
# The Material Constitution

Marco Goldoni and Michael A. Wilkinson

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London School of Economics and Political Science
Law Department

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Marco Goldoni and Michael A. Wilkinson *

**Abstract:** What is the material context of constitutional order? The purpose of this paper is to offer an answer to that question by sketching a theory of the material constitution. Distinguishing it from related approaches, in particular sociological constitutionalism, Marxist constitutionalism, and political jurisprudence, the paper outlines the basic elements of the material constitution, specifying its four ordering factors. These are political unity, the dominant form of which remains the modern nation-state; a set of institutions, including but not limited to formal governmental branches such as courts, parliaments, executives, administrations; a network of social relations, including class interests and social movements, and a set of fundamental political objectives (or teloi). These factors provide the material substance and internal dynamic of the process of constitutional ordering. They are not external to the constitution but are a feature of juristic knowledge, standing in internal relation and tension with the formal constitution. Because these ordering factors are multiple, and in conflict with one another, there is no single determining factor of constitutional development. Neither is order as such guaranteed. The conflict that characterizes the modern human condition might but need not be internalised by the process of constitutional ordering. The theory of the material constitution offers an account of the basic elements of this process as well as its internal dynamic.

* Marco Goldoni is Senior Lecturer, Glasgow University Law School. Michael A. Wilkinson is Associate Professor of Law, London School of Economics and Political Science. We would like to thank Samuel Tschorne for very valuable comments on an earlier draft.

## 1. INTRODUCTION

The normative study of the constitution in Europe is suffering a certain fatigue. Due in part to the influence of North-American political science and constitutional theory, constitutional enquiry had become narrowly focussed on the protection of constitutional norms and the enforcement of individual rights through the judicial process. The special role played by constitutional courts and the German Constitutional Court in particular underlined an increasingly 'juridical' approach to constitutionalism.[1] If the constitution was what the court said it was, the task of the constitutional lawyer was to provide normative and hermeneutic guidance to aid judges in their process of legal reasoning. This coincided with the broader judicialisation of constitutional politics, aptly characterised by Ran Hirschl as 'juristocracy', but (note!) fully embraced by legal constitutionalists as the best institutional arrangement for holding the constitution together and protecting individual constitutional rights from political abuse.[2]

The theoretical hegemony of this approach, appositely labelled 'normativism',[3] can be traced from the beginning of the post-war period through to its triumphant pinnacle at the 'end of history' marked by the fall of the Berlin wall and the collapse of the Soviet Union. But in the wake of 9/11 and the return of the state of emergency and the state of exception, normativism begins to appear vulnerable. And with the inception of the Euro-crisis, the rule of law crisis and more recently the migrant crisis in Europe, it starts to look untenable.[4] These critical conjunctures show that the normative constitution in general and the protection of rights through judicial means in particular are not self-sustaining. Constitutional history reclaims front stage, if it had ever fully left the theatre. The repercussions of course extend beyond constitutional theorising, as the 'end of history narrative' is discarded, disowned by its inventor, and non-liberal political theory returns to the fore.

It is no surprise that by the beginning of the millennium a new wave of political constitutionalism had entered the stage. Following a first wave spearheaded by J. A. G. Griffith, who captured the political nature of the British constitution as well as its impending demise in his famous lecture on 'The Political Constitution' in 1979,[5] this second wave transcended the British context.[6] It had at

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[1] See e.g. C. Möllers, 'We are (afraid of) the people', in M. Loughlin and N. Walker (eds.) *The Paradox of Constitutionalism: Constitutional Power and Constitutional Form* (Oxford University Press, 2007) 87 – 107.

[2] R Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004).

[3] See M. Loughlin, 'The Concept of Constituent Power' (2014) 13 *European Journal of Political Theory* 218; M. Loughlin and S. Tschorne, 'Public Law' in *The Routledge Handbook of Interpretive Studies* (Routledge, 2016).

[4] See e.g. J. White, 'Authority after Emergency Rule' (2015) 78 *Modern Law Review* 585; C Gearty, 'The State of Freedom in Europe' (2015) 21 *European Law Journal* 706. More generally, see V. Ramraj 'No Doctrine More Pernicious? Emergencies and the Limits of Legality' in Ramraj (ed.) *Emergencies and the Limits of Legality* (Cambridge University Press, 2008) 3 – 29.

[5] J. A. G. Griffith, 'The Political Constitution' (1979) *Modern Law Review* 1 – 21.

least one salutary effect: constitutional lawyers were pushed to question interpretative methodologies nurtured over the intervening decades with a narrow focus on courts, the 'least dangerous branch' in Alexander Bickel's aphorism. They were forced to take more seriously the limitations of the judicial branch of government and invited to return to studies of parliamentary authority and of the increasing, and increasingly unbound, exercise of executive power.[7]

In as much as this turn encouraged a healthy scepticism about the superior moral wisdom and expertise of judges in matters of constitutional interpretation, as well as an attention to significant differences in constitutional culture regarding the perceived role of the court in the broader institutional arrangements of the polity, this second wave of political constitutionalism was undoubtedly beneficial in widening and enriching the discipline of public law.[8] But, with some notable exceptions, it remained normative, reductive, formal, wedded to individualistic premises, and incapable of offering explanatory conceptual accounts of constitutionalism or of constitutional development.[9] It restricted itself to claims about the superiority of parliaments over courts at holding the executive to account and at determining rights disputes, positioning itself normatively against the legal constitutionalist's faith in judicial reasoning. Broader issues of constituent power and state theory were largely eschewed.

In short, political constitutionalism was insufficiently *political*, and insufficiently attuned to the concept of the political.[10] It remained mute in the face of renewed constitutional crises and political-economic crises of the state system, and impervious to the increasingly fraught nature of the social relations undergirding constitutionalism, which were fomenting constitutional instability. Political and legal constitutionalists alike neglected the material relations that condition the emergence and development of a constitutional order, and the changes to these relations that prompt the suspension or modification of formal constitutional norms. To understand these phenomena requires attention to the underlying material context, to the basic political and social conditions of possibility of constitutionalism and the dynamics of constitutional change. Mainstream constitutional theory (whether legal or political constitutionalist) has little to say about the most important challenges to current constitutional ordering, whether in the shape of the existential crisis of the Eurozone, the fracturing of the

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[6] For analysis of these waves, see M. Goldoni and C. McCorkindale, 'Political Constitutionalism', in M. Sellers (ed.), *Encyclopedia of the Philosophy of Law and Social Philosophy* (Springer, 2017) (forthcoming).

[7] E. A. Posner and A. Vermuele, *The Executive Unbound* (Oxford University Press, 2011). Cf. T. Poole, *Reason of State* (Cambridge University Press, 2015).

[8] See J. Waldron, *Law and Disagreement* (Oxford University Press, 1999); R. Bellamy, *Political Constitutionalism* (Cambridge University Press, 2007); A. Tomkins, *Our Republican Constitution* (Hart Publishing, 2005).

[9] Cf K. Ewing, 'The Resilience of the Political Constitution' (2013) 14 *German Law Journal* 2111; O. Beaud, 'Reframing a debate amongst Americans: Contextualising a Moral Philosophy of Law' (2009) *International Journal of Constitutional Law* 53 – 68.

[10] See P. Minkinnen, 'Political Constitutionalism vs. Political Constitutional Theory: Law, Power and Politics' (2015) 11 *International Journal of Constitutional Law* 585 – 610.

political unity of the state, or the return of anti-systemic political and social movements.

The material constitution, it is argued here, is not grasped merely by supplementing judicial analysis with political analysis (whether positivist or normativist), or by exposing the significance of parliamentary authority and the role of executive powers in the governing arrangements of the polity. It is grasped only by properly grappling with the deeper societal context in which formal constitutional development is embedded (or, as the case may be, increasingly dis-embedded). It is the purpose of this article to offer a starting point for conceptual enquiry into this material constitution.

The material constitution is clearly nothing if not complex. To reduce complexity and gain an analytical purchase on this terrain, we identity four key (if not necessarily exclusive) 'layers' of the constitution to which the formal constitution stands in relation: *political unity*, the dominant form of which remains the modern nation-state; a set of *institutions*, including but not limited to formal governmental branches such as courts, parliaments, executives, administrations; a network of *social relations*, including class interests and social movements, and a set of fundamental *political objectives* (or *telos*). These make up the *ordering factors* of the constitution. After some preliminary methodological ground-clearing, contrasting this from related approaches (part 2), we then examine each of these four ordering factors in turn (part 3). Finally, we conclude (part 4) by arguing that the material constitution is neither a field of extra-juristic knowledge, nor a straightforward conveyor-belt of legal norms. It is a field of juristic knowledge but one whose content is both dynamic and continually contested in its internal relation to the formal constitution.

