

# The Tradition of the Material Constitution in Western Marxism

*Marco Goldoni and Michael A. Wilkinson*

## 1.1 INTRODUCTION

In this chapter, we provide an overview of Marxist contributions to the concept of the material constitution. Marx was the first philosopher to place the political economy of modern production at the core of his analysis of the social order. Although he did not formally articulate the idea of the material constitution, his thought remains indispensable to a materialist constitutional theory. This chapter covers several key episodes of Marxist contribution to the material constitution following multiple waves of materialist thought since Marx. But it cannot be anything close to exhaustive and will focus on the tradition of Western Marxism.

The chapter traces the historical arc of Marxist influence, beginning with its origins in the work of Marx and Lassalle (Section 1.2), continuing to a peak in the revolutionary era of Lenin and Luxemburg, followed by a swift turn to reformism in the interwar period (Section 1.3). It then examines an important exception to this decline in the work of Gramsci and his concept of hegemony (Section 1.4). After the Second World War, ‘post-Marxist’ critical theory detaches itself from political practice and working-class struggle, and leaves aside material analysis, particularly under the auspices of the Frankfurt school (Section 1.5). The chapter then examines two exceptions to the recent marginalisation of the materialist canon in the work of Balibar (Section 1.6) and Negri (Section 1.7). We conclude by arguing that this diminution of influence is regrettable as there remains much to learn from the Marxist tradition for understanding the material constitution of the twenty-first century.

## 1.2 ORIGINS OF THE MATERIAL CONSTITUTION: MARX AND LASSALLE

In the history of constitutional and political ideas, there is no common agreement on the first formulation of the material constitution, which might be said to date as far back as Aristotle’s *Politeia*. But it is undisputable that the origins of a modern materialist understanding of political society can be traced to the work of Karl Marx. To avoid any misunderstanding, Marx did not directly use the term ‘material constitution’. And Marx’s discussion of constitutional questions is often marginal or a pretext to address other issues, such as social and political emancipation. More generally, Marx’s approach to constitutions is epitomised by his famous comment on Hegel’s doctrine of the State (in what was his first lengthy work, although published only posthumously) that constitutions are riddled by contradictions and the only way to solve those

is by resorting to a purely democratic form of government.<sup>1</sup> Only by redefining popular power in terms of constitutive power (a permanent constituent activity) is it possible to avoid the constitutional fetishism of liberal thought, that elevates the constitution above the people as an external constraint on their power.<sup>2</sup>

It is in fact, for Marx, the specialisation of the political constitution that sets up the main contradiction afflicting modern constitutionalism.<sup>3</sup> This is at the centre of *On The Jewish Question*, where the displacement of social emancipation by the political constitution and the rights of man plays a pivotal role in his critique of the limits of modern liberalism and republicanism.<sup>4</sup>

Although Marx's early writings contain only an embryonic vision of the material constitution, clearer outlines can be found in a number of later works on the critique of political economy. In these more mature works, Marx presents two crucial insights. First is the materialist understanding of capitalism, reflected in the core idea that capital is a social relation which shapes productive activities by organising the forces and relations of production. A crucial text is the *Preface to the Critique of Political Economy*, where Marx famously notes that 'the mode of production of material life conditions the general process of social, political and intellectual life. It is not the consciousness of men that determines their existence, but their social existence that determines their consciousness'.<sup>5</sup> Accordingly, production is a fundamental social activity through which labour (as the essence of the human being and the process through which man transforms nature) comes to be organised and transformed into a commodity and it is the organisation of the mode of production that drives historical development. Law is portrayed as a result of such development, as if it were a mere reflection of the underlying dynamics of the productive process.

According to this classical Marxist view, private property and other legal institutions (e.g., the modern family) are thus seen as reflexes determined by underlying structures of production. The *German Ideology* may be read as representative, with Marx directly attacking a certain way of understanding the law as the product of an act of pure will, which he denounces as 'the legal illusion', and which raises suspicion of any purely positivist conception of the constitutional order. In a nutshell, this background reveals the material constitution as a structure embedded in the modern division of labour typical of capitalist relations. In this economy, the written constitution can play one of only two roles: either it consolidates the underlying capitalist relations as instruments for harnessing wage labour to the command of capital or it serves an ideological function by providing a veneer of legitimacy to an otherwise exploitative structure. Be that as it may, the fundamental lesson is the following: society forms around productive structures whose point is to organise the relation between man and nature.

This last observation allows us to introduce the second fundamental insight offered by Marx. Once the connection between social reality and the formal constitution is questioned, a methodological issue arises. As Marx is concerned with the scientific status of his analysis, he

<sup>1</sup> If one had to point to a 'constitutional model' which Marx looked to with favour, it would probably be the short-lived experience of the Paris Commune, as eulogised in *Civil War in France*. On this point, see, from the perspective of constitutional law, N. Sultany, 'Marx and Critical Constitutional Theory', in P. O'Connell and U. Özsü (eds.), *Research Handbook on Marxism and Law* (Edward Elgar, 2021), 235–39.

<sup>2</sup> S. Kouvelakis, *Philosophy and Revolution* (Verso, 2018), 297.

<sup>3</sup> For an exploration of these contradictions, see R. Hunter, 'Marx's Critique and the Constitution of the Capitalist State', in P. O'Connell and U. Özsü (eds.), *Research Handbook on Marxism and Law* (Edward Elgar, 2021), 190–217.

<sup>4</sup> A similar issue affects Hegel's separation between political and civil society, as remarked in K. Marx, 'Critique of Hegel's Philosophy of Right', in *Early Writings* (Penguin, 1991), 72–74.

<sup>5</sup> K. Marx, *Capital*, vol. 1 (Penguin, 1991), 426.

believes it is necessary to present a methodology that allows the observer to grasp the structural components of reality without being distracted by the sparkling lights of ideology or the deceptive objectivity of the legal form. Again, the constitutional observer can benefit: the reality of the constitutional order is not exhausted by the legal form; it should be sought first and foremost in the political economy of modern capitalism, coupled with a secondary interest in constitutional appearances.

In the third volume of *Capital*, this methodology is summarised: ‘But all science would be superfluous if the outward appearance and the essence of things directly coincided’.<sup>6</sup> This statement sums up in an elegant way both how Marx addresses the relation between the material and the phenomenal (matter and appearance) and how he tries to overcome Hegel’s idealist approach to the historical development of the constitution. The distinction between reality and appearance is a precondition for having proper science, constitutional science included. This critique highlights Hegel’s mystification of the equivalence between being and thought, the real and the rational, which entails a double inversion. At one level, being is reduced to thought and so what is concrete is denied autonomous reality. At another level, reason becomes an absolute and self-sufficient reality.<sup>7</sup> Hegel’s ‘mystical’ approach to reality fundamentally denies its material existence or makes it invisible. Marx’s approach invites a reversal of the order of the constitutive factors of reality, paving the way for a materialist understanding of the constitution.

