⁵⁴ *Ibid.*, 15.

⁵⁵ W Abendroth, *Short History of the European Working Class* (Verso, 1972) 151.

⁵⁶ H Chapman, ‘The State’ in Berenson, Duclert and Prochasson (eds), *The French Republic: History, Values, Debate* (Cornell University Press, 2011) 170.

⁵⁷ H Chapman, *France’s Long Reconstruction: In Search of the Modern Republic* (Harvard University Press, 2018) 2.

the executive and the administration. This process would be theorised by Otto Kirchheimer in an analysis that extended far beyond the West German political scene, as leading to the dominance of a ‘catch-all party’ and then a ‘state-party cartel’, which was rational, pragmatic, and based on ideological de-mobilisation.⁵⁸ In a more recent reassessment, the ‘catch-all party’ eroded parliamentary democracy through the ‘vanishing’ of ‘political antagonism and principled opposition’, with parties disconnected from their social bases. The professionalisation of party organisation and appeal to personal politics led to ‘political apathy of the mass population and the waning of the classic separation of legislative, executive and judicial powers’.⁵⁹

The ‘social democratic’ compromise between capital and labour did have an impact on constitutional politics and policies, legitimising the pursuit of full employment, comprehensive welfare states, and top-down economic planning. But in practice it was most often led by Christian Democrats, who had themselves abandoned classical liberalism and its ideologies of *laissez-faire*, and embraced aspects of social market economy and social Catholicism. This meant that the constitutional settlement was pushed from the top down, less revolutionary than elitist in form. Across Western Europe, it was a ‘governed democracy’ that ruled, in which ‘legitimacy was derived *from* the will of the people but not exercised *by* the people’. Once they had exercised their right to vote, ‘the people were expected to retreat from the political stage and allow their representatives to act in their name’.⁶⁰ Rather than a democracy based on an active, mobilised citizenry, a passive, soft authoritarianism emerged, benefitting from the widespread fear of political freedom. Is this ‘revolutionary constitutionalism’, or is it better described as *counter-revolutionary* in nature?

5. THE ITALIAN CASE: REVOLUTIONARY OR COUNTER-REVOLUTIONARY?

Italy is a good test-case for this question, given that its strong radical left and mass Communist Party after the Second World War would seem to offer a clear argument for a type of ‘revolutionary constitutionalism’. The involvement of radical forces, notably in the Constituent Assembly, elected with the task of drawing up a constitution following a national referendum in 1946 that abolished the Monarchy, did undoubtedly have a significant impact on the constitutional text. In a formal sense, the new constitution, which came into

⁵⁸ F S Burin and K L Shells (eds), *Politics, Law and Social Change. Selected Essays of Otto Kirchheimer* (Columbia University Press, 1969).

⁵⁹ See A Krouwel, ‘Otto Kirchheimer and the Catch-All Party’ (2003) 26 *West European Politics* 23, at 31.

⁶⁰ Conway, ‘Democracy in Postwar Europe’ above, 66.

force on 1 January 1948, marked a revolutionary break in the creation of an Italian Republic. Its textual provisions – declaring commitments to fundamental human rights, social and political pluralism and labour rights – attempted to break with the fascist past. In Ackerman’s retelling it was, and in his view remains, based on ‘revolutionary principles’ setting out the framework of social democracy.⁶¹ In this narrative, Alcide De Gasperi and Palmiro Togliatti, leaders respectively of the Christian Democrats and the Italian Communist Party (Partito Comunista Italiano (PCI)), were revolutionary constitutionalists.

The material constitution of the Italian Republic, however, was far from revolutionary: there were a great many aspects of continuity with the fascist era; the official left became increasingly de-politicised; and in the way Italian constitutionalism unfolded over time, significant counter-revolutionary trends became dominant as a matter of the institutional balance of power. This was not a ‘workers’ constitution’ but a ‘bourgeois constitution’, and even in terms of political freedoms and republican principles it would be overshadowed by a liberal constitutional project that gradually cemented the power of juristic and technocratic elites.

5.1 Constitutional Continuity

As Italian jurist and Constitutional court judge, Marta Cartabia, puts it, there was no new coherent idea of a state at all in postwar Italy. The only political objective shared by the major three protagonists in the re-founding of the Republic (Communists, Christian Democrats and Socialists) was a negative one, the idea of ‘never again’ a return to fascism. And although united in this shared commitment, even this minimal denominator was often rhetorical. In reality, ‘the great majority of scholars’ maintain that ‘the evolution from the liberal to the fascist to the republican phases took place without any clear-cut interruption’.⁶² The words of Italian jurist and member of the Constituent Assembly, Piero Calamandrei, who had championed a ‘revolutionary action’ during the Second World War, are emphatic:

It was a popular constitution, approved when any hindrance from the former king had been barred by the institutional June 2, 1946 referendum ... But it wasn’t a revolutionary constitution in the sense of consecrating, in juridical forms, a politically accomplished revolution.⁶³

⁶¹ RC, 152.

