



Democracies without War

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Citation for published version (APA):

Thornhill, C. (2022). Democracies without War: Effects of War as a Determinant of Populism. In C. Barbosa Gouvêa, & P. Villas Bôas (Eds.), *State of Exception: Populism and the Militarization of Politics in the COVID-19 Pandemic in Brazil* (pp. 89-112). Editora Letramento.

Published in:

State of Exception

Citing this paper

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Democracies without War: Effects of War as a Determinant of Populism

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Introduction: Continuous constitutional backsliding

The wave of constitution making that occurred in the 1980s and 1990s in Latin America and Eastern Europe generated global interest in constitutionalism. At this time, analysis of constitutional norm formation acquired unprecedented importance as part of legal and social-scientific inquiry into the foundations of democracy.¹ Such analysis was generally marked by a spirit of optimism, as techniques of legal organization appeared to hold the key to effective democratic organization, even in societies with negligible democratic experience. This optimism coincided with the collapse of Soviet-backed regimes in Eastern Europe and the later dissolution of the Soviet Union, so interest in constitutionalism and its frequently correlated concept, civil society, gained explanatory traction in a climate in which ideological conflicts appeared lighter than usual. Today, such analytical optimism appears remote. Now, a new wave of research into constitutional law has begun to take shape, which also tracks contemporary developments in constitutionalism. In recent years, a body of research has been constructed which focuses, with diverse emphasis, on a new constitutional phenomenon – this phenomenon is *constitutional backsliding*.² Such research usually addresses processes in which polities that appeared to have reached the end of a trajectory of constitutional-democratic consolidation, revert (or appear to revert) to a position on the spectrum of constitutional order that indicates deterioration in the quality of democracy.

At one level, this new line of research should be approached with the some scepticism that ought to have greeted the constitutionalist optimism of the 1980s and 1990s. In some respects, the basic societal object of this research – the *constitutional backslide* – is too dramatically constructed, and it is observed without regard for broader historical context. Fluctuations in the robustness and recognition of democratic constitutions should not be surprising. Historically, few general waves of constitutional-democratic formation have led

This research was funded in part by The Research Council of Norway [grant 300214]. Project: LAW22JULY: RIPPLES (Rights, Institutions, Procedures, Participation, Litigation: Embedding Security), University of Oslo.

¹ See for example Jürgen Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Frankfurt am Main: Suhrkamp, 1992); Andrew Arato, *Civil Society, Constitution, and Legitimacy* (Lanham/Oxford: Rowman and Littlefield, 2000).

² See for some examples the chapters in Mark A. Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press, 2008); and Tom Ginsburg and Aziz Z. Huq, *How to Save a Constitutional Democracy* (Chicago University Press, 2018).

immediately to the establishment of stable democratic political systems, and most processes of constitution making have witnessed endemic long-term crisis. Accordingly, inquiry into democratic backsliding may be motivated by alarm. But it should not register shock or even surprise, and it should not define its basic object of analysis as a distinct phenomenon.

In broad perspective, the first constitutional orders that can be reliably classified as democratic (i.e. constitutions that allowed both equal male and female participation in electoral processes and competitive rotation of government) were created in and after 1918. To be sure, a very small number of polities, although if strictly defined only Norway and New Zealand, met this definitional threshold before 1914. However, it was only at and after the end of World War I that it became possible to observe a moderately sized group of polities with broad democratic features. Even around 1918, the number of genuine democracies is frequently overestimated. The USA is often viewed as an old democracy. Yet, quite evidently, even after the enfranchisement of women in 1920, the USA was not even close to being a democracy. The USA remained an apartheid democracy until the mid-1960s, as in many Southern States a very large proportion of black citizens could not vote. More marginally, Australia and Canada also fell short of democracy after 1918. Both these states retained ethnic exclusionary clauses in legislation granting electoral rights, which, as in the USA, survived until the 1960s. Italy (fully authoritarian from 1922/26), Belgium, Switzerland and France did not become full democracies after 1918, as women were not enfranchised in national elections until after 1945. All Latin American states that possessed some democratic features in the interwar era either retained restrictive franchises or underwent authoritarian revolution, such that they were not fully democratic. Nonetheless, some polities experienced processes of full democratization around 1918. Amongst major post-1918 states, Germany, Poland, Austria, the Netherlands, all of Scandinavia, Czechoslovakia, the UK from 1929 (with caveats set out below), and Spain from 1931 could reasonably be classified as democracies: that is, as states in which men and women could vote freely in competitive elections.