The second major mystification concerns Hegel’s idealised concept of the State. This is important because the State provides the form of political unity and annexes the functions of creating legal entitlements and effective protection. While, according to Hegel, the State is an achievement as much as it is a synthesis of ethics (*Sittlichkeit*) and morality beyond civil society, that is, a rational expression of the Spirit, Marx (whose conception of the State remained notoriously underdeveloped) takes it to be a complex field whose formation and growth are intimately linked to the development of the capitalist economy. Although later described as the political agent of the bourgeoisie, Marx’s concept of the State hints at its constitutive role in both allowing capitalism to flourish and in serving as an internal limit to certain forms of accumulation.<sup>8</sup> At this stage, one could track the first sketch of the material constitution in the condensation of capitalist relations within the political unity of the State form. The State and its political regimes are described as concrete forms whose functions are driven by capitalist development and whose status can be defined, at most, as relatively autonomous.<sup>9</sup>

With these intuitions, we can begin to discern a constellation of ordering factors that hint at a rudimentary notion of the material constitution: a set of forces and relations of production organised around a division of labour (understood as wage labour)<sup>10</sup> and the conditions for class struggle in the development of the constitutional order, tracking the conflict between capital and labour. Two underdeveloped propositions can be offered: the mode of production defines basic aspects of societal organisation and political agency exists not in the political system, but in the class struggle itself.

<sup>6</sup> K. Marx, *Capital*, vol. 3 (Penguin, 1991), 897.

<sup>7</sup> Commenting on §279 of the *Philosophy of Right*, Marx notes: ‘Hegel makes the predicates, the objects, autonomous, but he does this by separating them from their real autonomy, viz, their subject. The real subject subsequently appears as a result whereas the correct approach would be to start with the real subject and then consider its objectification.’ Marx, ‘Critique of Hegel’s Philosophy of Right’, 78.

<sup>8</sup> For a classic analysis, see B. Jessop, *The State* (Polity, 2015).

<sup>9</sup> N. Poulantzas, *State, Power, Socialism* (Verso, 2013), 82ff; cf. C. Tomlins, ‘How Autonomous Is Law?’ (2007) 3 *Annual Review of Law and Social Science* 45.

<sup>10</sup> Marx’s major focus on wage labour is a constant element of critique from feminist materialism: see, e.g., S. Federici, *Caliban and the Witch* (Penguin, 2021); C. Delphy, ‘A Materialist Feminism Is Possible’ (1980) 4 *Feminist Review* 79.

Marx's intimations on the material constitution can thus be developed in two directions. One is toward a strict economic structuralism, in which the economy determines the laws of constitutional development. In the twentieth century, a version of structuralism was expounded in the most sophisticated and systematic way by Louis Althusser.<sup>11</sup> Objective conditions of capitalist development theoretically determine the structure of the material constitution (the 'social formation') in its totality, even if only 'in the last instance', and provide the conditions for overcoming the same capitalist constitution. A different direction for Marx's materialist understanding of the social order is taken by insisting on a genuine political element in class struggle and on the potential strategic role played by political, institutional and constitutional means.<sup>12</sup> In this direction, the notion of constituent power as revolutionary activity is crucial.

In both versions, social relations are shaped by the struggle between capital and labour. In both versions, the material constitution qualifies as the 'real constitution', meaning either as the basic structure of societal organisation or as the fundamental conflict around which political society develops. The constitutional order is more than a system of rules; it is moulded in a fundamental way by the organisation of relations and modes of production. The particular concrete organisation of the terms of the capitalist relation results in the various material constitutions of modern capitalist States. However, the juridical status of the material constitution remains ambiguous and the added value of this notion for constitutional analysis is unclear.

To pursue this, we can turn to another nineteenth century socialist figure, Ferdinand Lassalle, who did not fully share Marx's approach to capitalism. In two famous and seminal conferences given in 1862 (five years before the publication of the first volume of *Das Kapital*), Lassalle introduced a distinction between the 'real constitution' – basically a synonym for the essentials of societal organisation – and the written constitution (sometimes pejoratively defined as a 'piece of paper'). Lassalle postulated that the former would completely determine the latter.<sup>13</sup> More specifically, Lassalle implies an equivalence between the constitutional text and norms but denies that they are part of social reality. To the question 'what is the nature of the constitution?', Lassalle replied with the following definition: 'a constitution is the fundamental law proclaimed in a country which disciplines the organization of public rights in that nation'.<sup>14</sup> This is because, fundamentally, Lassalle thought that 'constitutional questions are not primordially legal questions, but a matter of relations of force'. By stating that the constitution is the fundamental law of the country, Lassalle assumed that it has higher value than ordinary law. The basis of the legal order has to be found in the material organisation of society, that is, 'always and exclusively in the real effective relations among social forces in a given society'. What remains unclear is whether the real constitution, that is, the organisation of the dominant forces within a society, is also a juridical constitution or only a deeply entrenched state of affairs.

Lassalle adopts an imperativist conception of law: legal norms are enforceable commands. This conception of the law makes the relation between the real constitution and the written constitution ambiguous. It is not clear how the written constitution becomes only a cover or a

<sup>11</sup> L. Althusser, É. Balibar, R. Establet, P. Macherey and J. Rancière, *Reading Capital* (Verso, 2016).

<sup>12</sup> See, further, E. Meiksins Wood, *Democracy against Capitalism: Renewing Historical Materialism* (Cambridge University Press, 1995).

<sup>13</sup> For a similar type of constitutional analysis, see Engels' comments on the British Constitution: The Position of England. The British Constitution, in K. Marx and F. Engels, *Articles on Britain* (Progress Publishers, 1975), 32–58.

<sup>14</sup> F. Lassalle, 'On the Essence of Constitutions' (1942) 3 *Fourth International* 25 (all the quotes are available at: [www.marxists.org/history/etol/newspaper/fi/volo3/no01/lassalle.htm](http://www.marxists.org/history/etol/newspaper/fi/volo3/no01/lassalle.htm), last accessed 19 July 2022).

patina for the social organisation of economic power. In fact, it seems that the real constitution becomes law only when codified in written form and with the introduction of explicit sanctions: 'these actual relations of force are put down on paper, are given written form, and after they have been thus put down, they are no longer simply actual relations of force but have now become *laws*, judicial institutions, and whoever opposes them is punished' (original emphasis). Under this description, the formal constitution represents the juridification of the 'real' relations of power or, in the most trivial sense, the registration or codification of the real constitution.

Lassalle is adamant in stating that the formal constitution is stable and lasting 'only when it corresponds [. . .] to the real constitution, that is, to the real relations among social forces'. When this is not the case, what one is observing is just a sham constitution. When there is a gap between the material and the written constitution, then the latter is simply the ideological mask covering the underlying relationships of power or, at best, providing a veneer of legitimacy. In other words, Lassalle maintains that the social order of production is already shaped pre-politically and pre-constitutionally. At most, the formal constitution operates as part of the justificatory ideological apparatus of the dominant social forces.

The limit of such a rigid materialism is that it reduces the legal order to an effect of other social processes, that is, the legal order remains in an external relation to societal organisation. Relations of production are put at the centre of the analysis, but how those relations came to take up those particular *modes* and *forms* of production is left unaddressed. Representing the relation between political economy and the formal constitution in this way prevents a fuller understanding of the normative underpinning of the hegemony of dominant forces.

This reductionist materialism suggests, at the epistemic level, that there is an apparent reality and a deeper one, not immediately visible, but structurally essential. The task for the constitutional observer is to avoid the superficial and retrieve the undergirding structural reality, which is what really matters. Marx's and Lassalle's versions of the material constitution identify the latter as essentially located in a dedicated sphere, that of modern political economy with its patterns and motives of social organisation. The value of this intuition should not be underestimated. Social power, as generated by capitalism's determination of economic activity, is conveyed through legal channels with the aim of strengthening the stability of the social order. But from the perspective of constitutional theory, what is problematic about this intuition is the driving distinction between what is structural (or fundamental) and what is epiphenomenal or supra-structural. Although to different degrees, Marx and Lassalle identify in political economy not only the source of the constitutional order, but the genesis of the social bond (based on domination and exploitation). Almost all institutions of the constitutional order are presented as emanations of political economy, or at least compatible with the rising capitalist legal order. Law, religion, science and, politics are supra-structural.