⁶² See the references in M Cartabia, ‘The Italian Constitution as a Revolutionary Agreement’ in Albert (ed), *Revolutionary Constitutionalism: Law, Legitimacy, Power* (Hart, 2020).

⁶³ Cartabia, *ibid.*

The notion that the new constitution was born ‘out of the resistance’ is also misleading.⁶⁴ Despite the fierce battle between partisans and fascists after the installation of Benito Mussolini by the Germans as head of the Social Republic in 1943, it was the Allies that played the major role in defeating Mussolini and, along with Catholic Church, the trade unions, and the National Liberation Committees, in jointly effecting the liberation. This was not liberation by a popular revolt. Despite the mass strikes and social resistance, fascism had ultimately been ‘destroyed by a coup from above’, the instauration by King Vitor Emmanuel of General Pietro Badoglio, preserving ‘the control and freedom of action of the traditional ruling elites in Italian society’,⁶⁵ and supported by British and Americans governments that were suspicious of the anti-fascist movements. After the Truman doctrine was declared in March 1947, outside intervention became more explicit, America having chosen Italy to pursue its crusading ideology of anti-communism, in which it was strongly backed by the Catholic Church and its institutional apparatus.

As a constitutional matter, there was significant continuity with the inter-war period. The underlying legal system was transplanted from the fascist state into the Italian Republic, including the 1930 Criminal Code and the 1942 Civil Code. The same was true of the procedural codes and all the basic administrative laws, the law on the judiciary, military legislation and even the infamous law on public order. More significantly, the ‘sub-constitutional legal framework of the new republic’ was still ‘imbued with fascist culture’ and the fascist personnel in the bureaucracy, judiciary and administration remained.⁶⁶

The so-called *epurazione* commissions, designed to purge the system of officials associated with Mussolini were a dire failure; while fascists, including torturers, escaped justice, and the judiciary and police went virtually untouched, there was a significant purge of left-wing partisans and the *Carabinieri* were encouraged to crack down brutally on any working class or peasant revolt. This element of continuity was not a disconnected contingency in the unfolding of the postwar Republic. The links between neo-fascism, criminal organisation and elements of the state apparatus would later resurface in the ‘strategy of tension’ and political violence of the *anni di piombo* (‘years of lead’) in the 1970s. And it would be the accumulation of decades of corruption and criminality that eventually led to the collapse of the so-called ‘First Republic’ after the *mani pulite* (‘clean hands’) investigations, and ushered in various new regimes under the ‘Second Republic’, including Silvio Berlusconi’s, in the 1990s and 2000s.

⁶⁴ Cartabia, above (citing it as an ‘empty slogan’).

⁶⁵ Ginsborg, above, 12.

⁶⁶ Cartabia, above.

Materially, the economic and social fabric of Italian society was far from revolutionised after the Second World War. The 1948 election itself was won by the Christian Democrats partly due to their success in managing the currency crises, which had so alarmed the Italian middle-class. The Bank of Italy, in the hands of the arch-liberal Luigi Einaudi, had pushed pro-capital policies, specifically justifying austerity as an anti-inflationary strategy. In comparison to other countries' experiences in interwar Europe, economic liberalism had not been as discredited, since Italian fascism was associated with an unequivocally interventionist state. This gave 'hard-line monetarists' such as Einaudi a chance to push deflationary strategies even before Christian Democracy was consolidated as a political force, protecting the value of the *lira* (and middle-class incomes) but leading to harsh credit consequences for small and medium-sized businesses and to extensive redundancies and dismissals for the working class.⁶⁷ The power of the business elites, which had been central to the rise of interwar fascism, was thus largely untouched and the top-down corporatist structures left intact. The Italian employers' federation *Confindustria* demanded authority for employers in the workplace and an end to any plans for worker control. Large enterprises that had benefitted from state intervention in the fascist economy undertook a rapid and dramatic conversion to neoliberalism and the free play of market forces.

Politically, although not the organic party of the Italian bourgeoisie, the Christian Democrats were trusted by the capitalist class as the party most capable of defending their interests. Along with Catholic organisations and the bourgeoisie, they were thus able to construct a new hegemonic social bloc under the leadership of De Gasperi. Even though abandoning any commitment to laissez-faire economic ideology, Christian Democracy continuously supported the capitalist system, and added a fervent Cold War anti-communism to De Gasperi's programme of Catholic morality.

The dominance of Christian Democracy was achieved through informal transnational networks as well as national party structures. But if their transnational networks were new, their conservative purpose was not.⁶⁸ As Alan Milward puts it, for the first Prime Minister of the Italian Republic, a Western European bloc was seen as the 'spiritual rampart against the ideo-

⁶⁷ T Abse, 'Italy's Long Road to Austerity and the Paradoxes of Communism' in Moss (ed), *Monetary Union in Crisis: The European Union as a Neoliberal Construction* (Palgrave Macmillan, 2005) 250.