In virtually all polities that underwent democratization around 1918, however, democracy was short-lived. Austria, Poland, Germany and Spain (from 1931) acquired full democratic characteristics, but they soon collapsed into different patterns of authoritarianism. Denmark (marginally), Czechoslovakia, Netherlands and Norway were democracies after 1918. However, their democratic institutions were destroyed by German invasion between 1938 and

1940. The UK has been viewed as a case of successful democratic formation and survival in the interwar era, following franchise extensions in 1918, allowing all men and some women to vote, and in 1928, allowing all women to vote in 1929. Yet, the classification of the UK as a full and enduring democracy is at least a matter of dispute. Interwar Great Britain was both a very marginal case of successful democratization and a very marginal case of successful democratic survival. Britain was governed by a series of emergency regimes from 1931, and, under these regimes, it was effectively impossible for the UK government to be democratically removed from office. There were no elections in Britain after 1935. Moreover, until 1950, some wealthier British citizens retained electoral privileges that allowed them to vote more than once in national elections. In light of this, it is surely not accurate to claim that the UK electoral system was finally and comprehensively democratized in the post-1918 period. Of post-1918 democracies in Europe, therefore, only Finland and Sweden genuinely existed and survived as such, and Finland's military alliance with Nazi Germany in the 1930s might reasonably disqualify it from this categorization. Sweden remained democratic throughout the entire period from 1919 to 1945. Other states either were not fully democratic after 1918 and/or they were annexed by authoritarian states before 1940. Ireland remained essentially democratic from 1922. Yet, owing to the constant imposition of martial law, the quality of Irish democracy at this time is at least contestable.

The first broad wave of democratic constitution making, in other words, was not in any real sense a wave of democratization. Globally, 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.

After 1945, then, catastrophic crises afflicting processes of democratic constitution making again became the norm. Many African polities emerged from decolonization in the 1950s and 1960s as constitutional polities with democratic electoral systems. Within a short period of time, however, competitive elections were all but non-existent in Africa, and military coups became the most frequent means of governmental rotation. Amongst major newly founded states, only India and Israel remained consistently democratic, albeit with clear deficits. Renewed processes of partial democratization in Latin America typically resulted in dictatorship, either once or repeatedly. Those polities in Latin America that evaded dictatorship, for example Colombia, established mechanisms for power sharing between rival groups (1958-1974), which were at best semi-democratic. States in Europe in which new

democratic constitutional reforms were implemented after 1945 hardly displayed a rapid transition to full democracy. France, fully democratic from 1945, almost witnessed a military coup in 1958, and the Constitution of the Fifth Republic was largely created in response to military pressures and considerations. In most other new European democracies, rotation of government was infrequent, and many major polities developed, formally or informally, on the model of a dominant party system. This was visible in Italy, the Federal Republic of Germany (FRG) and Austria, where rotation of government was not fully institutionalized until the late 1960s, or even later. Outside Europe, such weak institutionalization of competitive elections was also visible in Japan and India. The USA did not become a democracy until the passing of the Civil Rights Act (1964) and the Voting Rights Act (1965), which finally established (formally) uniform electoral rights for all citizens, regardless of ethnic affiliation. Provisions for selective ethnic exclusion from elections were dropped in Canada in 1960 and in Australia in 1962.

By any reasonable definition, thus, there was no immediate wave of full democratic transition after 1945. It was only in the 1960s that full democracy began to take shape as a common political form. Most importantly, the post-authoritarian democratization processes that began after 1945 – for example, in the FRG, Italy, and Japan – had only very partial initial success.

These facts have pressing relevance for discussion of contemporary constitutional circumstances. Contemporary analyses of constitutional weakness examine a range of factors to explain why, of the polities that transitioned to democratic constitutionalism in the 1980s and 1990s, so few are now fully consolidated democratic states. Amongst factors cited to explain democratic weaknesses in post-1980s constitutions are, for example, the fact, that – allegedly at least – these constitutions were created in a climate of neo-liberalism. Consequently, it is often claimed that democratization at this point was flanked by deep cuts in public spending, which meant that democracy was unlikely to be welcomed by the social groups who traditionally had been beneficiaries of democratic reform.³ Also cited amongst such factors is the (alleged) fact that, from the 1980s onward, transitional constitutions were distinctively crafted in accordance with a global template, such that national populations struggled to identify with the substance of democracy, and embedded values and orientations were only weakly reflected in national constitutional laws. This perception has of course been

³ Alison Brysk and Carol Wise, 'Liberalization and Ethnic Conflict in Latin America.' *Studies in Comparative International Development* 32(2) (1997): 76-104.

widely exploited in the legitimational strategies of reactionary groups and governments, who use it to discredit international norm setters and to weaken the traction of international law within national polities.⁴