Economic structuralism obscures other fundamental aspects of society such as political and legal institutions, collective symbols, cultural reality and the experience of political action. Even from within materialist philosophy, discontent with a reductionist representation of the status and role of each system in societal formation grows during the twentieth century. In particular, the representation of the status of culture (and its role in shaping constitutional imagination) as an ideological construction is judged to be excessively reductive if explained in economically causal terms. These concerns would be addressed, in the interwar era, by Antonio Gramsci. But first it is necessary to look at a second generation of Marxist thinkers who, in the years around First World War and the Russian revolution, expanded the analysis of the material constitution of capitalism in revolutionary political directions.

### 1.3 THE REVOLUTIONARY GENERATION AND ITS DEMISE: LENIN, LUXEMBOURG AND THE TURN TO SOCIAL DEMOCRATIC REFORMISM

In the Marxist tradition, the fortune of the generation of Marxist scholars after Marx and Lassalle was a unity of theory and practice that Marx and Engels had not been able to enjoy due to their distance from national organisations of the working class. Under the direction of Vladimir Lenin, classical Marxism, until then lacking a clear political theory and strategy, would develop in synergy with the revolutionary actions of the Russian masses, from the first Russian revolution of 1905 through to the overthrow of the regime of Tsarist absolutism in 1917. This epochal meeting of constituent power with Lenin's revolutionary practice showed both the promise and the limits of a classical Marxist approach to the material constitution.

The council experience of the Soviets in the first revolution of 1905 (with antecedents in earlier Russian proletarian movements) had presented the direct self-organisation of the working class in the revolutionary struggle, targeting the Russian imperial regime with a series of industrial, political and military strikes.<sup>15</sup> The events of 1905, transforming a 'dormant Russia into a Russia of revolutionary proletariat and a revolutionary people' were, in Lenin's view, bourgeoisie-democratic in aim but proletarian in method, principally the use of the mass strike.<sup>16</sup> This was essential preparation for the October revolution of 1917. In the previous year in exile in Switzerland, in 'State and Revolution', Lenin had set out his Marxist theory of the state as an organ of class rule and class oppression. The bourgeoisie state needed to be overthrown by a worker's revolution, establishing the transitional 'dictatorship of the proletariat', a worker's state which would then 'wither away' as material conditions were transformed.<sup>17</sup>

Yet the relationship between the self-organising power of the soviets and the ultimate direction of the Bolshevik party that Lenin had founded was ambiguous. Lenin saw the soviets as a necessary and spontaneous product of class struggle and class consciousness and even as an 'embryo' of a future worker's government,<sup>18</sup> but ultimately as insufficient for organising and fighting a revolutionary insurrection in the concrete conditions of Russia in 1918. For that to succeed, new organs of revolutionary struggle against the bourgeoisie would have to arise, since the soviets were in danger of becoming co-opted or outmoded. Lenin's Bolshevik strategy after the assumption of dual power in the first phase of the Russian Revolution in February 1917 was to insist on 'a decisive struggle against the real holders of power',<sup>19</sup> re-establishing the correct relation between the soviets and the revolutionary class through organised leadership. The successful dictatorship of the proletariat required a professional revolutionary outfit to organise class autonomy, and an avant-garde party to ensure the conquest of state power and the success of the proletarian movements. Given the increasingly hostile international context, strong centralised control would be necessary to defend the revolutionary gains of 1917.<sup>20</sup>

<sup>15</sup> Negri identifies in the council tradition simultaneously the directive organs of the revolutionary struggle, the representative of the interests of the working class in the structure of bourgeois power, and the class organised in state power: A. Negri, *Insurgencies* (University of Minnesota Press, 2006), 267.

<sup>16</sup> V. Lenin, 'Lecture on the 1905 Revolution', available at: [www.marxists.org/archive/lenin/works/1917/jan/09.htm](http://www.marxists.org/archive/lenin/works/1917/jan/09.htm), last accessed 19 July 2022.

<sup>17</sup> V. Lenin, *The State and Revolution*, available at: [www.marxists.org/archive/lenin/works/1917/staterev/](http://www.marxists.org/archive/lenin/works/1917/staterev/), last accessed 19 July 2022.

<sup>18</sup> Lenin, describing the Petrograd Soviet of Worker's Deputies, 'first letter from afar', available at: [www.marxists.org/archive/lenin/works/1917/ffafar/index.htm](http://www.marxists.org/archive/lenin/works/1917/ffafar/index.htm), last accessed 19 July 2022.

<sup>19</sup> V. Lenin, 'On Slogans', available at: [www.marxists.org/archive/lenin/works/1917/jul/15.htm](http://www.marxists.org/archive/lenin/works/1917/jul/15.htm), last accessed 19 July 2022.

<sup>20</sup> A. Callinicos, S. Kouvelakis and L. Pradella (eds.), *Routledge Handbook of Marxism and Post-Marxism* (Routledge, 2021), 9.

Over the course of a few years after the events of October 1917, amidst imperial aggression and civil war, Lenin's practical focus changed from a geographic extension of the revolution, particularly in Germany, to the defence of the Soviet Union itself. The soviets, from constituting 'the organs of proletarian dictatorship' would end up as an organ of the state administration, first and foremost with the task of organising social production and increasing productivity.<sup>21</sup> Despite or because of Lenin's equivocation on the role of the soviets, the party would end as the sole bearer of constituent power, displacing the radical mass movements of collective self-organisation.<sup>22</sup>

After the death of Lenin, Marxism–Leninism would be transformed into a state ideology, economic and political power consolidated and concentrated in the centralised bureaucracy of the Communist Party of the Soviet Union under Joseph Stalin. The material constitutional dynamic of the soviets and their collective self-organisation would end, *Leninism* in retrospect 'blocking for half a century any development or renewal of the extraordinary revolutionary experience embodied in Lenin's theoretical work',<sup>23</sup> although it would continue to resonate in the context of national liberation movements against the colonisation of the developing world.<sup>24</sup>

The Russian example was of a revolutionary experience that occurred in conditions of relative backwardness compared with the nineteenth century hubs of imperialist capital expansion in Western Europe, both in terms of objective economic development and subjective working-class consciousness. Lenin's analysis and methods could not be straightforwardly applied in the very different constitutional settings of Central and Western Europe. There, Rosa Luxemburg, attached to the Polish and then German workers' movements, took a related but distinct route, advocating the self-emancipation of the working class under the auspices of the revolutionary councils that had followed those in Tsarist Russia. In the soviets, Luxemburg had seen 'the real embodiment of Marxism among the masses'.<sup>25</sup> This led her to depart from what she perceived as excessive centralism in Leninism, even before its mutation under Stalin. For Luxemburg the elimination of democratic spontaneity was fatal to the ultimate goal of socialism.<sup>26</sup>

Luxemburg also strenuously rejected the social democratic reformism that was coming to dominate parties across Europe, specifically denouncing the German SPD after its support for the War in 1914. Her opposition included a rejection of the constitutive assembly convened after the November revolution in Germany in 1918. There could, in her view, be no negotiated transition to socialism achieved through the compromises between capital and labour that might occur within the framework of the bourgeois state. Instead, it would be necessary to harness the radical, creative energies of the masses through the development of a democratic proletarian class consciousness, based on immediate collective action.