⁶⁸ The Catholic 'centre party' in Germany (*Zentrum*) had played a 'decisive role' in supporting Brüning's regime of authoritarian liberalism in the interwar period. See H Mommsen, *The Rise and Fall of Weimar Democracy* (University of North Carolina Press, 2007) 288.

logical assault of Communism'.⁶⁹ The 'apocalyptic fears of socialist-bolshevist revolution' in the interwar period, which had led the Vatican 'to support any right-wing anti-communist authoritarian regime', ranging from Admiral Horthy in Hungary to General Franco in Spain,⁷⁰ continued after the war, when large sections of the Christian Democratic electorate were less than fully reconciled to parliamentary democracy.⁷¹ The goal was not necessarily to suppress democracy as such, but to restore political and economic stability; any democratic movements which threatened that would need to be subdued.

5.2 De-Radicalisation of the Official Left

After Italian Communist Party leader Palmiro Togliatti's turn away from the path of insurrection and uprising, the official left took the route of advocating an evolutionary approach to politics. This was in line with Soviet policy, disappointing many rank and file communists as well as socialists and anti-fascists. The Communists soon dropped any opposition to capitalism as such, Togliatti's speech in August 1945 reducing reconstruction to the 'prudent democratic administration of the economy on nineteenth century liberal lines'.⁷²

The battle waged by the left, which had begun in 1943 with the deposition of Mussolini, was 'decisively lost', when De Gasperi consolidated the power of the Christian Democrats after a dominant electoral victory in the summer of 1948.⁷³ Convinced of the need for national unity as well as being urged restraint from Moscow, the left acted cautiously. Togliatti channelled its energies away from any extra-parliamentary action, despite the growing agitation of landless labourers and the social protests of communist militants. Largely uncritical support for the USSR rendered it morally adrift and politically subservient, reneging on domestic class struggle in the forlorn hope of a postponed international revolution. After the split with Stalinism in the wake of Khrushchev's revelations and crushing of the Hungarian uprising in 1956, postponed hopes of international revolution would be substituted by the stubborn dream of a 'European road to socialism'.

Although Communist Party membership reached a high of over two million in 1954, reflecting a mass political culture unique in Europe, the local organisations on which it depended were struggling and the Stalinism of its

⁶⁹ A Milward, *The European Rescue of the Nation-State* (Routledge, 2000) 332-333.

⁷⁰ W Kaiser, *Christian Democracy and the Origins of European Union* (CUP, 2007) 54.

⁷¹ *Ibid.*, 169.

⁷² Ginsborg, 94.

⁷³ Ginsborg, 120.

leadership weakening it. ‘Lip service’ was paid to the idea of workers control, to radical democracy and the ideals of the Soviets, but real power ‘was concentrated in the hands of the party secretariat, and decisions flowed from the top downwards rather than from the base to the leadership’.⁷⁴ The authoritarian nature of Communist Party structures meant that organised political opposition within the party was forbidden and every effort was made to ensure unity.

Culturally and intellectually, the impact of the PCI may have been immense, but this was only in inverse proportion to its political legacy. It was as if half of Antonio Gramsci’s lessons, on achieving hegemony in civil society through a long ‘war of position’ had been learnt, but only at the expense of the other half, the need for sharp engagement with the class enemy on the terrain of state power in swift and tactical manoeuvres.⁷⁵ Togliatti had been completely outmanoeuvred by De Gasperi, and after the PCI’s exclusion in 1947, the Christian Democrats kept the Communist Party away from the levers of power until the historic compromise of the 1970s.

International geopolitics surely had a significant impact on the way constitutional politics unfolded. The immediate postwar period saw American intervention in Europe generally and in Italy in particular on a scale that was ‘breath-taking in its size and its ingenuity’ and ‘flagrant’ in its ‘contempt for any principle of non-interference in the internal affairs of another country’.⁷⁶ In addition to the threat of revoking the huge financial assistance of the Marshall Plan in the case of a Communist Party victory, there was the looming possibility of direct US military intervention in the early days of the Cold War.

But if it is doubtful that the revolutionary consciousness of the working class would have been sufficient to have succeeded given the objective conditions, the problems went deeper than geopolitical threats and material constraints. With the socialist revolution ‘seen as an essentially external event, postponed to an indefinite future’, and dependent upon the support of the USSR, the Italian working class were given little faith in their own autonomous struggle. After disbanding and disarming the local Resistance, the PCI would ‘scrupulously thwart all attempts to spread revolutionary Marxism among the workers’ movement’.⁷⁷ In essence, the working class had been abandoned by its political representatives, who had focused on the pragmatics of electoral alliances.

⁷⁴ Ginsborg, 199.

⁷⁵ P Anderson, *The New Old World* (Verso, 2009) 278-335. See further, P Anderson, *The Antinomies of Antonio Gramsci* (Verso, 2020; originally published in 1974 in the *New Left Review*).