Such arguments about the special conditions of democracies created in and after the 1930s have little persuasive force. It may be the case that processes of democratization in the 1980s were affected by global budgetary policy. Yet, outside Eastern Europe, levels of austerity after democratization were not greater than in the authoritarian polities that preceded democratic transition.⁵ Within twenty years, as discussed below, many Latin American governments had begun to consolidate welfare states.⁶ Moreover, processes of democratization conducted after 1945 did not immediately create fully evolved welfare states. Likewise, it surely was the case that democratization processes in the 1980s were triggered and guided by global normative expectations. In most regions, democratization was promoted by international organizations, and it coincided with the elaboration of regional human rights systems, such that it was in only a few societies that democratization was propelled by collective acts of norm formation within national society.⁷ However, nothing in this was new. Prior to the 1980s, few democratic constitutions had been created by national actors alone. The constitutions established in Japan and the FRG after 1945 were partly prescribed by occupying forces and partly based on UN human rights norms. The Indian constitution that came into force in 1950 incorporated international human rights law. The Italian Constitution of 1948 was written at the precise moment in which the international treaties guaranteeing Italy's sovereignty were agreed by the occupying powers. These treaties prescribed certain basic constitutional norms to the government of the emerging Italian democracy. Over a decade later, the completion of the democratization process in the USA, in 1964-65, was an occurrence that was inseparable from international normative pressures. In general terms, the abrogation of American apartheid was part of a wider governmental initiative to build up enthusiasm for the USA, instead of for the Soviet Union, amongst countries in Africa in the process of decolonization. More immediately, it was motivated by President Johnson's desire

⁴ Such critiques are widespread amongst reactionary groups in relatively new democracies such as Hungary, Poland, Brazil and in older democracies such as the UK.

⁵ Pre-transitional Chile is generally seen as a model of authoritarian neo-liberal anti-welfarism.

⁶ 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.

⁷ For example, repeated criticism of the human rights record of Chile and Argentina in the UN in the 1970s was a vital impetus for anti-system mobilization, bringing about effective collaboration between international and domestic human rights groups.

to signal compliance with international human rights conventions and international conventions prohibiting racial discrimination.⁸ Overall, few democratic constitutions were created by solely national means, and the basic premises for democratic constitutionalism were usually configured outside national societies.

On these grounds, attempts to discern peculiarities in the environments in which constitution-making processes were conducted in the 1980s and 1990s are usually rather threadbare and weakly justified. Generally, there is little in the background of the democratization processes in this period that distinguishes them from earlier experiments. Most importantly, we look in vain through modern history for successful waves of constitutional democratization.

Structural weaknesses in the democratic polities created after the 1980s are exemplary of problems encountered in most such processes, and constitutional realities since the 1980s are not, strictly, out of line with previous experiences. Moreover, many democracies that are currently manifestly afflicted by crisis belong to older generations of democratic institution building. Amongst such polities we can number (until recently) the USA, the UK and India.

Constitutions and war

On the basis of the above, it may be well advised to avoid using an exceptionalist perspective when analysing current problems in democratic constitutionalism: it may be more accurate to observe all lineages of democratic formation as inherently crisis-ridden. Despite this, however, when we look at the constitutional polities created in the 1980s and 1990s, one distinguishing feature in these processes becomes apparent. This feature, ignored to date in constitutional commentaries, may be examined to provide a qualified explanation for some aspects of constitutional devaluation in some contemporary democracies. In particular, striking in the constitution-making processes that occurred in and after the 1980s is that, for the first time in history, there occurred a mass transition to constitutional rule that was not immediately linked to war and its outcomes. It is not conceivable that this fact had no impact on constitution-making processes and social reactions to them.

⁸ See the following extract from Johnson's speech of late 1963 in the UN General Assembly: 'We believe more than ever in the rights of man, all men of every color, in our own land and around the world. And more than ever we support the United Nations as the best instrument yet devised to promote the peace of the world and to promote the well-being of mankind.' *Address Before the General Assembly of the United Nations*. December 17, 1963.

Before 1945, almost all constitutions had been created under circumstances associated with war, and by actors whose influence was linked to military organizations. Virtually all constitutions prior to this point can be aligned to one, and sometimes simultaneously to more than one, amongst a series of models of *military constitutionalism*.

First, one frequent historical function of a constitution was that constitutional laws were established to cement a post-bellum political order, producing rights for social groups that had attained new influence because of war, often granting rights to soldiers as contractual recompense for military sacrifice. Many constitutions created in the processes of democratic transition described above mentioned above can be aligned to this model. For example, salient examples of constitutions implementing post-conflict reforms and establishing compensatory recognition for soldiers are seen in France (1875), Russia (1906), UK (1918), Germany (1919), Austria (1920), Poland (1919, 1921), Czechoslovakia (1920).