<sup>21</sup> Negri, *Insurgencies*, 290. Negri concludes that 'the compromise of the soviet and the party is a compromise between living labour and a perspective of a new originary accumulation, which should result in the determination of the conditions of communism'.

<sup>22</sup> An alternative to Lenin's and the Bolshevik's centralised conception of the bearing subject of the communist material constitution – the party – was offered by Alexander Bogdanov, an eclectic intellectual and political figure whose philosophy was heavily criticised by Lenin in his *Materialism and Empiriocriticism* (1909). Lenin accused Bogdanov of idealism because of the emphasis put on the importance of an autonomous proletarian culture which – according to Lenin – would imply that reality exists only in the mind of the people. Bogdanov proposed a relational conception of social reality and was strongly opposed to the idea of a political avantgarde. On Bogdanov's theory of physics (strictly related to his conception of the social order) see, most recently, C. Rovelli, *Heligoland* (Allen Lane, 2021), 80–84.

<sup>23</sup> V. Gerratana, cited in Callinicos et al. (eds.), *Handbook of Marxism*, 10.

<sup>24</sup> See Chapter 11, by Nanopoulos.

<sup>25</sup> Negri, *Insurgencies*, 280.

<sup>26</sup> See P. Hudis, 'Rosa Luxemburg', in A. Callinicos, S. Kouvelakis and L. Pradella (eds.), *Routledge Handbook of Marxism and Post-Marxism* (Routledge, 2021), 75–85.

In Luxemburg's materialism, social reform from the top-down was not, and could not be, up to the task of creating a democratic socialist society, not least due to the violence with which the capitalist class would defend its material position. What was required was social and political constitutional change from the bottom-up, through spontaneous revolutionary activity and mass strikes. This task would be performed by worker's councils exercising radical constituent power. Radical democratic socialism would advance by adding new autonomous institutions in a transitional constitutional structure, which would then compete for authority with the institutions of liberal bourgeoisie rule.

Interpreting Luxemburg through a constitutional theory lens and reconnecting it with Machiavelli's early modern republicanism, Camila Vergara has recently argued that Luxemburg's work offers a plebeian materialist strand of thought, which 'embraces conflict as productive of liberty, and sees the institutionalisation of popular power as a necessary condition for emancipation'.<sup>27</sup> Vergara even renews the links between Luxemburg and Hannah Arendt, who, inspired by Luxemburg, had also seen the council systems to represent an instantiation of political freedom as action, a political structure neglected (in Arendt's view) by Marxism in its obsession with the 'social question'.<sup>28</sup>

As a matter of historical record, however, Luxemburg's hopes for a spontaneous democratic socialism would be destroyed, the Spartacist uprising ruthlessly crushed and Luxemburg and her co-founder Karl Liebknecht murdered by the Freikorps, under the direction of the social democratic government led by Friedrich Ebert. The worker's council system that promised much in the early interwar conjuncture was rendered ineffective by the end of the 1920s and the German social democratic party and the trade unions had turned into centralised bureaucratic structures pursuing economistic strategies in attempts to de-politicise conflicts between labour and capital.<sup>29</sup> Right across Europe, the prospects for revolutionary socialism or a Bolshevik style-takeover were becoming limited or non-existent in the radically different circumstances faced by the left in comparison with Russia. The prospect of a radical democratic exercise of constituent power to overturn the bourgeoisie order of the 'long nineteenth century' was receding.

The First World War had proven fateful for any international unity in the cause of social democracy, with the insurgent classes themselves divided due to the scissions created by the war. '1914' had parted the ranks of Marxist theory in Europe 'as radically as it split the working-class movement itself, rapidly destroying the Second International (of socialist and labour parties).<sup>30</sup> After the end of the First World War, socialist uprisings would either be defeated, as in Germany and Italy, or assume reformist postures, seen off by the strength of the capitalist state in Western and Central Europe and the willingness of liberals and social democrats to turn to authoritarian means to frustrate material change.

Belief in the gradual reform of the state on the basis of the constitutional compromise and an 'equilibrium of class strengths' would become a dominant position, represented by Eduard Bernstein's 'evolutionary path to socialism' as well as the work of Austro-Marxists Karl Renner and Otto Bauer.<sup>31</sup> Bernstein in particular had a 'decisive influence' on the SPD.<sup>32</sup> Some in the

<sup>27</sup> C. Vergara, *Systemic Corruption* (Princeton University Press, 2020), 169.

<sup>28</sup> *Ibid.*, ch. 7.

<sup>29</sup> R. Dukes, *The Labour Constitution* (Oxford University Press, 2014).

<sup>30</sup> P. Anderson, *Considerations on Western Marxism* (Verso, 1979), 13.

<sup>31</sup> See, e.g., O. Bauer, 'The Equilibrium of Class Strengths', in M. Blum and W. Smaldone (eds.), *Austro-Marxism: The Ideology of Unity: Austro-Marxist Theory and Strategy [1924]* (Brill, 2015), vol. I., 323–33.

<sup>32</sup> See P. Gay, *The Dilemma of Democratic Socialism: Eduard Bernstein's Challenge to Marx* [1952], 2nd ed. (Collier Books, 1970), 252.



German socialist camp would commit to the promise of economic democracy and the role of workers councils, which was given constitutional recognition in the Weimar Republic.<sup>33</sup> But it was a revisionist and reformist tradition, assuming socialism to be the 'legitimate heir' to the liberal order, that socialist state theorists such as Hermann Heller continued in the German public law academy.<sup>34</sup>

The German social democratic position of constitutional compromise proved to be politically disastrous, as economic democracy was marginalised and even the parliamentary route to socialism was abandoned in the strategy of toleration of authoritarian liberalism for fear of the greater evils of National Socialism.<sup>35</sup> In an intriguing compare and contrast of Heller and the British socialist academic and activist Harold Laski, Franz Neumann insisted that Heller (to his detriment) had rejected the Marxist theory of the state; he rejected the position that the state was, in an important sense, a 'class state' or, put differently, a capitalist state.<sup>36</sup> As a result, Heller failed to transcend the liberal view, which saw the state as standing above or apart from the interests of civil society and the social relations pertaining to the economy. Heller's aim was to construct (and reconstruct) the state as precisely such a unity in contradistinction to the conflict that characterised civil society, as a structure independent of the class struggle. Heller saw the difficulties of maintaining this unity in a society riddled by social inequality but retained faith in a state that was in principle neutral and autonomous. Like Hegel before him, Heller saw inequality and class conflict as merely an irritant rather than as constitutive of the modern capitalist state and one that could be managed by a sufficiently enlightened ruling class. Neumann adds, dismissively, that 'in Heller's book one can read on every page the German idealistic philosophy which constitutes its origins'.<sup>37</sup>

Neumann argued that Heller in effect worked backwards from his rejection of the Marxist utopia of the withering away of the state. Since, in Heller's view, the Marxist theory erroneously supposes the possibility (even inevitability) of the classless society-to-come, it must also be in error to suppose the current political society to be essentially defined by class forces, and the state to be determined by class rule. Neumann refutes Heller's 'radical anti-Marxist conclusions' in the obvious way: 'even if one is convinced that a classless society is an unrealisable objective, this does not contradict the Marxist analysis of the class nature of the actual state'.<sup>38</sup> Marxism without utopia might lead to a deeply pessimistic position, but not necessarily to a false one.

