INTRODUCTION

EMPIRES AND CONSTITUTIONS: SOME DEFINITIONS

The first claim in this book is that the development of constitutional law has a dialectical relation to imperialism, and to military forces that accompany imperialism. From their first emergence, modern constitutions formed components in lines of state-building connected to inter-imperial rivalry, and they reflected the interlinking of states in a transnational military system. In this process, imperialism shaped the creation of constitutions in different ways. Many states acquired constitutions as they were separated from existing empires, so that national self-determination became the wellspring of constitutional law.[1] With some qualified exceptions after 1848, constitutions, as a rule, established normative foundations for governments, based in ideals of national citizenship, which were distinct from the institutional substructures imposed by imperialism. In many contexts, however, constitutions were built on norms of citizenship established in empires to serve imperialist ends. Many states acquired constitutions as they reconfigured their foundations while remaining empires, and many states became empires as soon as they acquired constitutions. Well into the twentieth century, a crisis of imperialism lay in the background to the formation of much constitutional law, and most constitutions were written so that states could adapt to or recover from such a crisis.

[1] One historian states simply that the constitutional moments that occurred in the American and French Revolutions started the longer process 'later described as "decolonization"' (Ahmed 2014: 1). In a similar context, one historian argues that the momentum towards 'self-determination and national sovereignty' was initiated in the American and French Revolutions (Üngör 2011: 2).

This meant that many constitutions replicated imperatives and conflicts inherent in imperialism, and many states constructed on a constitutional basis soon perpetrated actions typical of empires. Even in constitutions that detached the space occupied by nation states from empires, constitutional law rarely merely supplanted imperial rule, and constitutionalism usually evolved as a legal order for managing state actions in a form close to imperialism. As outlined in Chapter 1, the original forces that created constitutional law resulted from a reorganization of national societies in the face of imperial violence, and this origin frequently shaped societies in distinctive imperial fashion.

This background explains the title of this book, which defines its primary object as *post-imperial* constitutions. Many books have examined the development of *postcolonial law* in contemporary society. However, this book claims that the concept of *post-imperial law* most adequately captures the construction of modern constitutional order at the global level. It uses this term to describe how imperialism formed an overarching structure that diversely shaped the global development of constitutional law both in colonizing and in colonized zones. In so doing, it uses the prefix 'post' in 'post-imperial constitutionalism' carefully. This prefix is employed to indicate that constitutions typically emerged in different parts of imperial systems. In such contexts, constitutions were established to place government on discernibly national and symbolically consensual foundations, specifically opposed to imperial patterns of legitimacy. Yet, in so doing, they frequently perpetuated imperialism at the interstate level and reproduced or even intensified features of imperialism in domestic societies, so that imperialist impulses remained palpable in the constitutional polities that replaced, or grew within, empires. In many contexts, constitutions constructed national societies in a form that extended imperial modes of social formation, and, over long historical sequences, they often served the constant reconfiguration of imperialism. At least until 1945, many constitutions were post-imperial and imperialist at the same time, as they articulated patterns of legitimacy separate from empires but also reproduced imperialism as a global system. The concept of the *post-imperial constitution* is selected here as a dialectical term to interpret these realities. Strictly, only the British constitution can be classified, simply, as an *imperial* constitution.

The second claim in this book is rather more straightforward. This claim is that the link between imperialism and constitutionalism meant that constitutions promoted military violence in various ways. It is