Second, a further frequent historical function of a constitution was that constitutional laws were created to address the 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 settings, *third*, constitutions and deep constitutional reforms were implemented at the end of wars of unification, or wars leading to intensified centralization and political and 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 (1921). Constitutions of this type were also created for 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 some such instances, national armies pre-existed nation states, and acted as *de facto* nation-building units.

In some cases, *fourth*, constitutions were created by foreign occupying armies, or they were at least implemented 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 (1815), Japan (1946), Italy (1948), the FRG (1949), India (1950), as well as more recent constitutions in Iraq, Kosovo and other states. 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 in the form of resistance armies and insurgent groups, and they often took shape in environments 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. They typically served both to consolidate independent political institutions in their polities and to strengthen the national military apparatus. Important examples are USA (1789), Chile (1822), Finland (1919), Poland (1921), Ireland (1922), Kenya (1963), Algeria (1963).

Of course, *sixth*, some constitutions were simply created by military leaders that led successful campaigns in civil wars. Such occurrences did not frequently lead to the creation of constitutional texts. However, some civil wars contained constitution-making moments, in which imposed constitutional laws served different purposes. Important examples are USA (1865), Spain (1939-40), Bolivia (1952-56), Portugal (1974-76). Such constitutional laws usually created a legal-political system in which the military assumed a privileged position.

Overall, up to the 1980s, few constitutions were created in circumstances not connected to warfare or, as a minimum, directly or indirectly linked to the army. This is infrequently noted in constitutionalist research. Yet, historically, the man in uniform was an almost invariable presence either in, just outside the door of, national constitutional assemblies. Even striking exceptions to this pattern, for example the Spanish constitution of 1978, were hardly untouched by military pressures and considerations. The history of constitutional theory and practice tends to separate constitutional rule from military rule, and observers of constitutional order usually see it as the antithesis of military government. In virtually all settings, however, constitutions had the specific function that they created legal frameworks suited to, and promoted by, the interests of prominent military organizations, and they shaped societies on a form already determined by the army. Virtually all major constitutions that have pervasively influenced the development of constitutional law 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, 1799, 1875), Denmark (1849), Germany (1849, 1870/71), Prussia (1848-50), Austria (1867), Colombia (1886).

On this basis, constitution-making processes before the 1980s were generally connected by a common contractual motivation. The solid core of modern constitutional law reflected an intended transaction, in which regents and governors at once allocated constitutional rights to citizens and expected these citizens to provide military service in return. Most modern constitutions evolved, in essence, as military contracts, in which states purchased violence from citizens. In virtually all states, electoral rights granted to citizens underwent expedited expansion in times of war or following periods of interstate conflict, and such rights served both to compensate citizens for sacrifice and to secure their willingness for eventual future sacrifice. 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, 1949; Japan 1946; Italy 1948).

Striking in this regard, further, 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. Accordingly, constitutions were usually created in situations produced by war, which retained some parallels to civil war. Many of the most important constitutions were established in environments shaped by war, in which war – latent or manifest – still persisted between inner-societal factions. In fact, before the 1980s, most major constitutions failed to hide the antagonism between the different groups which they were supposed to incorporate, and most constitutions created polities that caused at least one full civil war. After 1918, in particular, the constitutions designed to stabilize relations between different constituencies in new democracies usually failed to create a legal order able to pacify different factions in society, and most constitutional polities of this time experienced endemic militarization and either full or partial civil war. In most cases, the creation of constitutions in military conditions led directly to the uncontrollable politicization of political interactions covered 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), Poland (1921), Spain (1931).

Constitutions, war and welfare

Of the most vital importance in this respect is the fact that, historically, the military contracts formalized in constitutional law were usually flanked by arrangements for the administration of welfare provisions for constitutionally integrated citizens. The first constitutions, created in the late eighteenth century, integrated potential soldiers by offering them simple political rights. Progressively, however, the rights allocated to citizens by constitutions were expanded beyond simple guarantees for private/personal and political rights. After 1918, welfare-related institutions became, incrementally, part of the hard wiring of constitutional government in most national democracies. This innovation occurred in tentative fashion at first, and there were no fully evolved welfare states in the interwar era. However, the increased shift to democratic constitutionalism, based in political rights, after 1918 also brought an increased shift to welfarism, based in socio-economic rights. Some societies, for example Germany, Poland, Sweden, the UK and (from 1933) the USA created institutions forming important precursors for modern welfare regimes.