⁷⁶ Ginsborg, 115.

⁷⁷ See P Basso, ‘Amadeo Bordiga (1889-1970)’ in Callinicos, Kouvelakis and Pradella (eds), *Routledge Handbook of Marxism and Post-Marxism* (Routledge, 2021) 131.

The political reality was that the PCI soon settled into the ‘centre ground of postwar Italian culture’.⁷⁸ The exclusive focus of its party leadership on the initial alliance with Christian Democracy, making concession after concession to keep it intact, while the Christian Democrats showed little sign of any interest in a ‘progressive democracy’, was later admitted as an error by many of the PCI leaders. It meant that ‘the most powerful weapon in the hands of the left, working class militancy, was virtually discarded in the major political battles of the time’.⁷⁹ Although insurrection at that stage may well have led to all-out civil war, which the left was ill-prepared for, it was under Togliatti himself, as Minister of Justice, that an end was called to the process of *epurazione* for political and common crimes, a failure of historic proportions to deal with the legacy of fascism.

The twin failures of domestic moderation and external supplianc to the Soviet Union were not uncomfortably juxtaposed, but on the contrary, tightly linked, the party’s moderation ‘compensation for its relation with Moscow’. Precisely because of its ‘suspect kinship to the land of the October Revolution, it had to prove its innocence of any wish to emulate that all too famous model of change. The burden of an imputed guilt and the quest for an exonerating respectability went hand in hand’.⁸⁰ Throughout the postwar period the PCI oscillated between ‘catastrophic predictions of capitalism’s imminent collapse and the enthusiastic endorsement of gruesome monetary policies in the name of an allegedly supra-class national interest’.⁸¹ Its rigid political machinery and constitutional positioning left it completely unable to benefit from the social revolts of the late 1960s and 1970s, and from the radical currents of *operaismo* and *autonomia*.⁸²

The official left had little to show for its moderation. After several decades in the position of semi-outsider – outside state power but involved in local governing organisations – the PCI dipped from its electoral peak in 1976 and eventually dissolved with the end of the Cold War. It was re-founded in 1991 as the Democratic Party of the Left, reaching a nadir in 1992 when its percentage of the vote sank to a record low, obtaining roughly half the

⁷⁸ Eley, above, 293.

⁷⁹ Ginsborg, 83 (Ginsborg cites Vittoria Foa, who describes the ‘constant characteristic of the whole reconstruction period’ as ‘the separation of a political programme from working class struggle’).

⁸⁰ P Anderson, *The New Old World* (Verso 2009) 336.

⁸¹ Abse, above, 250.

⁸² The influence of these is beyond the confines of this essay. On the importance of Antonio Negri, one of the leading theoretical figures of *Autonomia*, see M Goldoni and M Wilkinson, ‘The Material Constitution in the Tradition of Western Marxism’ in Goldoni and Wilkinson (eds), *The Cambridge Handbook on the Material Constitution* (CUP, forthcoming).

support it had in the mid-1970s. Although it would partially recover, new forces emerged on the political scene, Umberto Bossi's *Lega* and Gianfranco Fini's *Alleanza Nazionale* (successor to the Italian Social Movement, MSI, which had been founded in 1946 by supporters of Mussolini) along with Silvio Berlusconi's *Forza Italia*. By then the centre-left would be doggedly pursuing the central goal of Italy's entry into the European monetary union and the supranational constitutional constraints that came with it, a continuation of the Eurocommunist path adopted in the 1970s, preferring rule from Brussels to dictat from Moscow, but substituting in different ways for any politics of popular sovereignty.

5.3 Counter-Revolutionary Currents

Material and political factors were key in the postwar 'transformation without revolution', including the gradual retreat of the official left from revolutionary ambitions. But this was not only a 'failed revolution'. In political and institutional terms there were significant features of a counter-revolutionary nature. Despite the end of the Italian Monarchy, even the formal democratic freedom ushered in by the 'bourgeois constitution' would be constrained in significant respects, limiting the parliamentary and pluralist republic.

In the early 1950s, after outmanoeuvring his Communist protagonists but again facing electoral uncertainty, De Gasperi moved towards a concept of *democrazia protetta* ('protected democracy'), in an effort to limit 'extremists' and side-line political enemies. This was similar in concept to the inappositely named 'militant democracy' that had been developed by Karl Lowenstein in the interwar period, and was so influential across Christian Democratic networks.⁸³ Although a failure in some of its particulars, 'protected democracy' signalled a new kind of democratic and constitutional ethos, protecting the centre ground and raising market liberal values above civil liberties. As was the case elsewhere in Europe, the theory and reality of protected democracy, 'for the most part, favoured the right'.⁸⁴ It also signalled the particular type of political economy that was emerging in Italy: clientelistic, highly bureaucratic, legalistic and filled with '*enti inutili*' in the massive morass of specialised agencies of the '*parastato*'.⁸⁵

Institutionally, the move towards 'a rigid and normative' constitution 'washed away' not only the constitutional flexibility of the previous *statuto Albertino*, 'but the traditional idea of the sovereignty of parliamentary legis-

⁸³ See Müller, above, 146-150.