## 2. CONTRASTING THE MATERIAL CONSTITUTION

The conditions of constitutional formation and durability include political economy, political culture, social relations, religion, as well as geopolitical factors, international relations and imperial forms of domination. It is not just that the development of modern constitutions is shaped by these factors from the outside, as it were, as mere irritants to an already established order. It is that they combine to constitute order itself and to condition constitutional development through processes of re-ordering (and of *dis*ordering).

These features can be integrated into constitutional enquiry by placing their relation with the constitution at the centre of analysis. Taking this approach means, for constitutional scholars, to take as matters of *juristic* knowledge, geo-political, political, and social concepts which had been previously been delegated – or relegated - to other disciplines, such as sociology, international relations, and political theory.

We begin this approach to the material constitution by relating it to the 'formal' constitution - the constitutional texts and unwritten conventions as interpreted by official bodies. If the formal constitution is the sum of all constitutional norms and principles that drive the regulation of political and social interactions (constituting the 'laws of law-making'), this stands in relation to the material constitution, but not merely as a relation of form to function or form to content. An analysis of the function and content of constitutional norms is of course a first and important step in any constitutional enquiry. Constitutions do not only establish and regulate a formal process of law-making; they invariably protect certain material interests, from freedom of speech to balanced budgets. This tells us something about the content of the constitution, at the very least as a set of aspirational goals or political and social objectives.

But the material constitution is not merely the 'content' of the formal constitution or the totality of formal constitutional norms (even extending this to include informal norms and principles); neither does it compete with, substitute for or stand in antagonistic relation to the *validity* of the formal constitution. The aim of material constitutional enquiry is ultimately explanatory rather than normative (or ideological). It provides an understanding of the ordering (and disordering) dynamics of constitutional change. What *ought* to follow as a matter of constitutional interpretation or constitutional law-making is a question of political morality and prudential judgment.

This point must be stated clearly: the material constitution does not *determine* legal validity per se. Neither does it determine the outcome of political action or of judicial adjudication. That might contingently appear to be the case, particularly in episodes of political crisis, when positive legal norms are bypassed or the letter of the law is overlooked, pushed by clearly identifiable material forces or hedged in by material constraints. But critical or conjunctural periods, where material forces push in antagonistic directions and open up alternative paths for constitutional change, also reveal the indeterminacy of the material constitution.

Rather, the formal constitution is a feature, an instance, *of* the material constitution,[11] part of the wider constitutional order. Without a corresponding material constitution, without political and social traction, a formal constitution remains a 'dead letter', a list of wishful auspices or even a 'sham'. In that case, form and function may depart so far as to call into question the very discourse of constitution and of constitutionalism. But, to adopt the language of 19th century German-Jewish jurist Ferdinand Lassalle, the distance between the 'juridical [or formal] constitution' and a 'real constitution' ('the actual relationships of power in a country') must be grasped as a matter of constitutional law and constitutional theory.[12] And it is important to note that the distance exists in liberal democratic

[11] C. Mortati, *La costituzione in senso materiale* (Giuffré, 1940) 138. Available commentaries of Mortati's work in English are M. La Torre, 'The German Impact on Fascist Public Law: Costantino Mortati's Material Constitution' and G. Della Cananea, 'Mortati and the Science of Public Law', in C. Joerges, N. Ghaleigh (eds.), *Darker Legacies of Law in Europe* (Hart Publishing, 2003) 305-20 and 321-336.
[12] F. Lassalle, 'Uber Verfassungswesen' in 2 Gesammalte Reden Und Schriften 38 (E. Bernstein, ed.).

as much as non-liberal or non-democratic regimes. All constitutions, it might be said, are relatively sham, given the distance between their formal aspirations and their lived reality.

The 'distance' between constitutional form and constitutional material is of course a matter of degree and admits of little analytical precision. But the metaphor of gap or distance is in fact misleading to the extent that it suggests a dichotomy whereas the relationship between the 'formal constitution' and the 'material constitution' is better characterised as an internal one. Even an essentially sham constitution may have certain civilising effects on official behaviour; even an authoritarian regime may look to constitutional devices to secure its legitimacy or effectiveness in practice.[13]

So to speak of the material constitution is not merely to insist, with a legal positivist such as Hans Kelsen, that the effectiveness of law, whilst not the same as its validity, is a condition of validity.[14] That of course, is a truism. *De jure* authority depends on (and is conditioned by) *de facto* authority, as positivists as much as natural lawyers concede. But both positivist and naturalist traditions retain a methodology of separation of fact and norm that is inimical to understanding the constitution in practice, to tracking constitutional development in the interrelation of fact and norm. What, to adapt Kelsen's own terminology, are the conditions of effectiveness and how does law stand in relation to them? To this question, the positivist offers no answers. The positivist (as well as the naturalist) merely assumes effectiveness, or presupposes the existence of a 'standing constitutional tradition'. In an era where such traditions are looking increasingly precarious, and the effectiveness of law itself is in doubt, the question must be posed anew.

Rejection of constitutional formalism is nothing new. For this reason it is helpful to distinguish our approach from three other related approaches in constitutional theory: sociological constitutionalism, Marxist constitutionalism, and political jurisprudence.

Sociological constitutionalism, building on sociology of law, legal pluralism, and systems theory has long developed variations on the materialist theme. As the state's institutional authority has increasingly fragmented and the background political order has become increasingly complex and diffuse, the formal identity of law and state (and constitution and state) becomes problematic if not untenable. A recent and growing movement in the sociology of constitutions developed from the work of Niklas Luhmann, and including Gunther Teubner, Chris Thornhill, and Marcelo Neves as representative authors, builds on this insight.[15] Its starting

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[13] See e.g. T. Ginsburg and A. Simpser (eds.) *Constitutions in Authoritarian Regimes* (Cambridge University Press, 2014).
[14] See H. Kelsen, *Introduction to the Problems of Legal Theory*, translated by B.L. Paulson & S.L. Paulson (Oxford: Clarendon Press, 1992).
[15] G. Teubner, *Constitutional Fragments* (Oxford University Press, 2012); C. Thornhill, *A Sociology of Constitutions* (Cambridge University Press, 2011): M. Neves, *Transconstitutionalism* (Hart, 2013).

point resembles a material constitutional analysis: the existence of an *internal* relation between society and constitution. It is therefore worth pausing to distinguish the sociology of constitutions from the approach offered here.

The sociology of constitutions is based on a functionalism that we reject. To study functional systems, subsystems and processes of functional differentiation does offer an insightful reconstruction of certain features of modern societal development, and in particular in the economic sphere. The material constitution, however, is neither functional, nor systemic, but, as we argue below, it is based on specific ordering factors.

There are three related reasons for this rejection. First, the sociological explanation of constitutions in terms of *functions*, which therefore admits of *functional equivalents*, cannot explain why political unity remains fundamental to constitutional analysis or why certain functions are attributed to specific political institutions. Sociological constitutionalism conceives the relation between society and constitutions in terms of processes of inclusion and stability (in classic sociological fashion). The development of sectorial constitutions unfolds following functional (and not governmental) rationality. Its decentred view misses the overarching and ordering logic of political government.

Second, sociological constitutionalism operates in terms of closed *systems* rather than orders, paying insufficient attention to ordering factors, or indeed to the emergence of disorder. Systems theory confines 'the political' to institutionalised political systems in an effort to limit the expansionist and colonising tendency of politics.[16] As a consequence, it resists the idea that the internal relation between society and constitutions is substantialised through governing activities. It likewise resists the idea of a constitutional order organised in pursuit of basic political aims.

The third reason is that the sociological approach endorses a *communicative rationality* that leaves insufficient constitutional room for political subjectification, societal conflicts, social movements and anti-systemic forces (whose aim is to change the constitution is an irregular manner or in terms that would affect its substantive identity). This is because only communicative exchanges in accordance with the relevant code are registered by a system.[17] The internal relation between constitution and society is conceived in utterly irenic terms, except for the exceptional cases when a system is going to 'hit the bottom'.[18] But neither ordering, nor, significantly, disordering constitutional forces can be accounted for in such terms. Conflict is endemic to the process of constitutional ordering, not peripheral.

The political, subjective and conflictual dimension of the material constitution suggests an affinity with the Marxist tradition. This has recently been

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[16] For an exception, see P. Blokker, 'Politics and the Political in Sociological Constitutionalism' in P. Blokker and C. Thornhill (eds.) *Constitutional Sociology* (Cambridge University Press, forthcoming).
[17] See especially Teubner, *ibid.* And see Habermas, *Between Facts and Norms* (MIT Press, 1992).
[18] For a critique of this argument see E. Christodoulidis, 'On the Politics of Societal Constitutionalism' (2013) 20 *Indiana Journal of Global Studies* 629.

revitalised in constitutional theory in the work of Antonio Negri, and the view proposed here shares much with it.[19] Negri's materialist understanding of the constitution permits a focus on movement rather than origins and is able to explain constitutional development. For Negri, the material constitution refers to 'the continuous formation and re-formation of the composition of social forces'.[20] This movement is determined through class struggles, which are consubstantial with processes of collective subjectification – the construction and formation of collective subjects. The material constitution thus evolves within spatially delimited coordinates (the factory, then society itself) as collective subjects are formed. This aspect of collective agency avoids the reduction of the material constitution to what might be called 'structure without subjects', or 'natural-social' relations of production (which include exchange, law, culture, ideological practices).