This social thickening of rights was also connected to the effects of military organizations. In most settings, the early evolution of the welfare state (defined here as pattern of statehood in which governments provide some income security guarantees, health care, pensions, and heavily subsidised universal education) took place on a substructure created by military actors and military agreements. The basic organizations around which welfare states are structured – that is, health care providers and educational institutions – first developed in close connection with military bodies, and as part of wide societal reaction to warfare. From the earlier nineteenth century onwards, periods in which military conscription was implemented usually saw increased welfare provision, comprehensive reforms to national education systems, and protective legislation in the sphere of employment law.⁹ In fact, in most societies, welfare states first took shape as part of the extended national security apparatus. Their function was to prepare potential soldiers for military duties by insulating them against adverse consequences of poor education and poor health care. This link between militarism and welfare provision was then visibly intensified after 1918. After 1918, the first

⁹ See discussion in Herbert Obinger and Klaus Petersen, *Mass Warfare and the Welfare State: Causal Mechanisms and Effects*, ZeS-Arbeitspapier, No. 02/2014, Universität Bremen, Zentrum für Sozialpolitik (ZeS).

growth of the welfare state was only possible because of the widened fiscal regimes created during the war and because of the increased executive powers of governments, also brought about by war, which underpinned economic distribution policies. Moreover, the purpose of such 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. In some polities, the establishment of welfare rights clearly articulated bargains forged in warfare, and welfare regimes were designed to extend patterns of interclass collaboration that took shape in World War I and structurally to sustain the transition from a war-time to a peace-time social order.¹⁰ In such processes, integrational functions assumed by armies were directly transferred to welfare institutions.

Importantly, however, in interwar Europe, welfare states remained deeply imbricated in 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, the development of welfare states became fundamental to the general disposition towards civil war in the period after 1918. It was only in very few societies (e.g. Sweden) that welfare states were supported by broad organic consensus about the need for cross-class distribution of resources. Although conceived as instruments for building inter-group consensus, for promoting general integration, and for effecting social pacification, interwar 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 visibly polarized, often in military fashion, around attitudes to welfare. 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 societies, the army was also deployed – *de facto* – as an instrument that supported 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 used the army to countervail political dissent. Overall, in the years after 1918, welfare

¹⁰ See my discussion in Chris Thornhill, 'A Constituição de Weimar como constituição militar' in Gilbert Bercovici (ed), *Cem anos da Constituição de Weimar (1919-2019)* (São Paulo: Editora Quartier Latin do Brasil, 2019), p. 243-272.

states began to take shape as organizations for building social peace. Typically, however, armies were deployed to promote their retrenchment.

These processes culminated, distinctively, in the global welfare-state revolution, which took place after 1945. As mentioned, the years after 1945 witnessed a new period of constitution making, in which, slowly, normative premises for democracy were established and took root in society. This process was accompanied, vitally, by a concerted reinforcement of welfare systems, gaining deepening effect over subsequent decades. In the years after 1945, as war itself had become a universal phenomenon, penetrating deep beyond national boundaries and affecting all social groups, welfare provision (including strongly subsidized education) become a robust constitutional feature of modern states.¹¹ All post-1945 democratic states that had experienced either warfare or occupation after 1939 institutionalized provision for welfare at a much higher level than before 1945.

At this point in modern history, then, a distinct and rather paradoxical occurrence can be observed, which is vital for analyzing the constitutional centre of democratic statehood. As mentioned, almost universally, the core constitutional features of modern states – political rights and welfare rights – were products of the army, and the historical sequences in which citizens were integrated through political rights and welfare rights were determined, variably, by war and its effects.¹² After 1945, however, welfare rights were constructed in institutional forms that slowly separated them from their military origins. Although they resulted from war, the basic resources distributed by democratic welfare states (primarily income security, health care, pensions and education) were placed on new foundations, such that their formative attachment to military interests was obscured, and almost effaced. This was not universally the case. For instance, in the USA, welfare reforms were promoted against the backdrop of the Vietnam War, and the US army remains an important welfare provider.¹³ 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. In these respects, the form of the welfare

¹¹ 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.

¹² Astonishingly, T.H. Marshall did not see this very clearly in his analysis of social integration, written after 1945. See T.H. Marshall, *Citizenship and Social Class*, introduced by Tom Bottomore (London: Pluto, 1992 [1950]).

¹³ 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.

state broke – or rendered tenuous – the link between welfare and war, which had structurally defined modern states from the earlier nineteenth century. Very importantly, the heightened and increasingly even distribution of welfare resources also served to sever the deep causal thread between contest over material goods and inner-societal conflict, which had also 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 rise of the welfare state was originally brought into being by war and war-time experience. The link between war and welfare created deep instability after 1918. But the post-1945 welfare state also placed a deep dividing line between the state and war, and it finally positioned welfare institutions, not the army, as the primary integrational unit in society. In so doing, it tended to reduce the extent to which interactions within national societies were susceptible to militarization. Dialectically, welfare states grew from militarism. Yet, their eventual formation acted to cement a pattern of integration in democratic societies, in which the socio-integrational role of military organizations was limited. 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 hospitals, schools and universities). The differentiation between military organizations and welfare institutions (including educational organizations) can be seen as a vital fact underlying post-1945 democracies.