⁸⁴ Müller, above, 147.

⁸⁵ Ginsborg, above, 152.

lation'. In the process, constitutionalism in Italy, reflecting wider European trends, framed a new balance between parliament and the judiciary, empowering a special body, the Constitutional Court. The result of judicial review of legislation – central to Ackerman's path to 'revolutionary constitutionalism' – was the renovation of 'the constitutional mindset that had informed the legal culture prior to the dawn of the Republic'.⁸⁶

Although the new constitution maintained the 'myth' of parliamentary sovereignty, the constitutional reality was that its power diminished as the power of the Italian Constitutional Court grew, the Court eventually moving to a 'radical assertion of constitutional supremacy'.⁸⁷ And, in the words of Sabino Cassese, former Judge of the Constitutional Court, the 'ebb and flow of administrative history' would anyway be regulated 'by other, more concrete means, more closely tied to social than to constitutional history'.⁸⁸

What of the promise of social rights in the constitutional text, so championed by parts of the left? As Calamandrei himself argued, these were essentially a deceit, proposed by the left 'out of weakness' and accepted by the right 'because it knew they were harmless'.⁸⁹ In his words they were 'to compensate the forces of the left for *the missed revolution*' with conservatives well aware that once the moment of crisis had passed, 'the reforming impulses would lose their urgency, and ... could remain in waiting for another century'.⁹⁰ Although Ackerman stresses the fact that De Gasperi failed to constitutionalise the anti-communism of the postwar moment, the constitutional reality meant that this was entirely unnecessary.⁹¹

The Christian Democratic Party became so dominant that it was fused with the state itself in an increasingly corporatist set of governing arrangements and electoral strategies. Its intertwining of political and religious identities ostensibly opposed the materialism of both 'bourgeois liberalism' and 'atheistic Marxism'.⁹² But while the party paid lip service to traditional Catholic social values, in practice it espoused economic modernisation, meaning 'the liberty of the individual and of the firm, the unfettered development of technology and consumer capitalism, the free play of market forces'.⁹³ And in the attempt to

⁸⁶ Cartabia, above.

⁸⁷ RC, 155. Although proceeding relatively cautiously, the Court would later assert its authority over an 'increasingly broad range of hot-button issues', RC, 161.

⁸⁸ S Cassese, *Esiste un governo in Italia?* (Roma, 1980) 72.

⁸⁹ Mandel, above, 290.

⁹⁰ *Ibid* (Mandel's own translation of Calamandrei), my italics.

⁹¹ RC, 152.

⁹² C I Accetti, *What is Christian Democracy? Politics, Religion and Ideology* (CUP, 2019) ch 1. Cf. S N Kalyvas, *The Rise of Christian Democracy in Europe* (Cornell University Press, 1996).

⁹³ Ginsborg, 154.

appeal to various powerful and sometimes conflicting interest groups, it propelled the fragmentation of the state and extended the parallel bureaucracies that had pre-existed the Republic. The consequence for representative democracy was ‘grave’, with a weakened cabinet and a ‘subserving’ parliament.⁹⁴ Christian Democracy did not merely serve dominant economic elites; it made itself a major repository of economic power, pursuing a constitutional path that led to the corruption scandals which brought down the ‘First Republic’ in 1992.

6. CONSOLIDATION OF THE COUNTER-REVOLUTIONARY TRAJECTORY: EUROPE AS CONSTITUTIONAL CEMENT

Looking back just a few years after the start of the Italian Republic, Calamandrei lamented that the hopes of the Resistance had been frustrated by conservative intransigence. The 1948 constitution had been unrealised, and ‘behind the façade of a “formal democracy” lay the reality of continuities and compromises with Fascism and the “police state”’.⁹⁵ Conservative intransigence was only part of the story; the failures of the left and its faith in the constitutional path were pivotal. But there is another factor that was key. The new constitutional settlement would be significantly reinforced in its counter-revolutionary features by transnational developments. These served to narrow the differences among European constitutional paths and cement the domination of the elite judicial and technocratic pathway.

To fully comprehend the counter-revolutionary aspect of postwar constitutionalism, we thus have to take into account the project of European integration and its own constitutionalising mission. Europe, although not the root cause, would strongly *reinforce* de-politicisation, and it would do so in a number of ways, institutional as well as ideological. In significant respects, it represented a continuation of domestic routes of de-radicalisation, economism and consensus-seeking. But it also added a counter-revolutionary layer to the domestic constitutional process.