#### 1.4 KEEPING THE FLAME ALIVE: GRAMSCI AND THE CONCEPT OF HEGEMONY

Even within the confines of 'Western Marxism', interwar Marxist theory lost any unity of theory and practice that it had in the era of the birth of organised socialist parties after Lassalle. In conjunction with the isolation of the USSR and its turn under Stalin to the active suppression of revolutionary thought and practice by a harsh bureaucratic apparatus, the fertile seeds of Marxist

<sup>33</sup> Dukes, *Labour Constitution*, 40.

<sup>34</sup> The SPD grew out of the Socialist Worker's Party of Germany, established when Lassalle, Bebel, Liebknecht and others came together at Gotha in 1875, but soon banned under Bismarck's anti-socialist laws until 1890 (and later splitting with the Independent Socialists in 1917). On Heller's relation with the tradition of Lassalle, see H. Heller, 'The Nature and Structure of the State' (1996) 18 *Cardozo Law Review* 1139 (translated by David Dyzenhaus).

<sup>35</sup> M. Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press, 2021).

<sup>36</sup> F. Neumann, 'On the Marxist Theory of the State', in K. Tribe (ed.), *Social Democracy and the Rule of Law* (Allen & Unwin, 1987), ch. 4.

<sup>37</sup> *Ibid.*, 76.

<sup>38</sup> *Ibid.*

praxis were scattered or buried. The era of the classical tradition of Marx and Engels, Lenin and Luxembourg, had come to an end, and with it the exclusively Marxist cast of the material constitution. It would be for new political and social forces to cultivate the material constitution, including conservative and anti-Marxist forces.<sup>39</sup>

The interwar period signalled the beginning of a transformative period for the material constitution and the gradual abandonment of Marxian materialism as its philosophical point of departure. There were, however, exceptions, and one stands out for the scope and originality of its contribution, the work of Antonio Gramsci. Once again, it should be highlighted that Gramsci offered no straightforward formulation of the material constitution. Yet, Gramsci's work contains an indispensable toolkit, which extends beyond the productive dimension of social organisation. In fact, for obvious contextual reasons, Gramsci – while writing in prison – was observing a set of problems very similar to the legal institutionalists of the interwar era.<sup>40</sup> But in contrast, Gramsci would firmly ground his interpretation in a materialist base and would not be attracted by notions of the autonomy of the political.

Gramsci considered economic processes a necessary starting point but not sufficient for understanding the formation of society and put more emphasis (compared to previous Marxists) on the importance of political organisation and especially culture, in its political and popular dimensions. Although he did not leave behind any systematic writing on legal orders, he considered law as more than a mere epiphenomenon of the productive structure. And his idea of a struggle for hegemony as a necessary staple of the material constitution makes it an essential reference point.<sup>41</sup>

A starting point for understanding Gramsci's contribution to the theory of the material constitution is his re-visitation of the relation between State and civil society which is driven by the recognition of the rise of the integral State (*lo Stato integrale*). As such, the integral State provides a more nuanced definition of political unity (and the role of the political party) than advanced by Lenin. The integral State that Gramsci envisages is not the outcome of the suppression of diversity, but the articulation and homogenisation of differences in a manner that is conducive to a specific capitalist form of the productive process. In other words, the integral State is for Gramsci the form in which contemporary modes of productive organisation achieve and maintain political unity. The interest for a theory of the material constitution is Gramsci's rejection of the idea that the State and its constitutional order are exogenous and simply applied 'over' a structure of production. As we shall see, Gramsci postulates (in a way that speaks directly to the theorists of the material constitution) the socialisation of the political and the legal system.

The formation of the integral State certainly entails repression, but this is far from exhaustive of the State–civil society nexus. To understand what is at stake in the relation between State and civil society it is better to start by tracking the function of differentiation. Societal differentiation and the specification of which class manages which function are fundamental dynamics of civil society, and they already contain seeds of statehood. In this respect, the political order emerges out of civil society, although it always remains embedded in it. But this means that social

<sup>39</sup> In particular, Carl Schmitt.

<sup>40</sup> On this, see the following pages and Chapter 2, by Meierhenrich on Schmitt, Chapter 4, by Wihl on Smend and Chapter 5, by Rubinelli on Mortati.

<sup>41</sup> For a recent reconstruction of Gramsci's ideas about law, see P. Ciochini and S. Khoury, 'Thinking in a Gramscian Way: Reflections on Gramsci and Law', in O'Connell and U. Osuz (eds.), *Research Handbook on Law and Marxism* (Edward Elgar, 2021), 139–55. See also D. Litowitz, 'Gramsci, Hegemony and the Law' (2000) 2 *Brigham Young University Law Review* 515.

differentiation makes it impossible for the political and the legal system to become full expressions of society. Tracking of the formation of the integral State allows Gramsci to identify a space for hegemony, possibly the core concept of Gramsci's philosophy and one of the most important insights offered by his analysis.

The State as political unity is defined as 'political society + civil society, in other words hegemony protected by the armour of coercion'.<sup>42</sup> While Gramsci acknowledges that coercion is still a fundamental component of the modern State, the complexity of modern society means that cultural hegemony has to be generated for the concretisation of political unity. This is possible only if a certain social group musters enough political and cultural strength to be able to integrate societal energies into a political order by acting as a leader: 'A social group can, and indeed must, already exercise "leadership" before winning governmental power (this indeed is one of the principal conditions for the winning of such power); it subsequently becomes dominant when it exercises power, but even if it holds it firmly in its grasp, it must continue to "lead" as well'.<sup>43</sup>

In contrast to Lassalle, Gramsci understands that, in order to forge a material constitution, a leading social group cannot simply resort to oppression and coercion; it also has to inculcate particular values and beliefs. This is a well-rounded integrative strategy: the material constitution is organised not only through force and coercion, but also through intellectual hegemony. Gramsci maintains that it is impossible to eradicate social conflict from the polity; hegemonic forces are thus called to manage it by considering not only their social interests, but those of the wider society. Hence, the material constitution that is shaped by hegemonic forces is always a precarious achievement and needs to be constantly maintained, primarily by persuasion and negotiation among conflicting interests.

Unsurprisingly, the question of political organisation is one of the most pressing concerns for Gramsci. Although the organisation of fragments of civil society can be the outcome of spontaneous initiative, there is always a reminder of distribution of roles and the creation of a leading group that cannot be obtained in a fully 'horizontal' way. It is at this level that Gramsci thematises the importance of a 'new Prince' as a dynamic factor of unification, and the political party is indicated as the subject with the task of coordinating and leading the social groups to maintain political unity. Gramsci did not believe in the purely spontaneous formation of political subjects: an element of verticality is unavoidable in any political and social organisation. For the formation of a material constitution, Gramsci believes that a 'historical bloc' has to be formed (by a political subject),<sup>44</sup> as the first cell which contains the instructions for the development of the social order. But even the historical bloc (the groups whose interests can converge and produce a political alliance) does not aggregate spontaneously around its fundamental interests, as the latter might need to be composed and recomposed in a political formula.<sup>45</sup>

We are now in a position to see that hegemony and the figure of the 'dominant political party' are, according to Gramsci, intrinsic elements of the new material constitution of the twentieth century. Along with institutionalists such as Mortati, the political party is seen as the bearer of

<sup>42</sup> A. Gramsci, *Quaderni dal carcere* (Einaudi, 2014), 263.

<sup>43</sup> A. Gramsci, *Selections from the Prison Notebooks* (International Publishers, 1971), 57–58.