Constitutions without war

In the 1980s, this deep dialectical configuration at the centre of constitutional law was altered, at least in some cases and in some respects. First, in the 1980s, the formative link between actors involved in making constitutions and actors representing the prerogatives of militarized citizens became weaker. In most settings, 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. This constitution was designed both as a constitution of state and as a peace treaty between leaders of factions in

the civil conflict that had dominated Colombian politics from the 1940s. Some observers may also argue that constitutional redirection in Poland in the 1980s occurred against a background of acute civil conflict, such that insurgency influenced the constitutional trajectory. The 1992 Constitution of Ghana also preserved continuity with a pre-existing military regime, under Jerry Rawlings. Kenya teetered towards civil during the writing of the 2010 constitution.

Generally, nonetheless, a broad feature of constitutions or constitutional orders created in and after the 1980s was that they were constructed through processes of lengthy transition, 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, these constitutional systems were designed to curtail the autonomy of military actors and politicians brought to prominence through military operations. Clear examples of such processes are Argentina (post-1983), Brazil (1988), Uruguay (post-1984), Benin (1990), Ghana (1992), South Africa (1996). 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 utilized the military for purposes of domestic control, and these regimes had some features of military rule. 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 not without influence, and it then retained direct constitutional protection, in transitional Brazil. Overall, however, the mass of constitution-making processes at this time was generally defined – uniquely – by the weak representation of military interests.

These facts provide a distinctive lens for looking at 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 observe the manifestations of constitutional crisis in some polities.

At one level, the limited impact of war and military actors on the constitutional transitions in the 1980s had clearly propitious results for democratic stability, creating conditions for democratic institution building which avoided some crises experienced in earlier waves of

constitutional transition. In contrast to the democratic experiments after 1918, for example, the transitions in the latter decades of the twentieth century were not afflicted by extreme inner-societal militarization, and ideological tensions between social groups rarely gained expression in military or militarized antagonisms. Discernibly, polities in Eastern Europe that recommenced the democratic experiments that had been hurriedly 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. Even polities that experienced inner structural implosion after or during transition, such as Russia under Yeltsin, were marked by patterns of institutional fracture that, despite their catastrophic consequences for Russian citizens, were remarkably lacking in military volatility. Likewise, polities in Latin America that had historically shown propensities to hyper-politicization,¹⁴ in which antagonisms between rival groups escalated to such a degree that they triggered civil war, generally developed on pathways in which such antagonisms were dampened.

It is possible to speculate why polities with a long history of internal intergroup militarization embarked on new constitutional trajectories in the 1980s. At one level, the international normative horizon in which transitions occurred played a key role in enabling peaceful mass conversion to democracy. In most transitional polities, even the most radically opposed socio-political factions were able to agree on certain normative principles, usually set out in the international arena and closely attached to human rights conventions, which guided and insulated transitional processes. Even in polities defined historically by the most acute and entrenched factionalization, some consensus about basic points of democratic orientation was possible, and this consensus was pre-structured by global normative expectations. In transitional Argentina, different factions were able to agree on the importance of human rights law as a matrix of democratic stabilization.¹⁵ In Colombia, where pacification long proved elusive, some shared orientation around human rights law became central to democratic consolidation. The role of human rights law in framing a residual consensus between otherwise deeply hostile parties in constitution-making experiments acquired

¹⁴ See Marcelo Cavarozzi, 'Politics: A Key for the Long Term in South America' in William C. Smith, Carlos H. Acuña and Eduardo A. Gamarra (eds), *Latin American Political Economy in the Age of Neoliberal Reform. Theoretical and Comparative Perspectives for the 1990s* (New Brunswick: Transaction, 1994), pp. 127–155.