Astonishingly, the process of European integration is all but completely neglected in Ackerman’s story of ‘revolutionary constitutionalism’ in France and Italy. There is no discussion at all of the impact on the French and Italian constitutional pathways of membership of the European Economic Community or the later European Union. Specifically, he fails to note that the

⁹⁴ Ginsborg, 155.

⁹⁵ M Mazower, *Dark Continent: Europe’s Twentieth Century* (Penguin Books, 1999) 316.

judicialisation of the domestic constitution (central in his ‘revolutionary path to constitutional government’) would go hand in hand with a push for EU law supremacy, beginning with the famous litigation in *Van Gend en Loos* and *Costa v ENEL*.⁹⁶

As legal historians have recently recounted, these foundational cases were part of a transnational plan to create a federal-legal form of union, encompassing the European Court of Justice and domestic courts as well as a wider community of European lawyers.⁹⁷ The juristic path to European union was often openly celebrated by statesmen. Walter Hallstein, first president of the European Commission, lawyer, federalist and German Christian Democratic, framed integration as a phenomenon in which the ‘majesty of law’ would replace the high passions of politics, not only to manage and regulate interstate relations on the European continent but ultimately to unite Europe.⁹⁸ Although Hallstein’s vision foundered politically on the intergovernmental intransigence of De Gaulle, it would be retained as a constitutional plan through judicial avenues. It was through international legal organisations, Paul Reuter, advisor to the French government, noted in 1958, that ‘jurists could occupy a place they had lost in the national order’.⁹⁹ The term ‘juristocracy’ would later be associated with the work of Ran Hirschl, but it had a much longer lineage.¹⁰⁰

The significance of German and Italian constitutional culture in this trajectory is undoubted. But the elevation of legalism was a wider affair, and one with a longer genealogy.¹⁰¹ *Van Gend en Loos* and *Costa v ENEL* were themselves decided under the presidency of Judge Robert Lecourt, a French Christian Democrat. They had followed in the wake of the Constitution of the Fifth Republic of 1958, which signalled the erosion of domestic parliamentary supremacy under De Gaulle’s concentration of power. Although speaking the language of popular sovereignty, De Gaulle’s initiative was entirely ‘top-down’, contributing to a ‘ravaged parliament with an executive power in

⁹⁶ *Van Gend en Loos v Nederlandse Administratie de Belastingen* [1963] ECR 1 (26/93); *Costa v ENEL* [1964] ECR 585 (6/64).

⁹⁷ See e.g. A Cohen, ‘Constitutionalism without Constitution: Transnational Elites Between Mobilization and Legal Expertise in the Making of a Constitution For Europe (1940’s-1960’s)’ (2007) 32 *Law & Social Enquiry* 109.

⁹⁸ W Hallstein, *Die Europäische Gemeinschaft* (ECON, 1979) 33.

⁹⁹ P Reuter, ‘Techniciens et politiques dans l’organisation internationale’ in *Politique et technique* (Presses Universitaires de France, 1958) 195 (cited in A Vauchez, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (CUP, 2015) 13).

¹⁰⁰ Hirschl’s hegemonic preservation thesis gets a mention by Ackerman, but is bizarrely reduced to the single personal anecdote of Barak (RC, 318-319).

¹⁰¹ See T Judt, ‘A Grand Illusion? An Essay on Europe’ (New York Review of Books, Hill and Wang 1996).

the hands of a technocratic leadership'.¹⁰² European legalism reinforced this counter-revolutionary trajectory.

More historically resistant to the notion of a *gouvernement des juges* based on the powerful democratic legacy of French revolutionary republicanism, judicialisation took longer to gain a foothold in France than in Germany and Italy.¹⁰³ It was prefigured in the interwar attacks on the 'Jacobin despotism' of legislative supremacy associated with Rousseau's idea of the general will. By 1971 resistance would be overcome as the French *Conseil Constitutionnel* began to incorporate a bill of rights into the Constitution of the Fifth Republic, against the wishes of the founding generation, in what has been described as a judicial 'coup d'état'.¹⁰⁴ Soon after, there would be a political reorientation, with the left, reeling from its political defeats after the turbulence of 1968, coming to endorse fundamental rights and judicial review as a substitute for a politics of popular sovereignty.

The path of juridification would often be associated with a deep cultural conservatism, an attempt to restore an older wisdom under the guidance of authority figures and the security that was perceived to come with them.¹⁰⁵ European integration had 'quietly' established itself at Rome as an economically liberal project with public opinion hardly even noticing, a process of 'integration by stealth', benefitting from a 'permissive consensus' among the peoples of Europe.¹⁰⁶ But constitutionalisation also had a transformative aspect, particularly when considered as a supranational project. The constitutionalising mission of the European Court of Justice in conjunction with domestic courts reinforced the decline of parliamentarism and cemented the highly asymmetric power relations between labour and capital that had been latent since the Treaty of Rome in 1957. Varieties of neoliberalism and Christian democracy were able to coalesce ideologically in their opposition to socialism, and, using European networks, to form a transnational hegemonic bloc that would prove far more stable and powerful than any social democratic alternative.