<sup>44</sup> See the still relevant analysis by L. Paggi, *Antonio Gramsci e il moderno principe* (Editori Riuniti, 1970), 125ff.

<sup>45</sup> It should be noted that it is not clear whether the concept of historical bloc is descriptive of the main bearer of the material constitution, or it is a strategic notion. In the latter sense, a historical bloc would be formed in the struggle for achieving hegemony. For this interpretation, see P. Sotiris, 'Gramsci and the Challenges for the Left: The Historical Bloc as a Strategic Concept' (2018) 82 *Science and Society* 94, 95.

the material constitution as it is the only modern entity capable of uniting different social components while keeping them differentiated in the emerging mass society. The political party is the concrete force which takes up the role of Machiavelli's prince, but it has the daunting task of producing order materially from below and symbolically from above. According to Gramsci, mass society has to find within itself its own ordering principle. In order to achieve its integrative functions, the political party ought to become a 'total party' while avoiding ossification in a pernicious bureaucratic centralism where it would have only 'functions of propaganda and police'.<sup>46</sup>

Differentiation and hierarchy remain distinctive but necessary moments in the articulation of the material constitution of mass society. Law is an important aspect of this and its function runs parallel to that of hegemony, addressing a similar problem: how can the masses be persuaded to adopt the values and beliefs of the dominant class? As already noted, the legal order is for Gramsci a human artifice which does not lie outside of social organisation and is ultimately linked to political and social will. The role of law is, thus, ambiguous but functional to the formation and maintenance of the material constitution. The 'juridical question' is for Gramsci one of assimilation of the entire society to its most advanced fraction:

it is a problem of education of the masses, of their 'adaptation' in accordance with the requirements of the goal to be achieved. This is precisely the function of law in the State in society; through 'law' the State renders the ruling group 'homogenous', and tends to create a social conformism which is useful to the ruling group's line of development.<sup>47</sup>

Accordingly, the legal order assumes a double task. It operates at the level of coercion in the sphere of positive law, which is associated with 'order' and 'violence'. But the legal order also operates as a pedagogical tool, nudging 'education' and 'conformism'. Although Gramsci notes that the ethical dimension of the 'legal question' pertains more to civil society than the government,<sup>48</sup> it is undeniable that positive legal norms as approved by State apparatuses perform a formative task as well. It is coherent with this approach that Gramsci, in another passage, talks of the law as a hegemonic instrument for the selection of certain customs and attitudes, and the elimination of others. The main parallel may be with the school system as a producer of homogeneity. Gramsci thus offers an original variation on the material constitution, one which not only indicates the political party as the main actor, but which identifies in the struggle for political and cultural hegemony a crucial factor of constitutional ordering.

### 1.5 POST-WAR EUROPE, POST-MARXISM

The effect of the interwar economic, political and constitutional crises of the 1920s and early 1930s had been a deep demoralisation of the left, particularly in Germany. There had been a tremendous diachronic shift in the interwar era from the high optimism about the prospect of progressive social change in the aftermath of the First World War, with the arrival of universal suffrage, working class consciousness and political parties connected to the social masses, to the

<sup>46</sup> Gramsci, *Quaderni dal carcere*, Notebook 17, vol. III, 1939. Notoriously, Gramsci advocated a form of democratic centralism where the political party maintain an opening toward social energies ('the real movement') by maintaining, as already noted, a dynamic of 'push from below, command from above': Gramsci, *Quaderni dal carcere*, Notebook 13, vol. III, 1634.

<sup>47</sup> Gramsci, *Selections from the Prison Notebooks*, 195.

<sup>48</sup> Gramsci notes that '[t]he general activity of law (which is wider than purely State and governmental activity and also includes the activity involved in directing civil society [...]) serves to understand the ethical problem better': *Selections from the Prison Notebooks*, 195.

terrible darkness of the 1930s, with the failure of parliamentary democracy, growth of violent fascism in the West, and the brutal rule of Stalin in the East.

The generation of Marxist thought that takes root in the interwar conjuncture would be deeply pessimistic. As Perry Anderson notes, all the most significant works of ‘Western Marxism’ in the period between the mid-1920s and 1968 – from Lukacs to Gramsci, Adorno to Sartre – were the product of political failure, of the defeat of working-class struggle or of socialism.<sup>49</sup> With the Stalinisation of the Soviet Union, and the discipline exercised by Communist parties and their dogmatic orthodoxy, the choice for Marxist intellectuals and workers was often either to remain party members and renounce intellectual independence, or leave and risk losing connection with the class struggle. ‘The consequence of this impasse’ Anderson notes, ‘was to be the studied silence of Western Marxism in those areas most central to the classical traditions of historical materialism: scrutiny of the economic laws of motion of capitalism as a mode of production, analysis of the political machinery of the bourgeois state, strategy of the class struggle necessary to overthrow it.’<sup>50</sup> And, we can add, of the material constitution of society and its relationship with formal constitutional norms.

Critical theory after the Second World War would become structurally divorced from political practice and working-class struggle, particularly under the auspices of the Frankfurt school. The post-Marxist turn of the Frankfurt school would generally abandon material constitutional analysis, and particularly the issue of class relations and the political objectives of the state. Neumann himself would turn to the significance of political freedom and a diagnostics of its contemporary loss before his untimely death in 1954. His associate, Ernst Fraenkel would undertake normative work on democratic pluralism on his return from the United States to the Federal Republic of Germany.<sup>51</sup> Along with many of its leading thinkers, the transfer of Frankfurt school theorists to the United States in 1934 had not only wrenched it from European movements of socialism and parties of social democracy but also then installed it in a place with no discernible Marxist tradition, and in fact one which was to become actively hostile to those suspected of sympathising with Marxism in the heat of post-war MacCarthyism. The Frankfurt school brand of post-Marxism turned to philosophy, cultural analyses and increasingly specialised disciplines, often indebted more to Freud than to Marx.<sup>52</sup>

The post-war de-politicisation of the left would also have a profound impact, with leading scholars not only pursuing class collaborationist projects in Germany and urging a pragmatic politics of compromise on the SPD, but also helping to conduct the anti-Soviet international strategy of the United States.<sup>53</sup> In the post-war fate of Marxism and critical theory there were thus deeper continuities with the interwar schisms on the left, particularly in the anti-Communist stance of the social democrats, captured by Hilferding’s claim on the eve of National Socialist takeover that the primary fight of the SPD was against communism.

In a significant inflection of material constitutional thought, a new moralistic direction in social democracy took root, building on Heller’s ethical notion of the *sozial Rechtsstaat*. Fraenkel, for example, urged workers to unite with the bourgeoisie in pursuit of a ‘rational

<sup>49</sup> Anderson, *Considerations*, 42–43.

<sup>50</sup> Ibid.

<sup>51</sup> For a recent reassessment of Fraenkel’s legacy, see W. Scheuermann, ‘Recalling and/or Repressing German Marxism? The case of Ernst Fraenkel’ (2021) 18 *Modern Intellectual History* 1.

<sup>52</sup> For an overview, see A. Honneth, ‘A Social Pathology of Reason: The Intellectual Legacy of Critical Theory’, in F. Rush (ed.), *The Cambridge Companion to Critical Theory* (Cambridge University Press, 2004), 336–61.