¹⁵ Alison Brysk, *The Politics of Human Rights in Argentina. Protest, Change, and Democratization* (Stanford, CA: Stanford University Press, 1994), pp. 125-26

clearest articulation in South Africa. In this context, human rights law was effectively declared as a set of implied constitutional guidelines before the transition process began, and these guidelines were strongly protected and enforced throughout the entire constitutional transition.¹⁶

In 1918, and even to a certain degree in 1945, global political realities had impacted on political circumstances in new national democracies in incendiary manner. In both contexts, ideological rivalries within national societies had been inflamed by global polarities, and inner-societal tensions had been intensified by the fact that they overlapped with hostile positions in global ideological conflicts. After the 1980s, however, global ideological fissures had a softer profile, and their societal impact was less divisive. By this time, dominant ideological principles outside national societies, especially the rising presumption in favour human rights law, tended to coordinate domestic consensus rather than intensify intergroup hostility. There are exceptions to this of course. In Latin America, controversies over amnesty laws and provisions for impunity for persons committing abuses during military regimes showed that disputes about human rights could easily unsettle fragile democratic structures. Generally, however, the transnational framing of constitutional politics by transnational human rights law supported democratization processes, and it often obviated the extreme re-articulation of traditional intergroup conflicts. In many respects, the relative absence of military engagement in transition processes was supported by the fact that human rights law, backed by transnational actors, distilled a meta-constitution for political transitions. This meant that controversies between stakeholders in democracy were constrained by overarching (international) agreements and outbreaks of manifest military conflict between stakeholders were very rare. In many cases, of course, the increasing prevalence of human rights law also spelled out a normative grammar in which states could ultimately constitutionalize their military organizations and limit the power of military actors to destabilize civilian procedures.¹⁷

¹⁶ Theunis Roux, *The Politics of Principle. The First South African Constitutional Court, 1995–2005* (Cambridge: Cambridge University Press, 2013), p. 286.

¹⁷ In Colombia, international law provided a de facto constitution for the armed forces. See the following opinion in the Colombian Constitutional Court: ‘Las fuerzas militares tienen la obligación absoluta de impedir el desconocimiento del derecho internacional humanitario (restricción absoluta aun frente a los estados de excepción según lo dispone el artículo 214 de la Constitución) y los derechos que, conforme a los tratados internacionales ratificados por Colombia, no pueden ser suspendidos durante tales estados.’ Sentencia SU.1184/01.

At the same time, however, the absence of overt militarization in the wave of transitions to democracy that began in the 1980s had, in some respects, less favourable implications for democratic institution building. It is arguable, in fact, that 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.

On one hand, it is observable that, across the spectrum of transition processes, human rights law proved a very effective mechanism for steering democratic redesign in the 1980s. The international endorsement of human rights law as the basis for democracy building is often decried as a violation of democratic agency, and, as mentioned, it often underpins criticisms of relatively recent democracies. As mentioned, however, such criticism is largely spurious. Nonetheless, although (or because) the salience of human rights obviated military intervention in democratization, the reliance on human rights law as a normative framework 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 boundaries 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. In many settings, this policy was driven by inter-elite pacts and accords, and, on this premise, external standards were internalized within national government as primary tokens of effective democratic transition. By consequence, new or transitioning 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 inevitable 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 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.

In this light, democracies created after the 1980s drew many benefits from the marginal importance of military conflict. Yet, the fact that democratic systems were not established during or after warfare also meant, paradoxically, that they did not acquire the benefits resulting from military structuring of constitution-making processes – in particular, the orientation towards cross-class distribution of material risks. This was reflected in the fact that the transition to democracy in and after the 1980s was not accompanied by a welfare state revolution. Low militarization of constitutional politics in the 1980s visibly simplified democratic transition, having very beneficial outcomes in terms of short-term pacification. However, low militarization of constitutional politics also meant that, over a longer period, the structural comprises that supported democracy in other contexts were not put into effect, and longer-term strategies of social pacification were not implemented. The emergence of welfare as new units of integration, decisively replacing the military in this quality, was uncertain.

One consequence of this bundle of factors was that welfare-state structures in many democracies created in and after the 1980s were fragile. To the extent that it implies a critical comparison with earlier transitions, this claim can be exaggerated. Many earlier democracies, especially the UK and the USA, only established relatively weak welfare states. As mentioned, moreover, in the decade after 2000, a number of societies in Latin America experienced a belated welfare state revolution. Uniquely, a number of polities at this time 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, concerted welfare construction had usually been driven by warfare or 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.

One further consequence of these factors, moreover, was that welfare agreements were not very deeply embedded in society. The fact that social agreements were not constructed through military devastation meant that commitments to welfare remained superficial, and

controversies over welfare retained the power to split national communities. Evidently, this is not exclusive to democracies created in and after the 1980s. Following the financial crisis of 2008, many polities showed a willingness to renege on welfare commitments which, with variations (decreases and increases), had supported democracy since the years after 1945. This was especially acute in the UK and, in some spheres, in the USA. Moreover, in both these societies, conflicts directly or indirectly related to welfare have acquired very volatile expression, at times with low-level military implications. In societies in which constitutional democracy did not originate in war, however, the capacity for the intense re-politicization of welfare commitments remained particularly strong, and, in some cases, conflicts regarding such matters articulated and generated clear military antagonisms. In some cases, the fact that constitutions did not originate in war left a fateful twofold legacy – it meant that military elites were not fully discredited and that welfare arrangements were uneasily negotiated, precariously consolidated and subject to opportunistic violation. In both respects, it became visible that, partly owing to the absence of war in the constitution-making process, the basic constitutional function of welfare institutions as organizations that supersede the integrational role of military bodies was not realized. In extreme cases, of course, this configuration meant that remnants of the pre-transitional military could be mobilized to promote the retrenchment of welfare arrangements.¹⁸ The key case of this is Brazil, although it is entirely reasonable to include Colombia in this category of state.