¹⁰² O Kirchheimer, 'France From the Fourth to the Fifth Republic' in Burin and Shells (eds), *Politics, Law and Social Change: Selected Essays of Otto Kirchheimer* (Columbia University Press, 1969) 241.

¹⁰³ See M Lasser, *Judicial Transformations: The Rights Revolution in the Courts of Europe* (OUP, 2009).

¹⁰⁴ A S Sweet, 'The Juridical Coup d'état and the Problem of Authority' (2007) 8 *German Law Journal* 915.

¹⁰⁵ On postwar Germany's 'technocratic conservatism', see D Van Laak, 'From the Conservative Revolution to Technocratic Conservatism' in Müller (ed), *German Ideologies Since 1945: Studies in the Political Thought and Culture of the Bonn Republic* (Palgrave MacMillan, 2003) 147.

¹⁰⁶ P Grémion, 'State, Europe, and Republic' in Menon and Wright (eds), *From the Nation State to Europe? Essays in Honour of Jack Hayward* (OUP, 2003), 48.

Ideology also played a key role in cementing the constraints of European constitutionalism. Trade unions and social democrats across Europe, as well as Communist parties, attached their flag to the mast of ‘Europe’ and its modernising agenda. The Italian Communist Party, from an initial position of hostility to the EEC, and more generally to a Euro-Atlantic capitalist bloc, revised its position towards European integration through the 1960s, as it adopted a more favourable stance towards economic expansion. This revision would eventually be swift and sharp, the PCI by the 1970s rejecting anything other than Europeanism and the unity of the European left as doomed.¹⁰⁷ To hold out for a mass movement at the European level would become an article of faith: the road to socialism would be through Europe, or not at all.¹⁰⁸

The French Communist Party maintained a more radical political position than its Italian counterpart. But through the 1970s, as French intellectuals turned away from Marxism under the influence of the *nouveaux philosophes* grouped around Bernard Henri-Lévy, and the ‘second left’ grouped around Michel Rocard, the ground was laid for the new political economy of neoliberalism and President Mitterrand’s U-turn on a socialist programme in the early 1980s.¹⁰⁹ The constraints of the Common Market were favoured by socialists as well as conservatives as offering a way to moderate domestic politics and overcome domestic obstacles to economic modernisation.

Although juridification, technocracy and European integration were part of a broader project to stabilise society, they produced a constitutionally unstable mix, with sporadic disruption by political and social crises, strike waves and student protest, culminating with the turbulence of the late 1960s and early 1970s. This social instability highlights the resistance to the counter-revolutionary trajectory of constitutionalism as well as frustration with the official left and its political de-radicalisation.¹¹⁰ It reinforces the argument in this chapter that the main trajectory of postwar European constitutionalism, *contra* Ackerman, was anything but ‘revolutionary’. It was the *opposition* to

¹⁰⁷ D Sassoon, ‘The Italian Communist Party’s European Strategy’ (1976) 47 *The Political Quarterly* 253.

¹⁰⁸ See also E Mandel, *Europe versus America? Contradictions of Imperialism* (New Left Books, 1970). Cf. N Poulantzas, ‘Internationalisation of Capitalist Relations and the Nation-State’ (1974) 3 *Economy and Society* 145, reprinted in N Poulantzas, *The Poulantzas Reader: Marxism, Law and the State* (James Martin ed, Verso, 2008) 220 (accusing Mandel of going along with ‘bourgeois propaganda about the “united Europe”’, *ibid.*, 247).

¹⁰⁹ See G Therborn, ‘After Dialectics: Radical Social Theory in a Post-Communist World’ (2007) 43 *New Left Review* 63.

¹¹⁰ See M Goldoni, ‘From Trauma to Apathy: On the Hegemonic Force of European Authoritarian Liberalism’, (2022) 1 *European Law Open* 158.

this trajectory that tried to regenerate the revolutionary spirit that had been lost in the decades of reconstruction.

These movements against the establishment were a significant source of revolutionary activity against elite-led pathways and their authoritarian features, but were ultimately insubstantial as a matter of constitutional change.¹¹¹ What was remarkable was the way in which the crises of the 1970s would be turned by the ruling class (in Europe as well as in the US) into a ‘crisis of ungovernability’, when, in an echo of postwar diagnoses, democracy (rather than capitalism) was again blamed for the perceived excesses.¹¹² Just as in response to the interwar period, a hegemonic myth emerged linking democratic excess, hyperinflation, now in the form of ‘stagflation’, and constitutional failure.¹¹³ A turn to a further deepening of constitutionalisation, or, to use Ackerman’s words, ‘the path to constitutional government’, was again the reaction of the ruling class, which presented democracy as a threat to political and economic stability.