<sup>53</sup> U. Greenberg, *The Weimar Century* (Princeton University Press, 2014), 78.

natural law' and to leave behind notions of 'power relations' and 'class interests'.<sup>54</sup> This reflected a broader phenomenon, namely a turn by social democrats to the courts to defend social equality and workers' rights, foreshadowing the 'social rights' discourse that would dominate among later generations of constitutional scholars. Social democratic conceptions of democracy were designed, in line with other elitist scholars and emigres such as Carl Joachim Friedrich, if, by different means, 'to foster consensus about state institutions'.<sup>55</sup>

There was, to be sure, a brief resurgence of the radical left toward the end of the Second World War, buoyed by its key part in the Resistance movements, the prestige acquired by the Soviet Union and its Red Army in its victories over Hitler's armies, and the reuniting of social democracy and Communism in broad coalitions and united fronts in the fight against the violence of fascism and national socialism.<sup>56</sup> This briefly opened up a space for new democratic forms of communism and solidarity to flourish, a 'rare moment of European history – the moment of antifascist unity – whose opportunities compared with 1917–18'.<sup>57</sup> The upshot of this moment would be a brief 'wave of communisation',<sup>58</sup> but the opportunities for radical transformation this created would be generally squandered.

Socialist renewal did have a significant impact on post-war political society, legitimising the pursuit of comprehensive welfare states, reduction of unemployment, and rational planning through the involvement of left forces in constituent assemblies, notably in post-war Italy. But in conjunction with a fairly rapid pivot to cold war anti-communism on the socialist left, communist parties themselves would soon disavow any revolutionary constituent ambitions. With the dismantling of Resistance groups, the potential of dual power exercised by Resistance committees was abandoned, backing governments of broad national unity. The Italian Communist Party (PCI) soon settled into the 'centre ground of postwar Italian culture',<sup>59</sup> its prospects anyway dimmed by the US threat to withdraw Marshall aid if it were successfully elected to government. Togliatti's turn had already moved the PCI to the centre, disbanding and disarming the local Resistance, and enabling the path to the historic compromise of the 1970s.

Marxism's classical focus on class conflict would also be displaced from political and constitutional enquiry. In practice, the political element of class struggle declined with the quietening of the working class of Europe, even though they were the 'incontrovertible social victims of the war'.<sup>60</sup> The language of class struggle was thus disappearing not only from intellectual discourse but from party politics, subdued by the security of the bureaucratic 'iron cage' and a paternalistic elite-led system. The founding period of post-war resettlement was characterised by a growing de-politicisation of state–society relations: a combination of class compromise, the de-radicalisation of the trade union movement and the rise of the national corporatist state.

Both the unions and the social democrats across Europe (as well eventually as the communist parties) would attach their flag to the mast of European integration and its modernising agenda. In some ways, this too would be a continuation of interwar strategies of economism, de-

<sup>54</sup> *Ibid.*, 83.

<sup>55</sup> *Ibid.*, 88.

<sup>56</sup> See G. Eley, *Forging Democracy* (Oxford University Press, 2002), 287–91.

<sup>57</sup> *Ibid.*, 288.

<sup>58</sup> Particularly in Eastern and Central Europe, with Communist parties becoming leading national forces in Yugoslavia, Albania, Greece, and Czechoslovakia, major electoral players in France and Italy and even making significant gains in the Benelux countries and Scandinavia, along with a renewal of socialist parties in France, Belgium and the Netherlands.

<sup>59</sup> Eley, *Forging Democracy*, 293.

<sup>60</sup> M. Conway, 'Democracy in Postwar Europe: The Triumph of a Political Model' (2002) 32 *European History Quarterly* 76.

politicisation and consensus-seeking as well as strongly supported in the symbiosis between European and US intellectuals. The turn to modernisation and liberalisation which reflected ‘one of the major thrusts of American policy’ would be strongly supported by the French socialist party (SFIO) as well as the German SPD, whose programme, announced at Bad Godesberg in 1959, offered a renunciation of Marxist class struggle, an embrace of Christian ethics and acceptance of free market principles and the EEC. It reflected a more general revisionism of social democratic parties across Europe, with the discarding of working-class allegiance, and dilution of any commitment to revolutionary anti-capitalism. The factors considered as central to the moderation of the post-war settlement – the circumstances of global economic growth, and relative equalising of conditions between capital and labour – were conducive to a deradicalised left.

Reinforcing the tendency of conservatism to reinvent itself as a hardened form of Cold War liberalism was the tendency of critical theorists to turn away from material issues and into discourse theory and identity politics. The constitutional fetishism that begins in the Bonn Republic becomes more generally hegemonic in Europe, particularly through the process of European integration. Constitutional patriotism and ideological Europeanism become substitutes for any projects of social emancipation. By 1989, the standard bearer of what is left of the Frankfurt school of critical theory has declared the era of revolution over, the only avenue left to tame capitalism from within, Jürgen Habermas leading the turn away from material analysis in his twin *magnus opi*, *Theory of Communicative Action* and *Between Facts and Norms*. By that stage, the socialist and communist parties of Europe had embraced their own de-radicalisation and Europeanisation. The revolutionary era was decisively over. But the gap between political elites and the populations, aggravated through constitutionalist projects of an international and supranational type, were about to gain more traction even as history had been declared at an end.

### 1.6 THE FRENCH EXCEPTION?

One strand of contemporary heirs of the materialist tradition in France were theorists of *le politique* and of disagreement and dissensus such as Jacques Rancière. This initially appeared distant from the discourse ethics and rational consensus of Habermasian philosophy. But much of Rancière’s own analysis remained at the level of a counter-discourse, uncomfortable with the aesthetics of modern liberal consensus-politics but lacking the resources to tackle its materiality – its political economy, social relations and political teleology. In this respect it shared the tone and temperament, as well as normative and methodological assumptions of Frankfurt school post-Marxism.<sup>61</sup> Although Rancière identified politics as a process with a reflexive quality and not as an outcome,<sup>62</sup> his celebration of the theatrical quality of political action risked emphasising in a rather sterile way the performative nature of dissensus, putting a premium over its symbolic and linguistic achievements at the expense of the material context of its staging.

From a materialist perspective, the problem affecting this kind of post-Marxist analysis is typical of a ‘political jurisprudence’, which, as Loughlin argues (in the course of defending it), emphasises symbolic over material power, and prioritises abstract over concrete reasoning. In that respect, its contemporary theorists of note are philosophers such as Claude Lefort, Marcel

<sup>61</sup> S. Kouvelakis, ‘The Crisis of Marxism and the Post-Marxist Moment’, in A. Callinicos, S. Kouvelakis and L. Pradella (eds.), *Routledge Handbook of Marxism and Post-Marxism* (Routledge, 2021), 337–50.

<sup>62</sup> J. Rancière, *Aux bords du politique* (Folio, 2004), ch. 1.

Gauchet and Pierre Rosanvallon.<sup>63</sup> Lefort insists on the ‘empty place of power’ as the symbolic feature of the democratic state, which, from a materialist perspective, is sheer illusion as an analysis of the modern state or mere utopianism if a projection of a future shorn of revolutionary intent. In this French revival of political jurisprudence, the symbolic order of the state is structured through abstract principles of ‘sovereignty, equality and rights’; these principles of *droit politique* ‘fulfil the role of maintaining unity while containing social tensions’.<sup>64</sup> This not only leaves behind political economy and class struggle; it can also appear apologetic of liberal expert governance as a legitimate constraint on parliamentary majoritarianism.<sup>65</sup> It is thus no coincidence, for example, that these theorists of *le politique* pay little regard to the material constraints on political sovereignty in the concrete context of the evolving European Union.