Conclusion

As outlined above, in the structural wiring of most constitutional democracies, we can identify a dialectical interaction between the military and other institutional systems. First, military agents promoted the organizational apparatus of modern democracy – armies created electoral systems, educational institutions and organizations responsible for welfare provisions. Second, this fusion often had catastrophic results, as, once created on a constitutional design, polities persisted in a condition of or close to civil war, in which competition for welfare resources formed the most debilitating socio-political cleavage. Third, after 1945, a pattern of state building was established, at least in democratic polities, in which collectivities created by the army initially retained a dominant position, yet in which,

¹⁸ On the 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*, pp. 57-74; 61 (Open Access at <http://www.cmdpdh.org/publicaciones-pdf/cmdpdh-justicia-transicional-experiencias-justicia-verdad-y-memoria.pdf>).

gradually, the role of the military receded and lost importance, as primary integrational processes in society were internalized by institutions responsible for providing welfare and education. This remained a perennially difficult and precarious balance. Yet, at the formative core of most democracies, we can observe a process in which, either directly or indirectly, military agents created democracies based in electoral rights and welfare rights.¹⁹ As a further step in this process, then, welfare states were disconnected from their military origins, and they acted to reduce the military emphasis of society by weakening inner-societal hostilities and promoting relatively peaceful individualistic modes of institutional integration. The differentiation of the military, the welfare system and the (closely related) education system became an almost universal integrational foundation for democratic government. In other words, welfare states were created in war, but they became constitutional foundations of democratic peace.

None of these premises for democracy are secure. After 2008, as mentioned, there was a general tendency for democratic governments to weaken the fabric of democracy by reducing welfare provision and educational opportunities. However, in polities, in which constitutional order was not created in a wartime context, the lines of differentiation between the welfare system (including education) and the military system are often particularly precarious, and the danger that the integrational emphasis of society will revert from welfare to the military is high. In polities in which democratic survival is imperilled, we can often identify a clear trajectory in which welfare and educational institutions are deprived of resources, welfare provisions become objects of intensified contestation, and contest over welfare reacquires military dimensions. In some settings of this kind, social groups deprived of integrational options via education or welfare may mobilize, quite rationally, against their governments or against socio-economic adversaries. In so doing, they induce military responses, usually of a brutally repressive nature. In some settings of this kind, such social groups mobilize, less rationally, against minority groups, against non-dominant ethnicities, or indeed against other organizations that seek to protect welfare arrangements. However such militarization occurs, the reduction in the integrational force of welfare systems is always a threat to the cohesion of democracy. At certain thresholds, reduction in the force of welfare systems is likely to trigger the re-emergence of military organization and the aggressive articulation of social

¹⁹ For example, the French welfare state built after 1945 was planned by De Gaulle's exile government in London. The British welfare state created after 1945 was based in the Beveridge Report, commissioned by the wartime Conservative government. The construction of the German welfare state began before 1939, but it began anew after 1945 with provisions for returning veterans.

conflicts as dominant modes of social integration and interaction. Taking Brazil as a paradigm, this process may be observed as more probable in societies in which the structural compromises that underpin democracy did not originate in war.

In many current settings, the rise of political populism can be viewed as the expression of renewed politicization of welfare conflicts, the pacification of which originally resulted from war. This is particularly linked to the long-term effects of the 2008 economic crisis. Modern democratic societies can be seen to have their foundation in the differentiation between the military system and the welfare system (including education). Where this differentiation is endangered through welfare retrenchment, conflicts over welfare typically trigger experiences of social militarization, so that the basic propensity of modern citizenship to gain expression in civil war becomes palpable. This tendency towards acutely unsettling fusion between war and welfare is now tangible across the globe. In democracies established or consolidated after 1945, conflicts over welfare often result in intensification of collective group formation, associated with nationalism and anti-minority sentiment. Such conflicts are likely to acquire distinct, unsettling and explicitly militarized form in democracies created in the 1980s, which were not formed by war, in which inter-group polarities were not mediated by external conflict, and in which integrational functions of welfare systems are reduced.