often noted that the transition from empire to nation is a primary cause of military conflict, a fact explained by such factors as border disputes and ethnic irredentism.[2] On the account offered here, however, a deeper structural nexus exists between constitutions, imperialism and violence. Typically, constitutions were formed in environments marked by increased militarization of inter-imperial relations. In such contexts, they were designed to establish a sovereign order for the control of military force in society. A primary function of most constitutions was to separate citizens of one state from citizens of other states, defining national membership as a source of military duties in a system of military antagonism.[3] Moreover, the birth of constitutionalism coincided with the arming of national citizens, most of whom were not professionally trained as soldiers, a prospect that had alarmed earlier regents who feared an armed populace would turn against them. In such contexts, most constitutions created an enduring source of militarism in societies defined by constitutional rule. Since the advent of constitutions, self-evidently, many states without constitutions have declared war, and many have experienced civil war. No claim is made here that constitutional organization is an exclusive cause of military conflict, internal or external. However, constitutions usually brought substantial changes in warfare. Most states situated on a trajectory of constitutional organization experienced devastating war.[4] War between such states was qualitatively different from earlier wars, as warfare defined the conditions of citizenship in belligerent societies, and it entailed conflicts between constitutionally implicated citizens, in which one society, as a whole, fought against a different society, as a whole. In such wars, states frequently mobilized larger armies, and they sacrificed a larger number of soldiers than had earlier states.[5] Moreover, as

[2] See Wimmer 2013: 23–24, 110. On my account, the division sometimes posited between 'revolutionary wars' and 'wars driven by the politics of nation building' is not fully tenable (Wimmer and Min 2006: 876). Major revolutionary wars were caused by imperial fragmentation and nation-building was conducted in revolutionary fashion (France 1792; Russia 1918). Most importantly, revolutionary wars often transformed empires in ways analogous to secessionist wars, as they nationalized core states within empires.

[3] See pp. 134–5, 137, 197–8.

[4] Following one classic account of the correlates of war, nine of the ten states that lost most citizens in battle from 1815 to the 1980s were on a trajectory of constitutional organization and experienced intense conflicts as a result (Small and Singer 1982: 179). These states are Austria, France, Germany, Italy, Japan, Russia, Spain, Turkey and the UK; China is the exception. In each case, warfare tended to occur after or in the longer wake of intensified constitutional experiments, and constitutions were substantially forged in war, of different kinds, usually linked to imperialism.

[5] See pp. 68–70.

constitutions made all members of society present in warfare, they militarized domestic societies, and conflicts between domestic groups were inflamed by the fact that these groups encountered each other, as members of the same nation, in military environments.

The term *militarism* is used here in encompassing sociological fashion, and it extends further than most definitions, which tend to focus on civil–military relations, foreign policy and governmental use of military force. Militarism here describes a condition with some or all of the following features: (1) military prerogatives shape political institutions and military actors establish primary obligations for subjects in society; (2) military groups may have privileged social positions and define conditions of access to political power; (3) military demands and duties pervasively shape social and political behaviour beyond the strict military domain; (4) internal social conflicts are likely to engender and be resolved by military violence.[6] Militarism, further, often results in war – at least it intensifies conflict potentials in society likely to lead to war. The distinctive aspect of this definition is that it identifies militarization both in vertical and in lateral interactions in society, and it examines how factors in both dimensions create military violence. As explained in different chapters of this book, many major modern wars have been linked to contests over citizenship in the lateral dimension of society, resulting from constitutional organization. In most polities on a constitutional pathway, constitutions have created a deep causal convergence between intra-societal and international conflict, such that internal conflicts originated in, and in turn intensified, external military pressures.

On this dual premise, this book charts the long-term evolution of constitutional law since the last decades of the eighteenth century, when constitutions first became central institutions in governmental order. It shows how constitutions were initially defined by military imperatives arising from imperialism, which imprinted a military form on nation states. This form was globalized over time, with variations. This book then shows how, until relatively recently, constitutions produced ideas of governmental legitimacy that tended to induce

[6] This approach differs from accounts of militarism focused solely on civil–political relations. It is close to analysis of militarism as a cultural condition (Vagts 1981: 13) and it follows descriptions of militarism as a diffuse set of orientations that shape identity and nationhood (see Ben-Eliezer 2019: 26). However, it implies that, in most militarized contexts, external and internal militarism overlapped.

military violence, so that constitutionally ordered states frequently engendered militarism, both in their own societies and beyond.