European integration increasingly came to be seen as a way to immunise elites from this political and social turbulence. It eventually affected the core material constitution of the Member States, when, at Maastricht, the foundations of Economic and Monetary Union were laid. This took de-politicisation to a new level, with the constitutionalisation of ‘sound money’ and the creation of a European Central Bank, modelled on the *Bundesbank*, with the primary goal of avoiding inflation. It would be a crucial strategic and structural factor in cementing the *vincolo esterno* (external constraints) of EU membership, expanding the democratic deficit and eventually reducing democracy to ‘junk status’ at the height of the euro crisis.¹¹⁴ The counter-revolutionary trends of postwar constitutionalism would then come up against a further round of democratic movement and social contestation through the crisis period, as popular

¹¹¹ Abendroth, above, notes that although the strike wave ‘brought in its train a certain radicalisation at the base of the trade unions it did not produce a crisis in the bourgeoisie political regime or lead to any permanent changes in the political organisation of the working class’ (at 158, in the postscript added in 1971).

¹¹² M J Crozier, S P Huntington, and J Watanuki, *The Crisis of Democracy: Report on the Governability of Democracies to the Trilateral Commission* (New York University Press, 1975). Cf. R Keohane, ‘Economics, Inflation, and the Role of the State: Political Implications of the McCracken Report’ (1978) 31:1 *World Politics* 108, 113.

¹¹³ See M C Behrent, ‘The Origins of the Anti-Liberal Left: The 1979 Vincennes Conference on Neoliberalism’ (2017) 35 *French Politics, Culture & Society* 44.

¹¹⁴ F Schirmacher, ‘Democracy has Junk Status’ *Frankfurter Allgemeine Zeitung*, 2 November, 2011, <https://voxeurop.eu/en/democracy-has-junk-status/> (last accessed 6 September 2022).

reaction grew against European and domestic ruling elites but without any rupture from the system.

7. CONCLUSION

The constitutional turn towards domestic and external constraints on the *demos* encompassed broader changes in the relationship between state and society. In Antonio Gramsci's terms, it could be described as a 'passive revolution', a transformation of the state 'from above'.¹¹⁵ The term 'counter-revolutionary' is preferred here to capture the sense, from a *longue durée* perspective, that the march of mass democracy and political emancipation that begins in the revolutionary era of the late 18th century was arrested in significant respects after the Second World War and neutralised by elite-led projects of constitutional government. Ackerman reserves the label of an 'elite path' for the German case (for the details of which we have to wait his next instalment). But the Italian and French examples, although displaying variation at a granular level, also come to resemble this pathway. This path would be significantly reinforced through European integration, beginning at Rome, and then upscaled at Maastricht, as an elite consensus grew around the precepts of neoliberal political economy. It set up the conditions for the prolonged irresolution of the euro crisis in the 'long conjuncture' from 2008 through to the Covid-pandemic, as European and domestic elites faced with new economic emergencies sought to bypass constitutional constraints but without any reinvigoration of democracy.¹¹⁶ This was not only a transformation from above, but an erosion from below, reflecting a retreat from radical democracy and popular sovereignty.

The erosion of democratic authority in Europe was gradual and took specific forms in different constitutional cultures. But it was based on a trajectory that began from the outset of postwar reconstruction and was underpinned by diagnoses – and *misdiagnoses* – of interwar collapse.¹¹⁷ Myths of hyperinflation, political excess and legal positivism all leading to democratic breakdown would be raised in an attempt to de-legitimise popular sovereignty and

¹¹⁵ On the various meanings given to this term, see P D Thomas, 'Gramsci's Revolutions: Passive and Permanent' (2020) 17 *Modern Intellectual History* 117–146. See also in this volume, Di Martino, 'The Concept of Revolution as a Key to Comparison: Ackerman's "Revolutionary Constitutions" and Gramsci's "Passive Revolutions"'.

¹¹⁶ See H Lokdam and M A Wilkinson, 'The European Economic Constitution in Crisis: A Conservative Revolution', in Grégoire and Miny (eds) *The Idea of Economic Constitution in Europe. L'idée de Constitution économique en Europe* (Leiden, Brill, Legal History Library, 2022).

¹¹⁷ See M Wilkinson, *Authoritarian Liberalism*, above.

entrench counter-majoritarianism. Cold War liberalism quickly emerged with a vehement anti-communist vocation and minimalistic view of freedom. The working class was abandoned by left-wing political parties, and revolutionary politics was discarded, even, and especially, by the official left where it remained bound to the Soviet line and in thrall to the project of European integration. The left's faith in Europe as an 'empty signifier that would save all' persevered, even after the humiliation and ultimately capitulation of the radical left-wing formation Syriza in Greece in 2015.¹¹⁸ The counter-revolutionary constitutionalism that began after the Second World War was thus further reinforced, despite another considerable display of social antagonism and opposition from the streets.

¹¹⁸ See P Anderson, 'Situationism a l'envers' (2019) 119 *New Left Review* 47 (a review of Adam Tooze's work).