There is much to be gleaned from Negri's interpretation of the material constitution, not least from his warning against viewing it as the imposition upon society of an order by an already formed elite.[21] Yet Negri grants insufficient space to political activity intended as something relatively autonomous from societal struggle and, in later versions of his theory, ends up undermining the productive role of class conflict itself. It is no coincidence that his collective subject becomes the *multitude* (counterpart to an equally nebulous and unitary Empire), and that the only thing missing for the reconstitution of the material constitution is for this multitude to become conscious of its status as living labour, that is, as the engine of societal reproduction.

In our account, on the contrary, the struggles which animate the material constitution are conducted by a plurality of subjects whose positions are conditioned but not determined by already established relations. Subjectivity does not stem from social relations of production and re-production in a completely direct and spontaneous way. It is mediated through political organisation, political institutions and political strategies. Economic and social forces must not be presented as over-determining the material constitution precisely because, as we will later show, their role in shaping the constitutional order has to be understood in relational terms and not just as a top-down exercise of ruling power (or a bottom-up mirror image). Economic and social forces do actively order certain aspects of the material constitution, but their composition and their relation are also constantly subject to tensions and conflicts generated by other political and institutional factors of the constitution.

Finally, we also distinguish our approach from a tradition that has recently been revitalised by Martin Loughlin, which he calls 'political jurisprudence'.[22] In

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[19] See especially, *Insurgencies* (Indiana University Press, 1999) ch 1. Negri compares his approach to Teubner's in 'Law, Property and New Horizons' (2010) 21 *Finnish Yearbook of International Law* 1.
[20] A. Negri and M. Hardt, *Empire* (Cambridge: Harvard University Press, 2000) xiv.
[21] A. Negri, *Labor of Dionysus* (University of Minnesota Press, 1994) 63.
[22] See M. Loughlin, 'Political Jurisprudence' (2016) 16 *Jus Politicum* 15.

Loughlin's account, social conflict is converted into manageable political contest by establishing an overall political unity of purpose and character. This is achieved through symbolic, representational devices characteristic of modern statehood, as well as the coercive apparatus of government. The process is mediated by modern public law, as it advances in the dynamic claims of political right (*droit politique*).[23] Loughlin's analysis is a crucial corrective to normativist public law theory (in both legal and political constitutionalist guises), and by 'bringing the state back in', is able to reconnect public law with traditions of political theory that can contribute to a materialist approach, from Hobbes and Rousseau, through to Lassalle, Heller and Schmitt.[24]

'Political jurisprudence', however, presents conflicting claims over the common good in abstract terms, naturalizing in a Hobbesian fashion the human condition of antagonism and reifying the relationship between rulers and ruled. Political jurisprudence is thus insufficiently concrete, omitting the circumstances of antagonism and the materiality of the ruling relationship. This relationship is not only conditioned by material circumstances but through constitutional ordering, it acts upon and reconstitutes material relations in particular ways. Rationalising the prudential art of governing requires an account – missing from political jurisprudence - of how material conflict, real forms of domination and power dynamics are translated into and in turn shape the ordering and outcome of political negotiations and the content of political right. Political jurisprudence, in other words, fails to account for the material phenomena - in particular the interplay of concrete subjectivities from below, as they emerge through political and class struggle - which condition claims of political right. From a materialist perspective, this omission betrays a residue of formalism and even ideology, privileging one particular but ultimately contingent form of 'rule', of relationship between rulers and ruled, neglecting that this relationship has not only a formal and political but also a material and dynamic character.

If political jurisprudence thus offers a compelling account of the traditional 'grammar' of modern public law and the autonomy of the political, the edifice relies on nothing but the generation of political power in and for itself. The art of governing of course requires a relative autonomy of the political, but in practice this is generated out of social conflicts and through processes of political subjectification. It is not enough to convey the 'pure logic' behind the structure of a constitution or of its jurisgenerative grammar precisely because the material constitution is relational rather than mechanical in its translation of social conflicts into political contestation. While political jurisprudence focuses on the autonomy of the political and the principle of sovereignty as its constitutional instantiation, the study of the material constitution – while recognizing their significance – conceptualises the art of governing as a constitutional activity based on a material relation between the governing and the governed (rulers and ruled). This is in turn

[23] Ibid.
[24] See M. Loughlin, *Foundations of Public Law* (Oxford University Press, 2010).

contingent on social relations, including class dynamics, and, when the state itself is brought back in, on geo-political dynamics of power and influence. These demand explanation as part of constitutional analysis as they are central to the process of political unification and constitutional formation.[25]

In Loughlin's vision, the state as a political unity can never be fully captured by rule-based categories, because conflict can never be fully or finally resolved. But what conditions such conflict? And, if the assumption is correct, what makes any order possible, any governing arrangement relatively stable in the face of intractable irresolution? In Loughlin's account, the dynamic is effectively managed prudentially from the top-down. The material nature of the dynamic element is therefore implicit. But if 'the establishment of an autonomous domain of the political is… a historical achievement',[26] it is also a precarious one, particularly as through late modernity the legal-political coupling on which it depends is put under increasing pressure from social, economic and geo-political dynamics. Order, in other words, cannot be assumed. This is nowhere more evident than in the interwar period in Europe, when existing governing relationships, both within and between states, become unstable to the point of breaking. The late twentieth century post-war project of European integration, inaugurating a process of state *transformation* is then based on material and geo-political factors that political jurisprudence is unable to accommodate.[27] With governing relationship again at breaking point, a material constitutional analysis is required to make sense of the dynamic of constitutional change.

In sum, if sociological and Marxist traditions suffer from a *political* deficit, political jurisprudence suffers from a *material* deficit. On the one hand, economic structures and social relations are not 'an accumulation of inert things or a transcendent course of the human condition'.[28] They are the result of subjective, political action. But, on the other hand, political action does not occur 'in and for itself' but is organised around and constrained by existing material struggles. Etienne Balibar neatly captures the necessary relation between the political and the material, highlighting the materiality of modern political action by noting that the truth of politics 'is to be sought not in its own self-consciousness or its constituent activity, but in the relationship it maintains with conditions and objects which form its 'material', and constitute it as a material activity.'[29] This echoes the famous insight of Marx, that 'human beings make their own history, but they do not make it as they please; they do not make it under self-selected circumstances, but under circumstances existing already, given and transmitted from the past'.[30]

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[25] This is explored below, under 'political unity'.
[26] See also Loughlin, 'Political Jurisprudence', 8 *Jus Politicum*.
[27] See M. Wilkinson, 'The Reconstitution of Postwar Europe: Lineages of Authoritarian Liberalism', LSE Law Society and Economy Working Paper Series, 05-2016.
[28] E. Balibar, *Politics and the Other Scene* (Verso, 2002) 11.
[29] Ibid, 10. See also J. Rancière, *Disagreement* (University of Minnesota Press, 1999) 16.
[30] From Marx's, *The Eighteenth Brumaire of Louis Napoleon* available at www.marxists.org.

Material conditions and relations are thus both constituted (by politics) and constitutive (of politics). This dynamic is intrinsic to constitutional ordering.

Since there is always an *internal* relation between constitutional order and society, in contrast to the classic liberal understanding of the constitution as a limiting power imposed, externally, over society, the constitution is conceived as intrinsic to society and as a feature of political and social power. But power here is neither an insurgent mass nor an abstract relation. The formation, subsistence and reproduction of society always already entails constitutional ordering. In that sense constitutional power is always already constituted as well as constituting power, as Hans Lindahl has carefully theoretically reconstructed.[31] But how is it ordered? And why might order turn to disorder? In the next section we consider how to organise and conceptualise the process of constitutional ordering by offering four inter-linked building blocks of analysis.

## 3. THE FOUR ORDERING FACTORS OF THE MATERIAL CONSTITUTION

### a) POLITICAL UNITY

The first factor of constitutional ordering is the production and reproduction of *political unity*. A political unity gives sense to a constitution, trivially to enable us to speak, as we do, of the German Constitution, the United States Constitution or the Egyptian Constitution. The constitution exists *as* a political unity, not as an abstract set of norms. Even here, however, we should notice immediately that ambiguities are raised in relation to the historical context. Are we speaking of the Basic Law of the Federal Republic of Germany? Before or after reunification? Before or after the OMT decision of the *Bundesverfassungsgerricht*? We might of course be offering a snapshot, speaking of a momentary constitutional order, but this will not be very revealing as a matter of constitutional theory. The constitutional order is always a process of *becoming*.