Imperialism resists easy definition, and the ambiguities inherent in this concept are often mentioned in this book. For the sake of clarity, the following definition of imperialism is adopted. Imperialism is construed here as a form of sociopolitical administration that involves the extraction of land, labour and resources from prior inhabitants of a territory by colonizing agents. This administration is organized in a system that the parties from whom land, labour and resources are extracted cannot unilaterally terminate or even modify. Different groups are governed by different means under varying legal norms, enforced with different degrees of consensus and coercion. Military force is fundamental to imperialism, and relations between metropolitan and colonized subjects are sustained, whether directly or remotely, by military means. The military usually retains a key role in supporting governmental coercion in colonial territories; in fact, colonial societies retain features of military occupation.[7] Naturally, the daily government of colonized societies inside empires may rest on conventional agreements between implicated groups. By the twentieth century, imperialism had lost some characteristics of simple military occupation.[8] For instance, the British Empire was structured around a system of indirect rule that involved the co-opting of elites into colonial service and the avoidance of manifest military repression. Long before the twentieth century, the Ottoman Empire had established a complex semi-consensual patchwork to support imperial authority. Yet an empire is a type of polity in which power has violent purposes, so that – with internal and external variations – social roles are deeply defined by the extraction and enforcement of violence. As examined repeatedly below, one vital feature of empires is that they create diffuse polities in which the legal limits of the polity are hard to determine. Centrally, subjects of empires are often also military adversaries of empires, such that external war and civil war converge.

The third claim in this book is of a broader nature. This claim is that constitutions reflect an uncertain distinction between nations and

[7] See pp. 149–51. One recent account of British colonization in India states that, in the early colonial period, the military was the 'marrow' of the imperial regime. Then, the later colonial period still showed the 'preponderance of the military over all other competing demands' (Sehgal 2021: 235–237).
[8] See p. 169.

empires, and they create a system of administration and legitimation in which the internal and external acts of states are not fully separate.

It is a sociological commonplace that the period since the eighteenth century witnessed the rise of modern sovereign states exercising control of the means of violence inside national society (Weber 1921/2: 30). Moreover, it is often argued that nation states are ruled by governments based in a clear distinction between internal and external functions. Such analysis implies that, through their development, modern states became less disposed to violence in their internal actions than in their external behaviour; this view is supported by renowned sociologists and observers of international politics (Elias 1976: 354; Linklater 2017: 422).[9] However, this book challenges this view, claiming that such views are selectively focused. In modern history, the dominant political form has been, not the sovereign *nation state*, but the diffuse *empire*. It was only after 1945 that nation states replaced empires as primary systems of social organization. In most contexts, national political institutions have been profoundly shaped by the intersection between empire and nation, in which traditional concepts of sovereignty cannot be applied without qualification.

For example, aspects of the above definition of imperialism can be applied to many modern nations, and, beneath the surface of many national societies, we can observe unilateral acts of territorial annexation. Most modern European states have their origins in diffuse composite territories, which were unified by incremental processes of centralization in which military actors performed primary roles.[10] Broadly, many European states developed through a two-stage pattern of imperialism. First, in their original emergence, European states developed through personal imperialism in which regents allotted privileges to local landholding elites to secure their frontiers, so that governments acquired national form by establishing lateral attachments with politically relevant actors. Second, in their modern form, most states developed by transforming such lateral agreements into vertical agreements, which reduced the power of landholders as a precondition for territorial order. This process was usually realized as states imposed direct military duties on individual citizens, so that

[9] Interestingly, Michael Mann (2012: 361) is an expert in interpreting state formation and imperialism, but he does not link his formative analysis of the states to his discussion of empires.