In the standard narrative, the rupture on which political unity is built is *immaterial*: it is the autonomy – and primacy - of the political from the theological domain that opens the space for modern constitutional ordering. This transition from a theologically inspired foundation to a rational ground of political authority, however incomplete, is captured theoretically from Hobbes natural precepts of political association, through Sieyes' 'nation' as a primordial foundation of constitutional order, to Weber's modernisation narrative. The transition is recently captured by Marcel Gauchet's 'secularization thesis', which characterises modernity as a process of religious disenchantment, signalled by the secularization

[31] See H. Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood', in M. Loughlin, N. Walker (eds.), *The Paradox of Constitutionalism* (Oxford University Press, 2007) 9-24.

of the grounds of political authority.[32] In these accounts, it is the rational, imaginary and the symbolic that play the lead role in commencing and advancing the process of modern constitutional ordering.[33] Political unity is based on secular foundations; in constitutional language, 'we, the people do solemnly ordain' our political and legal order.

But what are the material conditions of this process of constitutional ordering and the political unity it relates to? To attend to the formation of political unity requires capturing the material process of political integration (or disintegration and re-integration as the case may be) of a collectivity. A constitutional order, in other words, represents a certain political space and stretches across a particular time. Nicos Poulantzas characterises these double axes as the spatio-temporal matrix of the constitution.[34] For our purposes, the matrix can be thought of as the coordinates that establish the enabling conditions of constitutionalism, making a particular order visible *qua* constitutional order.

Material constitutional analysis requires reconstruction of the type of political unity that emerges in particular historical epochs and geographical spaces. It is, in other words, part of material constitutional analysis to track the particular form that political unity takes, what conditions its development and what the constitutional implications of that particular form are. Whether the political unity is obtained through a nation-state, a pluralist state, a corporatist State, a federal state, a multinational federation, imperial domination, confederation, an inter-state federation or a supranational union, is of significant moment because it reflects a particular path of institutional and societal development and therefore a particular path of constitutional ordering. Conversely, the formal constitution and its interpretation by official bodies can have a significant and even decisive impact on the particular path taken towards political unity.

Yet despite the variations and the distinct types of political unity that emerge in this process of constitutional ordering, the modern European nation-state remains (at least in Europe) the paradigmatic form of political unity. Its internal relation to the modern material constitution therefore deserves particular attention, representing, as it does, an 'ideal type' of constitutional ordering.

The nation-state consolidates as a political unity through the establishment of a bounded community based on some combination of territory, language, and identity. In an influential account, it is constructed as a shared community of fate based on the imagined belonging to a nation.[35] Constitutional attachment can itself play a significant symbolic role in this process of collective identity formation, captured in the idea of constitutional patriotism.[36] But identity can also be

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[32] M. Gauchet, *The Disenchantment of the World: A Political History of Religion* (Diane Publishing, 2001).
[33] See M. Loughlin, 'The Constitutional Imagination' (2015) 78 *Modern Law Review* 1.
[34] See N. Poulantzas, *State, Power, Socialism* (Verso, 2014).
[35] See B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, 1983).
[36] See e.g. J-W. Muller, 'A General Theory of Constitutional Patriotism' (2008) *International Journal of Constitutional Law* 72 – 95.

presented as at least potentially a presupposition of constitutionalism, and hence as a vector of or even an obstacle to constitutional change.[37]

The modern nation-state is also consolidated as a politically sovereign entity, in a two-fold manner, captured by what Carl Schmitt termed the *Jus Publicum Europeaum*.[38] Internally, the European nation-state acquires the monopoly of legitimate force over the course of the 'long 19th century' (from the French Revolution to the First World War). Externally, it is recognised as the only legitimate subject of international relations, with the right to decide on matters of war and peace, subject to conventions regarding civilized warfare. The emergence of the *Jus Publicum Europeaum* is of course a long and uneven historical process, but it crystallizes a series of key conceptual distinctions: between public and private, state and society, the political and the social/economic realms.[39]

But neither bounded community nor political sovereignty fully explains the material conditioning of political unification. To pursue this further, Schmitt's retrieval of the term 'nomos' from the original Greek meaning, as a territorial unity of law and space, is instructive.[40] The meaning of classical state sovereignty in the Euro-centric tradition is, according to Schmitt, a concrete order based on land appropriation and claim to radical title overseas. It is this early modern nomos, understood as a 'taking' of land, which underwrites the foundations of public law; that provides the conditions for the 'autonomy of the political'.[41]

This material grounding of political unity on an initial appropriation of land brings it into contact with an established as well as critical tradition in political economy, which presents this initial element as setting in train and conditioning capitalist economic development: Adam Smith's 'previous accumulation', Marx's 'original' or 'primitive accumulation', Max Weber's 'political capitalism'. Hannah Arendt, following Rosa Luxemburg, describing the imperialism of the late 19th century, calls it 'simple robbery'.[42]

With this additional political-economic element, political unity looks to stand on much less firm ground than Schmitt's nomos. It emerges on the shifting sands of material development, in relation to production and distribution (and not only taking) of land as well to the material organisation of (unequal) social relations based on labour and money. Luxemburg had directly recalled the added significance of *nomos* as *nahme* in relation to modern imperialism, picked up in her analysis of imperial *Landnahme* not only as an act of 'land-grabbing', but also as a process of capitalist market expansion.[43] The focus merely on an initial land grab

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[37] See e.g. D. Grimm, 'Does Europe Need a Constitution?' (1995) *European Law Journal* 282.
[38] See C. Schmitt, *The Nomos of the Earth* (Telos Press, 2006).
[39] For Loughlin's own statement, see e.g. 'Ten Tenets of Sovereignty' in N. Walker (ed.) *Sovereignty in Transition* (Hart, 2003) 55-86.
[40] See Schmitt, supra n 38.
[41] Ibid.
[42] See H. Arendt, *Origins of Totalitarianism* (Harcourt, 1968) 148.
[43] Schmitt omits discussion of Luxemburg's updating of Marxism for the imperial age; he does however, briefly address Marx's idea of original appropriation in 'Nomos of the Earth', 333- 334, adding that, 'if the essence of imperialism lies in the precedence of appropriation before distribution and production,

occludes the material development of this early modern nomos. As David Harvey more recently notes, the modern state is not only founded on an initial 'grab' but its class character (relation of domination) is maintained through reiterated processes of 'accumulation by dispossession'. This occurs not only through force and fraud, but also through formal processes of privatisation and measures of austerity, which manage the relation between private and public debt.[44]

The formation of political unity thus occurs in relation not (only) to the symbolic moment of religious disenchantment, nor (only) to the concrete act of territorial appropriation, but to the political and economic organization and re-organisation of social relations across time and space. This includes the process of community building and sovereign recognition, but extends to political economic relations of material inequality and domination, as well as social reproduction and redistribution.

The political unity of the state therefore stands in diachronic relation to material dynamics, domestic as well as geo-political. From this viewpoint, the process of political unification is internally related to the transformation of the state from a feudal to a *capitalist (and later imperial)* organization of power. It is dependent upon relations between, for example, capital and labour, or core and periphery. Political unification then looks like a contingent and uneven historical dynamic based on concrete factors that are reproduced politically, not only since the state has to provide for security and welfare but because the claims to popular sovereignty, national community and imperial domination (as well as class-based and anti-imperialist claims to emancipation or self-determination) are themselves features of material demands for expansion or inclusion. The emergence and maintenance of political unity of course follows distinct developmental paths, in domestic as well as geo-political relation to political-economic development.[45] This is understood not merely as a way of organizing the economy, but as integral to the organization of the relations between state and society and between states themselves.[46]

The territorial and communitarian logic of political unity and the capitalist logic of domestic and imperialist market expansion exist in a tense relationship. Political unity itself is threatened by the perception that constitutional ordering occurs on the basis of brute economic domination, whether of a dominant domestic ruling class, a dominant state within a federation, or an imperial power.

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then a doctrine such as expropriation of the expropriators is obviously the strongest imperialism, because it is the most modern' 334.

[44] D. Harvey, *The New Imperialism* (Oxford University Press, 2003); M. Blyth, *Austerity: The History of a Dangerous Idea* (Oxford University Press, 2013).

[45] As suggested elsewhere by Loughlin, drawing on Lindahl, and giving a dynamic twist to the concept of nomos, noting that 'the act of foundation can be understood as such only after the event: the original appropriation… can be identified as foundational only once the second and third aspects of nomos (distribution and production) are institutionalized,' *Foundations*, 29.

[46] See e.g. W. Streeck, 'Taking Capitalism Seriously: Towards an Institutional Approach to Contemporary Political Economy' (2011) *Socio-Economic Review* 137 – 167.

For constitutional ordering to produce a relatively stable political unity, such as a nation-state or a supranational union, and not merely an order of economic domination, such as the executive committee of the bourgeoisie or a hegemonic bloc of creditor states, the notional separation of political and economic realms is required.

The internal relationship between the formation of political unity and economic domination is conceptually significant in that the modern nation state is typically characterised in constitutional theory as a political form in which authority does *not* rest on the explicit fusion of political and economic power: it is the relative autonomy of the political from the economic that sustains modern constitutional authority, distinguishing it from prior political forms, medieval as well as ancient.[47] But if the modern state qua *nomos* represents not only a formal (or brute) appropriation of land, but – as concrete dynamic ordering - a transformation of social and geopolitical relations through the *commodification of land, labour and money* based on forms of domination, the intimate link between the political and the material in the process of constitutional ordering is exposed.[48]

The formation of modern statehood is internally related to a dynamic of formal equality (political unity) and material inequality. It requires a relatively autonomous mode of political authority as well as the means of ensuring the flow of capital accumulation through the structures of the *bourgeoise Rechtsstaat,* and other forms (and informal modes) of geo-political domination and market expansion.[49] Political unity requires and builds bounded community and political sovereignty, but is both made possible and threatened by material relations of inequality and domination. Political unity is thus a highly unstable process, and this instability is manifested in the material constitution that it partially orders.

### b) INSTITUTIONS

This outline trace of the dynamic formation of political unity does not capture the full substratum of the material constitution in the process of constitutional ordering. The formation of political unity, and of a constitution itself, depends on the work of *institutions*, including but not limited to formal governmental branches such as courts, parliaments, executives, administrations, central banks; it also depends on non-governmental, informal, societal and cultural institutions, such as family, language, trade unions, myths and symbols. These have a unifying role and

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[47] See e.g. Loughlin, note 39 above. But see E. Wood, *From Lords to Citizens: A Social History of Western Political Thought* (Verso, 2011).

[48] See R. Luxemburg, *The Accumulation of Capital: A Contribution to an Economic Explanation of Imperialism* (Routledge, 2003 (1913)). These are the three 'fictitious commodities'; commodification of which Polanyi thought leads to a double-movement of social reaction or re-embedding, potentially destabilising the constitutional order. See, K. Polanyi, *The Great Transformation* (Beacon Press, 1944).

[49] See K. Polanyi *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press, 1944).

exercise an ordering force but evidently enjoy some autonomy from the logic of political unity as well as from the material conditions of economic development. [50]

Institutions are the 'objects' which comprise the material constitution (in Aristotelian terms, its material cause). They are produced through social interactions and they develop their own institutional normativity, in the manner of customs or conventions. The study of the material constitution requires analysis of the institutions whose normativity and integrative cohesion maintains the societal glue, enabling a relatively stable social order to emerge *as a constitutional order*.

This idea is highly indebted to the tradition of legal institutionalism and of concrete order thinking. Carl Schmitt's work is again instructive. Turning to this tradition in the 1930s (as he moves away from the decisionism of the sovereign state of exception), Schmitt came to the conclusion that a political community exists only insofar as there is an organic link between a society's public, institutional self-understanding and the way members of society shape their daily lives. This means that a given political form cannot be maintained unless a given set of institutions (which reflect certain social practices) is constantly nurtured and protected. A given political community thus exists only insofar as its public law maintains conditions for the protection of certain institutions, such as marriage and family, the military, bureaucracy, the monetary system and so on.[51]

To be clear, it is not that some social practices *naturally* give rise and form to a political community. There is no natural connection between a given political community and the institutions that the legal order of that community protects and advances. Society, as Schmitt understood, is inherently plural and social actors tend to overproduce normative responses to practical problems; this as Schmitt noted in late Weimar, underscores a certain instability in representative democracy, and indeed in the Constitution itself, when it attempts to protect diverse and potentially competing substantive values.

Schmitt envisions a division of labour between legal and political institutions. Roughly speaking, formal law is the set of rules and general clauses that define institutions and ensure that state-sanctioned patterns of conduct are followed. Political power carries out a selective job: political rulers identify the institutions that are conducive to the basic homogeneity of the population. Such selection is of course to some extent context-specific. But on the basis of Schmitt's leading interest in homogeneity, a constitutional solution must be sought which enables the creation and preservation of this homogeneity and of the concrete order it sustains. The risk of potential intra-social conflicts which societal reproduction carries with it (but which can only be understood fully once we delve into the third and fourth layers of the material constitution, below) must for Schmitt be tamed by appealing to the relative homogeneity of the people, defended if necessary by

[50] See, on this aspect of institutions, the seminal work (now available in English with an introduction by M. Loughlin) is S. Romano, *The Legal Order* (Routledge, 2017).
[51] See M. Croce and A. Salvatore, *The Legal Theory of Carl Schmitt* (Routledge, 2012).

the annihilation of the constitution's enemies. Therefore, Schmitt assumes a necessary and direct connection between a political ruler (through its political representative) and the society they rule. That is, there must be institutions which take it upon themselves loyally to apply the criteria that the political ruler conceives as necessary to protect and foster social institutions and their identity.[52]

Material constitutionalism, however, rejects this personalistic and conservative account of institutions; legal institutionalism itself even provides sufficient resources to avoid this reductive trap. Constitutional ordering, as noted above, is a dynamic process of becoming and this means, from a material constitutional perspective, the possibility of adaptation (within certain limits) to challenges and internal conflicts.[53] *Under certain conditions*, conflicts can nurture the material constitution by strengthening the institutions involved in their management or deferral. Institutions, including formal constitutional ones, rarely resolve conflicts as such, but they might prevent them from degenerating into outright hostility or political and societal collapse, acting as pressure valves for conflictual energies. And because there is always room for new interpretations of an institution's normativity, and for new institutions to emerge, the material constitution is more flexible and dynamic than the one envisaged by Schmitt, even after his institutionalist turn.

But institutions are also fragile achievements. They come under pressure both from above, when for example, they come into conflict with forces of political unification or material economic expansion, and from below, when social relations emerge in a manner which threatens their continuing stability. Trust in institutions might then be eroded, even fatally.

The story of constitutional law in Europe in the second half of the twentieth century is, for example, one of extraordinary institution re-building on the basis of new forms of political accountability, frequently non-majoritarian or 'technocratic'. From the pre-eminence of constitutional courts to the more recent rise of independent central banks, this reflects a distinct set of beliefs about the institutional mediation of the governing relationship, beliefs which were in part formed out of reaction to the breakdown of liberal institutions in the interwar period. This process of institution-building continues at the supranational and international level, through the project of European integration and the European Convention on Human Rights. As institutions acquire a certain life of their own, however, most notably in the case of the EU, their social dis-embeddedness poses distinct problems of constitutional legitimacy. With the proliferation of institutions come added layers of complexity as well as increasing points of conflict, at the interface between domestic and supranational institutions (most evidently between judicial authorities at national and European level) but also between clashing logics

[52] Ibid., 30-45.
[53] For further reflection on this key point, see section 4, below.

of rationality, such as between legality and market rationality, and opposing political and social forces.[54]

Moreover, as examination of the next ordering factor of the material constitution makes clear, Schmitt's allusion to homogeneity at best understates and at worst forcefully conceals the heterogeneous social relations and material conflicts that condition constitutional development. Since institutions might mediate conflicts between state and society but do not resolve them, we need to turn to a further ordering factor, that of the 'horizontal' social relations that pertain between the individuals who constitute a political unity and who comprise the instituting power of the society.

Institutions themselves are based on a relatively autonomous instituting power, which erupts out of society and the social imaginary.[55] The instituting power reflects not only social conflict but also co-operation and solidarity. These twin drivers of social reproduction must be kept in view.

### c) SOCIAL RELATIONS

The most basic material out of which a constitution is formed lies below the layer of institutions. It consists in subjective social interaction and social conflict, which is conditioned (sometimes tempered, as well as occasionally inflamed) by interpersonal solidarity as well as by competition. Social conflict and interaction is softened, concealed, maybe even displaced by the unifying function of institutions and the political unity of the state itself, but not (perhaps never), fully or finally resolved.

The extent to which social relations (and in turn the institutions and political unity they constitute) are conditioned by specific forms of class consciousness and class domination - where class need not be determined by ownership of the means of production as understood in classical Marxism -, remains a live question. But it is an important advantage of the material constitution, over a purely political jurisprudence (or a formal constitutionalism), that the relationship and the distance (or disconnect) between rulers and ruled and between the ruled themselves is not represented as purely formal. In a society which considers itself democratic, or in some sense as self-governing, the idea of a gap between rulers and ruled is itself antithetical to constitutional ordering, at least to its self-image as a democratic society. This is not to say there can be a pure identity between rulers and ruled. It is to say that the relation between rulers and ruled is a material and dynamic one.