[10] One historian has claimed that Great Britain was the only non-unitary state in eighteenth-century Europe (Higginbotham 2005: 70). However, Poland, Prussia, Austria (if it existed) and (more arguably) Spain were composite states.

they integrated their citizens through military organizations. In different ways, the spatial processes that created national societies were not categorically distinct from imperialism. In fact, common nation-building trajectories often formed a template for modern empires.[11]

In addition, most European states were formed as they extended their institutional capacities outwards, so that the internal construction of state institutions coincided with the external imposition of imperial rule. Of course, Charles Tilly diagnosed the deep link between state formation and military mobilization and the equally deep link between military pressures and democratic integration.[12] Yet he was less attentive to the fact that, in most historical settings, state formation depended on military circumstances related to imperialism.[13] Before the rise of modern overseas empires, states were scarcely formed on a national design; at this time, most nations evolved in composite form and national governments had limited reach in domestic societies. Most notably, before the rise of modern empires, states rarely fought wars as nations, and the military capacities of states were limited. Before the eighteenth century, most large armies were recruited on a transactional basis from military entrepreneurs and they were deployed in wars for private interests – usually because of dynastic rivalries, often caused by succession crises. Through the eighteenth century, armies increased in size and were more strictly subject to national control, but they were not primarily recruited from national populations. In fact, the disarming of national populations, ensuring some distinction between civil and military functions, was a vital premise for early modern government, and it persisted until the later eighteenth century.[14] It was only after the constitutional revolutions in the late eighteenth and nineteenth centuries that armies were mainly recruited amongst national citizens, defined by national affiliations, such that states obtained direct purchase on their citizens. This state-building moment was closely connected to imperialism, and it reflected a deep intensification of inter-imperial conflict. In most settings, this development profoundly shaped the societies that provided soldiers. Societies acquired more integrated national form as states promoted the general extraction of military force, which supported the building of centralized institutions, linking all persons directly to the

[11] See discussions in Chapter 1.
[12] Tilly (2004: 89–90). See for similar analysis Levi (1996: 109).
[13] The common impact of imperialism on citizenship formation is not noted in Mann's (1987) typology of paths to citizenship.
[14] On this point, see excellent discussion in Rink (1999: 37).

state. It was at this time that wars presented legitimational challenges for all society, as military initiatives required governments to account for their actions amongst the citizens affected by them. In many cases, this defined the basic patterns of citizenship that typify modern nationhood, and citizenship evolved as an internal attachment between states and citizens as states widened their reach externally. These processes normally occurred because military force was required to govern external territories and citizenship rights were promoted as social agents were linked to the state as providers of military force.

Typically, in sum, nation states hardly existed before they were empires, and empires were rarely constructed by fully formed nation states. Some historians argue that Russia was unusual amongst modern polities as it was an empire before it became a nation state.[15] However, nothing is peculiar in this feature. Great Britain approached territorial integration as it became an empire in the eighteenth century. It then established a shared legal-political regime for its citizens through the late nineteenth century, closely mirroring stages of external expansion. The USA approached consolidation as a nation state as it annexed territories previously held by other peoples and empires; in essence, it became a nation state as it became an empire.[16] In the case of Germany, national integration and imperialism interacted inseparably in creating the first modern German nation state (termed an empire – a *Reich*) in the 1870s. Similar processes can be observed in Italy, Spain, Japan and, later, in Poland. In Austria and Turkey, the later nineteenth century was dominated by the endeavour to transform empires into polities supported by national or semi-national affiliations.

In each point, many governments reinforced their sovereign status through acts of control in which a strict, positive distinction between the inside and the outside of national society was not manifest. Generally, the rise of imperialism was not a phenomenon that was simply external to colonizing societies. Rather, it was a process that created and transfigured colonizing societies such that, in many cases, metropolitan and colonized regions evolved as two parts of the same imperial society or *imperial system*.[17]

Against this background, this book examines constitutions from a distinct perspective. Nation states and empires are usually seen as

[15] Blauvelt (2003: 42).
[16] Saler (2015: 19).
[17] Here, the book builds on recent historical research. See the critical assessment of the 'notion of a clear-cut break between empire and nation' in Esherick, Kayali and Young (2006: 13). Other