Constitutional actors must not therefore be reduced to the status of already constituted or abstract objects (or institutions). Instead, the study of the material constitution focuses equally on the process of 'subjectification', putting emphasis on the formation of collective political actors and their contribution to

[54] See e.g. The OMT saga, Special Issue of the *German Law Journal*, vol. 15, n 2 (2015).
[55] See C. Castoriadis, *The Imaginary Institution of Society*, tr, K. Blamey (MIT Press, 1997).

constitutional change. This is also a question of identification: does the individual conceive of himself or herself, for example, predominantly as a part of a particular class, nation, or ethnicity, as a citizen, entrepreneur or a consumer? Or in what combination?

Constitutional lawyers can return to old insights from sociologically-sensitive studies of the constitution in order to integrate processes of political subjectification into the analysis. The substantive production and reproduction of the material constitution is the outcome of a series of social, political and geopolitical conflicts through which collective subjectivities are forged. Collective subjects provide the impetus for the material dynamic of political formation and institutional development. We need, then, to shift the constitutional focus from the abstract individual (or institution) back to these processes of subjectivation, with their potential for inclusion and exclusion.

A useful starting point from which to delve into this factor is the work of Italian institutionalists (such as Santi Romano and Costantino Mortati) as well as those working in the Gramscian tradition.[56] To restate a well-known insight of Machiavelli, if the emergence of a new material constitution is possible only through the political action of the prince, or equivalent (in Gramsci's version, the political party),[57] this depends on processes of selective subjectification and must be sustained by a series of organised political subjects. But political here should be read *lato sensu* and not in any way limited to political parties or otherwise already institutionalised forms. It should include informal groups and social movements, including anti-systemic and disordering social forces.

As we noted in our methodological preliminaries, while the study of political economy is crucial for understanding the material formation and reproduction of society (its metaphorical 'backbone'), the structure of the material constitution is not economically determined. So although the emergence of a material constitution is clearly intertwined with a concrete organisation of the undergirding political economy, the study of the material constitution cannot be *reduced* to the study of the underlying economic base.[58] Or, to put it differently, the economic base must not be presented as over-determining the material constitution; rather they are inter-related. Political economy stands upon an existing order and its trajectory is first of all advanced by a (constrained) series of political actions, including those representing the formation of political unity. Political subjects are thus essential in the formation and then preservation of a particular political economy, as well as in fomenting change through putting pressure on reforming the political-economic structure.

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[56] S. Romano, *The Legal Order*, supra n 50: C. Mortati, *La Costituzione in senso materiale,* supra n 11; A. Gramsci, *Prison Notebooks* (Columbia University Press, 1992. For an overview which emphasises the aspects of continuity among these authors, cf R. Esposito, *Living Thought* (Stanford University Press, 2014).

[57] A. Gramsci, *Selection from the Prison Notebooks* (International Publishers, 1971) 253.

[58] An example of this form of reductivism is C. Beard, *An Economic Interpretation of the Constitution of the United States* (MacMillan, 1913).

German constitutional scholar Herman Heller, the neglected interlocutor of Kelsen and Schmitt, who offered a third alternative between normativism and decisionism, gestures towards this dynamic account of constitutional development based on material social relations. While presenting law and politics in dialectical relation in the constitution of the polity, Heller argues that this relationship cannot be abstracted from the social dimension, in the sense that the political unity – the first factor in any constitutional ordering – not only depends on institutional support in order for it to survive but it also requires a certain degree of social equality, or at least the prospect of such.[59]

The constitution, according to Heller, is primarily a social order, formed not only by legislative actions, traditions, and political expediency, but also by constellations of social and economic power.[60] Viewed historically, the constitution might then appear as a mere *modus vivendi*, the result of a political compromise or fortuitous balance of social and economic interests. For Heller, however, the content of the substantive constitution is not, *contra* Schmitt, expressed by a solitary decision or even a plurality of concrete decisions, but has an ethical quality.[61]

For Heller, the authority of the constitution is framed not in the (Kelsenian) sense of authorisation by a previously valid norm (which would only lead to the infinite regression closed by the *Grundnorm*), but on the basis of ethical principles in the service of the common good. Rejecting both Schmitt's 'norm-less power' and Kelsen's 'powerless norm', as failing to recognize the dialectical construction of the constitutional state, Heller contends to have found a middle-way. He argues that the constitution requires at least one decisive section of those subject to its power not just to comply with the constitution out of self-interest or habituation, but to accept it as binding. It requires, in other words, that a proportion adopt an 'internal point of view', although Heller does not describe it using precisely those terms. Nor does he explain what section of the population would be decisive or what makes it such – or even what a 'section' of the population means.[62]

By introducing this perspective of social recognition and acceptance Heller is brought to confront a theory of democracy. 'The law of democracy' after all, notes Heller, 'attributes the formation of state power to "the people"'.[63] This of course was the case explicitly with the Weimer constitution itself. Although democracy will never consist in the 'identity' of rulers and ruled, the issue of *social homogeneity*

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[59] H. Heller, 'Political Democracy and Social Homogeneity' in A. Jacobson and B. Schlink (eds.) *Weimar: A Jurisprudence of Crisis* (Berkeley, University of California Press, 2000) 265. See further Dyzenhaus, 'Hermann Heller and the Legitimacy of Legality' (1996) 16 *Oxford Journal of Legal Studies* 641 – 666.
[60] Heller, ibid, 275-6.
[61] Ibid, 277.
[62] Cf. M. Wilkinson, 'Is Law Morally Risky: Alienation, Acceptance and Hart's Concept of Law View' (2010) *Modern Law Review* 441 – 466.
[63] Ibid, 273.

in democracy is raised in direct relation to ethical substance - the 'common good' - of the polity as well as its very viability.[64]

But the concrete nature, as well as fragility of this ethical quality is evident when turning from Heller's state theory to his political commentary. There Heller makes clear that this quality must not be presented or defended in abstract or existential terms. Claiming that Schmitt's 'friend-enemy' distinction ignores the *dynamics* of political will-formation, Heller argues that 'homogeneity' is something that daily must be formed anew, approving Renan's famous description of nationalism as '*un plebiscite de toujours*.'[65] Schmitt's basic friend/enemy distinction on which the concept of the political depends is not political enough. It is too 'top-down' in its view of constitutional ordering. This comes into direct contradiction with democracy, 'which is supposed to be a conscious process of the formation of political unity from bottom to top…'.[66]

Political unity is not a bare fact of existential recognition of 'self' and 'other', 'we' and 'them'; on the contrary, these positions and therefore political unity itself is formed, constructed, and mediated through the constitutional process, in channelling competing claims over the common good. Its essence, however, remains elusive, resistant to any straightforward empirical analysis or resolution.[67] Although a belief in social homogeneity is required in order to facilitate and sustain a relatively stable democratic order, this does not 'mean the abolition of the necessarily antagonistic social structure'.[68]

Heller emphasizes that in the democratic system, institutions, and political parties in particular, are essential for unifying the multitude of wills of the citizenry.[69] But 'homogeneity' is ultimately a social and economic category rather than a spiritual, cultural, or ethnic one.[70] What is decisive is not the intellectual or ideological superstructure, or even the institutional channels of conflict resolution, but the reality of economic disparities. He recognizes, nevertheless, that the bourgeoisie as a class will attempt to resurrect ideologies, including those of nationalism and of monarchy, in order to maintain its own position of power amid the eternal 'cycle of elites'. 'Without social homogeneity', Heller warned, 'the most radical formal equality becomes the most radical inequality, and formal democracy becomes the dictatorship of the ruling class.'[71]

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[64] This insistence on homogeneity is made (in different ways) by all three, not only Schmitt and Heller but also Kelsen arguing that a certain homogeneity is necessary for the democratic polity. Kelsen, however, explicitly rejects the claim that democracy requires socio-economic equality. See H. Kelsen, 'On the Essence and Value of Democracy' in A. Jacobson and B. Schlink (eds.), above.

[65] Ibid, 260.

[66] Ibid.

[67] Heller: 'One cannot say definitively how this "we-consciousness" is produced and destroyed. All attempts to find the impulse for this consciousness in a single sphere of life have failed and must fail. All that we can rightly know is that in each epoch a correspondence between social being and consciousness – in other words a societal form – emerges, ' ibid, 261.

[68] Ibid, 260.

[69] Ibid.

[70] Ibid, 261.

[71] Ibid, 262 (a factor which enables Heller to distinguish the European social problem from the 'Negro Question' in America). He notes that 'nothing is more characteristic of the social disparity which

The constitution thus stands in an internal relation with the material social order (as well as political unity and institutions), understood in terms of the informal social relations and inter-personal subjectivities that develop over time. If these become too materially heterogeneous, through the rise in social inequality, constitutional ordering itself may become difficult or even impossible. As the underlying social relations become too fraught, instability or even revolt beckons.

### d) FUNDAMENTAL POLITICAL OBJECTIVES

There is a final factor that conditions constitutional order, and may even hold it together in spite of social conflict, compensating even for political disunity and institutional weakness. This is captured by a material *telos* (or set of *teloi*). Constitutional subjects and institutions project certain basic or fundamental political objectives, or even a future 'finality', and foreclose or elide others. Again, the formal constitution stands in relation to these objectives, sometimes in tension with them, sometimes in harmony.

The creation of political unity, the shaping of institutions, and the development of social relations - these all revolve around the possibility of imprinting a trajectory upon the material constitution. Otherwise, they are likely to remain inert. But the trajectory of one will sometimes conflict with the trajectory imprinted by other ordering factors of the material constitution. The constitution will therefore evolve according to the complex material dynamic of political, institutional and social change. It will also evolve in relation to the trajectory laid down in the formal constitution and its interpretation by official bodies and institutions.

The set of explicit and implicit constitutional aims and objectives reflects the composition of dominant social, political and geo-political forces around it. But it also acts as a catalyst. This perspective offers an alternative to classic constitutional doctrines, which, in accordance with much modern political philosophy, lays emphasis on the *origin* of the constitution, as if it contains within itself the energy for the creation and the further development of the constitutional order. This origin then appears as external, both to society and to the constitutional order itself. As in the case of a mechanical device, the original act would set in motion the constitution from the outside, acting as an external catalyst and referent.

Social contract thinking, which influences a great deal of constitutional theorising, thus poses the creation of society and the conditions of constitutional order from an external perspective, that is, from a pre-political, hypothetical or 'natural' condition. The social relations that pertain at the time of the so-called origin (whether state of nature or original position) are then concealed, nullified by virtue of a thought experiment but one that acts as distorting lens because it de-

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threatens our democracy than the attempt to recast the economic disparity into an anthropological one', ibid, 264.

politicises existing material conditions and social relations. Once translated into constitutional law, it also legitimises taking matters out of the ordinary political and social processes of contestation.[72] In other words, the material constitution is entirely (and deliberately) concealed from view.

Decisionism, despite being radically different to social contract in its formal outlook, assumes a similar starting point: the origin of the legal order, its 'big bang', containing the seeds for its further development, lies in a position external to the order itself. The constituent power is conceived as *causa incausata*, creating out of nothing of a new order, a quality which can return through the state of exception. The origin can then also offer a conservative position, defending the constitution reactively against political and social change or against agitation for such change.

The study of the material constitution takes a different approach. Societal formation is always already political; the constitution does not and cannot come out of nothing or from a state of nature. What makes social formation possible in the first place, within a determinate space and through the mediation of already existing institutions, is the convergence of certain political and social forces upon a series of basic political aims and a capacity to affirm them. The state of exception then exists within the constitution understood broadly as a material constitution.

Through political association, different social forces will tend to commit themselves to pursue distinct aims for different reasons and on the basis of distinct interests. Through converging upon these aims, hegemonic forces are able impress a particular trajectory upon the material constitution. The conditions which make this possible are captured by Poulantzas and his relational conception of political power. Poulantzas saw that the material constitution is formed by the 'condensation of social forces' around a set of political aims.[73] A version of his research question should guide the study of the material constitution: 'why have liberal democracies decided to give themselves *these* particular political constitutions and not others?' These forces may be informal as well as formal, they could be predominantly domestic, but they could also be a hegemonic bloc within a federation, or a geo-political formation.

At the same time, the teleology of the material constitution, by developing according to its own (relatively autonomous) logic, reshapes the identity of the hegemonic forces over time. The trajectory of the material constitution is thus conditioned by the objectification of its aims: such an objectification then imposes limits on the manner in which to achieve them.[74] In other words, the hegemonic forces which support the material constitution are not entirely free to change course, without limits or constraints. Moreover, the formulation and pursuit of fundamental political aims might generate unpredictable consequences, contradictions or paradoxes in the unfolding of the material constitution. This is

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[72] See S. Wolin, 'The Liberal/Democratic Divide: on Rawl's Political Liberalism' (1996) 24 *Political Theory* 97 – 119.

[73] Poulantzas, *State, Power, Socialism*, supra n 34, at 11.

[74] R. Cover, 'Nomos and Narrative' (1983) 97 *Harvard Law Review* 4, 44-46.

to say that in the actual pursuit of common political aims, unforeseen spaces might open up for new subjectivities or changes in alliances, and with potentially disruptive effects.

The level of intensity of overall social and institutional support is an important indication of the strength of a material constitution. The stronger the support for the political aims (or even finality) of a regime, the more solid is its material constitution. Without such a trajectory, the material constitution will struggle to hold together, particularly when aims directly conflict.

It is important to note that there will not necessarily be convergence on these aims. Divergence will ensue and existential struggle will also sometimes occur. In fact, as suggested above, in the context of political and geo-political capitalist dynamics based on competition, class conflict, and imperial domination, as well opposing dynamics based on solidarity, cooperation and emancipation, divergence is inevitable. At certain conjunctural moments, where the oppositional forces combine to present an existential or constitutional crisis, with no overall hegemonic force prevailing, there will be greater fluidity of possibilities, and new trajectories will likely emerge, along with new hegemonic forces.

The notion of a constitutional teleology is an old one. As Aristotle puts it in the *Politics*, the 'constitution… reveals the *aim* of the city-state'.[75] This may seem enigmatic but at a minimum, of course, the implicit aim is the survival of the state, polity, or project of political unity. But frequently, and increasingly, formal constitutions themselves present more content-specific aims or explicitly announce a *telos* (or set of *teloi*). This is the case with many modern constitutions, particularly those instituted in Western Europe in the aftermath of the Second World War, which promote particular, if still rather vague values, such as democracy, federalism, human rights, or social welfare.

An illustrative case, because of its origin in well-documented material conditions, as well as the existential difficulties it now faces, is the constitution of the European Union (its formal constitution famously described as a 'constitutional charter' by its Court). An animating teleology has characterised the project of integration since its inception, with the preamble of 'ever closer union amongst the peoples of Europe' bearing its imprint since the Treaty of Rome. Discussion on the 'finality' of the European project was even a significant public precursor to the ill-fated Constitutional experiment.[76] But as Etienne Balibar puts it, reflecting on the birth of the EU at the Treaty of Maastricht, what is extraordinary is the explicit and detailed nature of its political-economic constitutional aims:

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[75] Aristotles, *Politics* [I.1.1252a1-7], [IV.1.1289a17-18].

[76] See J. Fischer, 'From confederacy to federation: thoughts on the finality of European integration' in C. Joerges, Y. Meny and J. H. H. Weiler (eds.) *What Kind of Constitution for What Kind of Polity: Responses to Joschka Fischer* (Jean Monnet Program Online Papers, 2001).

> The EU in its constitutive moment (Maastricht) was endowed with a quasi-constitution… where, for the first time in this part of the world… a principle of political economy deriving from a specific ideological discourse (namely neo-liberal deregulation and unrestricted competition, believed to produce 'optimal allocation of resources' and spontaneously 'just' redistribution) was presented as the sovereign rule which all member states ought to implement in their national policies under close surveillance of the federal (or quasi-federal) organs of the Union…[77]

Yet through the recent Euro-crisis, this set of formal and informal objectives, constitutionalised since Maastricht, revolving around the ordo-liberal demands of price stability, fiscal discipline and avoidance of moral hazard, come into conflict with the implicit *telos* of integration and specifically of currency 'irreversibility'.[78] In moments of heightened tension between the *telos* of currency 'irreversibility' and the basic norms of currency 'stability', involuntary 'Grexit' is then mooted as a way to stabilise the material constitution of the Eurozone.[79] There is no formal method of exiting (voluntarily or otherwise) the single currency but there is little doubt that the material balance of forces conditions the political possibilities available to Athens. Hegemonic blocs amongst creditor states thus may shift the balance of material constitutional power and alter the dynamic process of constitutional ordering.

This focus on particular political aims sheds a light on the nature of the art of governing, which as noted by Mortati, cannot be reduced to the other three classic constitutional functions.[80] In Mortati's account, the governing function subsumes the other three functions, rather than being fully explained away by them. In fact, the standard three functions get a sense of direction only through the looking glass of the governing function itself, and this governing trajectory is determined by fundamental political aims.[81]

The notion of functions here must not mislead. As suggested above, when contrasting our approach to sociological constitutionalism, the teleological dimension of the art of governing is shaped by political action rather than sheer functionality. This is not a pedantic distinction because it carries with it important consequences for understanding the process of constitutional ordering. It might be possible for one particular institution in a given constitutional order to have the power and the responsibility to steer the governing function toward the pursuit of certain fundamental political aims, but this is unlikely. With the growing complexity of constitutional structures, it has become difficult or even impossible to identify the governing function in one single aim or single institution. In fact,

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[77] E. Balibar, 'The Rise and Fall of the European Union: Temporalities and Teleologies' (2014) *Constellations* 202 – 212.
[78] M. Wilkinson, 'The Euro is irreversible… Or is it?' (2015) 16 *German Law Journal* 1049 – 1072.
[79] Ibid
[80] C. Mortati, *L'ordinamento del governo nel nuovo diritto pubblico italiano* (Giuffré, 1931).
[81] Mortati, *La costituzione in senso materiale*, supra n 11, at chapter 3.

since the finality of governing a society is not limited to its survival as such (for example, the State presents a certain ideal form of community), but includes the realisation or preservation of specific fundamental political aims, it is more accurate to seek the teleology of the material constitution across the institutional spectrum and even beyond into the dimension of social relations. In brief, the teleology of the constitution is material rather than formal, relating to all the ordering factors of the constitution.