strictly differentiated systems of rule.[18] Moreover, many constitutions were originally legitimated by the claim that they established national governments on foundations that were opposed to imperialism. This was expressed in the first constitutions in revolutionary America and Europe, where constitutional citizenship was defined as membership in a political community decisively distinct from an empire.[19] Still today, constitutions are presented as expressions of nation-building commitments. However, this book shows how constitutions effected complex patterns of transformation in society, and they were mainly used to manage the effects of international pressures. As a result, they often organized societies in a hybrid form between nations and empires, extending imperial logics into national society. Of course, it is essential to differentiate between polities formed at different locations in imperial systems, as metropolitan states and colonial states usually developed on very different constitutional pathways. However, from the eighteenth century, imperialism formed an encompassing world system, and it shaped affected states in partly overlapping manner, regardless of whether states emerged at the metropolitan side or at the colonial side of imperial systems. Quite generally, the book argues that constitutions have typically been imprinted on national societies as the *form of sovereignty* adapted to a world created by imperialism. Owing to this form of sovereignty, constitutions shaped social order around imperatives in which the inside and the outside of national society overlapped, and the distinction between empire and nation was not clear. As discussed in Chapters 1–5, constitutions often distilled constructs of citizenship on premises first used to support empires. In some

historians observe the 'entanglement of nation and empire' in European history, explaining how empires were often sites of 'advanced nation-building projects' (Berger and Miller 2015: 4–5). The convergence of nation-building and empire-building is central to the observations of Osterhammel (2009: 603), who analyses the period of nationalism as congruent with a 'world of empires'. Speaking of the Ottoman Empire, one historian focuses on the 'fraught notion of a break between empire and nation' (Kayali 2021: 16). One historian proposes the concept of 'the "nation-state/empire" . . ... as a basic unit in an analysis of international politics for the period between the late nineteenth century and 1945' (Akami 2012: 178). See for overlapping conceptions Khalid (2006: 251); Kamissek (2018: 271); Malešević (2019: 70).

[18] The claim is common that empires are based 'asymmetrical' constructions of power and 'hierarchical relations of law and membership', while nations are formed through 'social integration' in Jureit (2019: 109). For related statements, see Kivelson and Suny (2017: 12). The claim is also frequent that 'the nation-state tends to homogenize those inside its borders and exclude those who do not belong, while the empire reaches outward and draws, usually coercively, peoples whose difference is made explicit under its rule' (Burbank and Cooper (2011: 8)). See congruent classical analysis in Eisenstadt (1993: 20).

[19] See pp. 57, 73.

instances, the ideal of national sovereignty condensed in constitutional law had an intrinsically imperial focus. Many states legitimated by ideals of national citizenship were propelled onto an expansionist trajectory, so that they were not obviously separate from empires. At different points in the book, the concept of the *imperial nation* is used to explain the formation of constitutionally ordered states. This view of constitutions is advanced as an interpretive framework through the book. Using this perspective, the book analyses constitutions in different global regions, including Eastern and Western Europe, the Middle East, North and South America, Asia and Africa, as texts that translated imperial impulses into legal-political form.

To examine these matters, this book defines a constitution in the following terms. A constitution is observed here, first, as a legal order that allocates powers in the state and constructs the legitimacy of the state on public premises rooted in consensual attachments between citizens and government. As such, a constitution need not be democratic. Very few constitutions became truly democratic until after 1945. Yet a constitution must contain some commitment to popular electoral representation, and it generates legitimacy by establishing *a norm of inclusion oriented towards full democracy*. On this definition, modern constitutions appeared in North America and Europe between 1776 and 1795. Characteristic of modern constitutions is that they define a legitimate state as one whose authority is based in the *construction of all citizens as politically implicated actors* whose will is manifested through elections, with varying degrees of popular participation. Second, a constitution is observed here as a legal order that presents the state as a public order because it creates rules for the definition and protection of citizens. That is, constitutions present governmental legitimacy as the result of a legal regime to guarantee rights of citizenship, usually granting all citizens certain personal and procedural rights, and assigning rights of political participation to some social groups. This book restricts its focus to states that have entered enduring trajectories of constitutional formation based in this model. For this reason, although China comes into focus at different points in the book, China is not examined in depth.

CONSTITUTIONS AND EARLY IMPERIALISM

The connection between imperialism and constitutionalism was evident in the origins of constitutional formation. In medieval Europe, many polities developed semi-constitutional procedures for collective