## 4. THE MATERIAL CONSTITUTION AS AN OBJECT OF JURISTIC KNOWLEDGE

The considerations developed above are offered with the aim of demonstrating the epistemic value in studying the material constitution. Formal constitutional law, in material constitutional analysis, is not a mere instrument in the hands of political or of societal forces. But neither is it fully autonomous. Constitutional law is embedded in the underlying material dynamics – supported as well as irritated by them. In this sense, the material constitution resonates clearly with the tradition of concrete order thinking, but it must be given a more dynamic and conflictual material framing. The ordering force of law would remain empty if it were not supported by political unity, relatively powerful institutions, dominant social forces, and animated by a prevailing *telos* (or *teloi*). Nonetheless, the material constitution is not 'what happens' in the sense of sheer occasionalism; rather it delineates the conditions which make possible the emergence of a state of affairs as a constitutional order. These conditions can be identified and analysed as objects of juristic knowledge.

The ordering factors thus stands in internal relation to the formal constitutional settlement. The constitutional lawyer cannot ignore their formation because they breathe life into the constitutional order and condition its development. Each gives a sense of direction to constitutional norms and this direction is juristic as much as political. It follows that in contrast to those versions of political constitutionalism which portray law and politics as incommensurable, in material constitutional analysis the relation between law and politics is internal in the sense that law cannot be considered just as the transmission belt of political decisions that are made before and outside the legal order. Contrary to both normative positivists and decisionists, who postulate that the most important political decisions are either taken before or outside the law, once the formation of fundamental political aims is seen through the material dimension of the constitution all notions of an autonomous political process or of occasionalist political decision-making evaporate. There is nothing either occasional or purely procedural in the material constitution.

Second, and specifically in relation to the final ordering factor, the nexus between constitutional structure and political objective, typical of the liberal state, is disarticulated because there is no singular determination of a particular objective (which, in the classical liberal State is always the protection of individual freedom). Rather this is open to multiple variations. There are not only different types of state in the sense of different routes to formal political unity and institutional structures but also different types of state in terms of the different basic political aims pursued.

Since the material constitution is formed out of a remarkable set of ordering factors, which reflect the contours of broader societal development, it is not possible to assume that any form of non-compliance with the established legal order amounts to a form of desuetude or even a change of the constitution. For this reason, the material constitution must not be confused with the idea of 'living law' or the 'living constitution'. The latter is a much more flexible device which insists that social change is mechanically (or organically) registered by the legal order, usually through the interaction between particular actors and courts.[82] A material understanding of the constitution acknowledges that constitutional and social order stand in an internal (and often fractious) relation to one another and that this makes constitutional transformation notably more demanding than sheer adaptation to changing social circumstances.

Neither should the emphasis placed upon ordering factors suggest that order is easily attained within the material constitution. On the contrary, our insistence on movement, conflict, and dynamism should signal that political unity depends on a variety of forces, frequently oppositional, that combine in the process of political unification, institution-building and the movement of pursuing fundamental political aims. For this reason, the constitution can be strengthened by institutionalising material contest, and even material conflict. But such conflict *can* become threatening, and existentially so.

To understand this process better, we can draw a distinction between two types of conflict and observe how they can be conceived from the perspective of the material constitution. Here we can find a second epistemic use of the material constitution. A first type of conflict, if properly institutionalised, can lead to further consolidation of the constitutional order. The constitution is enhanced if it is able to manage conflict and display sensitivity to social instances, particularly those that could not have been foreseen at the moment in which the constitutional project was initiated. This also allows the constitution to mould society, making space for new social instances and novel societal inputs, which in turn gives the material constitution some elasticity and durability. This does not mean that everything can be accommodated, but the animating movement of the material

[82] This is a discussion familiar to US constitutional lawyers where the opportunity to update the meaning of the constitutional text to social change is more urgent. See, among many, J. Balkin, *Living Originalism* (Harvard University Press, 2011); D. Strauss, *The Living Constitution* (Oxford University Press, 2010). In Canada, this is known as the 'living tree doctrine': W. Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge University Press, 2007).

constitution, with its cascading effects on institutions, is enabled by this type of conflict management. These conflicts often involve pressure placed by social and political forces upon the boundaries of institutions and political/social subjects, and test their capacity to accommodate new claims. Nonetheless, this type of conflict need not challenge the fundamental political aims of the constitutional order nor necessarily give rise to new constitutional subjects. It rather redirects the existing constitutional dynamic.

A second type of conflict actually threatens the material constitution by testing the normative core supported by the dominant social and political forces. This happens when the dominant imprint is no longer able to exert pervasive effects throughout the political community. This might be the case when ruling forces no longer coalesce around the same political aims or when there are internal contradictions among these aims and a compromise cannot be found. When this happens, conflicts cease to be productive and a far-reaching change of the material (and formal) constitution becomes pressing. At this stage, the state of exception acts as a signal that the material constitution and the relative condensation of political and social forces which support it are under a serious threat of dissolution and an extraordinary intervention is required. In other words, the exception is not an unexpected event that threatens from outside the normality of the legal order; on the contrary, the exception surfaces from within, when the material constitution is under threat.[83]

If the state of exception is considered legitimate when it aims at preserving the material constitution,[84] it makes little sense to consider it an extra-juridical moment beyond the knowledge of constitutional lawyers. It is, on the contrary, within the realm of juristic knowledge. The same logic unfolds in other cases where the core of the material constitution is at stake. In the context of the European Union, for example, this became visible in the confrontation between highest national courts around the penetration of EU law into national constitutional systems. Faced with the risk that certain measures provided for by EU law may unravel aspects of the social fabric and hence of core aspects of national constitutional identity, judges felt they had to set a threshold to be drawn along key constitutional principles.[85] The development of the doctrine of 'counter-limits' by some national constitutional courts can be read as an exercise of guardianship of core aspects of the Member State's material constitution, bearing on political unity (national identity), institutional authority, and even social relations.[86] Reference to the material (rather than the formal) constitution helps

[83] M. Croce, A. Salvatore, 'After Exception: Carl Schmitt's Legal Institutionalism and the Repudiation of Exceptionalism', in 29 *Ratio Juris* (2016) 410.
[84] Loughlin, *Foundations of Public Law*, supra n 24, at 280.
[85] See especially the Lisbon decision of the German Constitutional Court, BVerfG, 2 BE 2/08, 30 June 2009.
[86] This doctrine has been developed by the German and the Italian constitutional courts: cf V Barsotti, P Carozza, M Cartabia, A Simoncini, *Italian Constitutional Justice in the Global Context* (Oxford University Press 2016) 214-217.

here in identifying the limits of constitutional revision or transformation. But this appeal to guardianship of the constitution may be made not only by constitutional courts, but other formal as well as informal actors, such as parliaments and even the people themselves, through social movements and political parties as well as referenda.

Mortati offers a helpful reflection on the relevance of these liminal concepts. In his view, the material constitution represents a privileged entry point for conceptual analysis. He makes clear that the material constitution has to be at the heart of constitutional analysis because the jurist's investigation into the material basis of the legal system is not just a sociological one, but a genuinely juridical analysis of those elements of the social world that the legislator has to bring to light and the legal system has to protect in order for a community to be *that* community. According to Mortati, the epistemic realm of the material constitution has clear boundaries:

> [t]he jurist does not do sociology, because she does not look out for the factors that determined the rise of forces and ideologies on which the state is based; nor does she express any opinion about them. By tracing the features that are necessary for conducts and social relations to acquire legal significance, she delineates the facts that emerge out of these very relations as they unfold within a given order, ones that are to be considered parts of its real constitution.[87]

This recognition of the material breadth of constitutional studies has conspicuous consequences. Studying the state of exception or the doctrine of counter-limits (as well as other liminal figures of constitutional law such as the constituent power) through the prism of the material constitution enriches constitutional studies by revealing the material basis of the relation between law, politics and society. The concept of the material constitution captures the internal relation between constitutional order and society without eliding its conflictual nature. It is through this dynamic that constitutional change occurs. If constitutional theory is to avoid the risk of becoming irrelevant in its abstractions, it will have to grapple with it. All the more so as we enter a period when formal constitutionalism is beginning to look divorced from constitutional reality, and constitutional order is, once again, threatened by radical change.

[87] C. Mortati, *Una e indivisibile* (Giuffré, 2007) § 18.