Etienne Balibar, a student of French Marxist philosopher Louis Althusser, is something of an exception, maintaining a closer connection with materialist philosophy and the classical Marxist tradition. Balibar neatly captured the necessary relation *between* the political and the material realms, 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’.<sup>66</sup> 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’.<sup>67</sup> Material conditions and relations are thus both constituted by politics and constitutive of politics, a dynamic that is intrinsic to constitutional ordering.

Balibar’s concept of ‘equaliberty’ presents the autonomy of the political as a *material struggle*, not merely – or not even primarily for – secularisation, but for equality, set against the pre-modern fusion of political and economic power.<sup>68</sup> This immediately illuminates the path of modern constitutional development in contrast to the theorists of *le politique* who present it as a symbolic rupture from a theological worldview. It enables a foregrounding of the continuous, if uneven, struggle for equality, including over universal suffrage, industrial rights, women’s movements, workers’ movements, and – broadening the horizon – anti-colonial movements.

Close attention to the evolving relationship between politics and the economy as a concrete and dynamic phenomenon also brought Balibar closer than his peers to the material and constitutional implications of European integration. Surveying the Union at the beginning of the new millennium he argued that the ‘impasse’ of sovereignty in Europe referred ‘to the absolute blockage of the question of “the people” understood ... as *demos* or constituent political power’.<sup>69</sup> The absence of ‘the people’ in Europe, he continued, was not only ‘symbolic’; there was an absence of any of ‘real control’ over the constitutional order that was imposed on their behalf. His diagnosis, accordingly, was nothing less than ‘the disappearance of the dialectic of constituent and constituted power ... [which] goes beyond the ‘bureaucratisation’ and

<sup>63</sup> M. Loughlin, *Political Jurisprudence* (Oxford University Press, 2017) 104–7.

<sup>64</sup> *Ibid.*, 106.

<sup>65</sup> As, for example, in Pierre Rosanvallon’s suggestion that the supposed impartiality of independent technocratic institutions could be equated with new conceptions of democratic legitimacy, see Pierre Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* (Princeton University Press, 2011).

<sup>66</sup> É. Balibar, *Politics and the Other Scene* (Verso, 2002), 10–11.

<sup>67</sup> From Marx’s, *The Eighteenth Brumaire of Louis Napoleon*, available at: [www.marxists.org/archive/marx/works/1852/18th-brumaire/](http://www.marxists.org/archive/marx/works/1852/18th-brumaire/), last accessed 19 July 2022.

<sup>68</sup> É. Balibar, *Equaliberty: Political Essays* (Duke University Press, 2014).

<sup>69</sup> É. Balibar, *We, the People of Europe: Reflections on Transnational Citizenship* (Princeton University Press, 2004), 157.



‘professionalisation’ of politics, and the ‘political apathy of the masses’. It implied, Balibar lamented, ‘the return to a technical, reglementary status of the law’.<sup>70</sup>

It was at this point in time (that is, during the first decade of this century) that Balibar retrieved the notion of the material constitution as an essential device for understanding the political regime of the European Union. Elaborating on some traits of the Marxist conception, he defined the material constitution as the codification of fundamental political practices understood in terms of a substantive (i.e., not formal) organisation of powers (political and economic).<sup>71</sup> The material constitution would serve the purpose of grasping the logic of differentiation within EU law: in the absence of a proper normative and written constitution, Balibar stated that the EU had a material constitution which comprised not only certain EU institutions and national governments, but also provisions whose formal status is not constitutional, such as (his example) the Schengen agreement.<sup>72</sup> If differentiation is consolidated through political practices, then sufficient political unity is obtained to stabilise a machine with certain political objectives.

This diagnosis would be sharpened in the Euro crisis phase. Balibar had by then described the Treaty of Maastricht as having put an end to the long European ‘civil war’ between economic liberalism and social democracy that took place across the twentieth century. It signalled the decisive triumph of economic liberalism and even the complete victory of capitalism in the constitutional ordering of Europe. Reflecting on the (re-) birth of the EU at the Treaty of Maastricht, he noted how extraordinary it was to set its liberal political–economic goals into explicit, detailed and rigid constitutional guarantees, meaning that

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.<sup>73</sup>

As the Euro-crisis progressed, Balibar identified a potential ‘revolution from above’, a transformation of Europe by the leaders of dominant nations ‘and the Brussels and Frankfurt technostucture’ using the language of ‘necessity’.<sup>74</sup> Invented by Bismarck in the nineteenth century, the notion of a revolution from above designated ‘a change to the structure of the *material constitution*’ on the part of the ruling classes, altering the ‘balance of power between society and state, economics and politics’. Balibar speculated that this process was underway with the European Union’s ‘neutralisation’ of parliamentary democracy, and its institutionalisation of budgetary and fiscal controls, all pushed forward ‘in the name of neo-liberal orthodoxy’. Although these changes had been germinating for some time, they were for the first time being demanded as part of a new configuration of political power.<sup>75</sup>

In the new configurations of rule, constraints on democratic self-determination were not predominantly ‘constitutional’ in the orthodox sense of the term but were relayed by global capital markets and credit rating agencies, which, along with banks that were considered ‘too big

<sup>70</sup> Ibid., 169.

<sup>71</sup> See É. Balibar, *Cittadinanza* (Bollati Boringhieri, 2012), 80–81.

<sup>72</sup> É. Balibar, ‘Europe as Borderland’ (2009) 27 *Environment and Planning* 190, 202.

<sup>73</sup> É. Balibar, ‘The Rise and Fall of the European Union: Temporalities and Teleologies’ (2014) 21 *Constellations* 202.

<sup>74</sup> É. Balibar, ‘Europe’s revolution from above’, *The Guardian* (23 November 2011). Available at: [www.theguardian.com/commentisfree/2011/nov/23/europe-revolution-from-above](http://www.theguardian.com/commentisfree/2011/nov/23/europe-revolution-from-above), last accessed 25 September 2020.

<sup>75</sup> Ibid. See, in a different context but in analogous manner, S. Wolin, *Politics and Vision: Continuity and Innovation in Western Political Thought* (Princeton University Press, 2004), 605.

to fail', had become constitutional actors for material purposes. These material constraints would then be formally entrenched at the EU level through the provisions of the Fiscal Compact and the European Stability Mechanism, and reinforced by political actors as well as interpretations of the European Court in its rulings on the programmes of the European Central Bank.<sup>76</sup> Marxian material analysis had returned in line with political constitutional events but the focus of Balibar's analysis remained 'top-down'.

### 1.7 THE AUTONOMIST VIEW: ANTONIO NEGRI

Another notable exception to the decline of the Marxist material constitution is represented by Antonio Negri, especially in his works from the 1970s.<sup>77</sup> Negri openly recognises the intellectual debt to legal institutionalism and especially the constitutional theories of Carl Schmitt and Costantino Mortati, whose notions of the material constitution are embedded in social reality and capable of making sense of the unity of the constitutional order. But Negri's materialist philosophy allows him to circumvent the existentialist (Schmitt) or sociological (Mortati) underpinning of their versions of the material constitution. Negri considers their emphasis on the sovereign or the dominant political force to ultimately betray a circularity that impedes grasping the dynamics of the material constitution.

In a nutshell, the problem with Schmitt and Mortati is their postulation that the material constitution is a fundamental political fact supported by the dominant political force and their simultaneous assumption that the dominant political force is the only one capable of moulding the material constitution. In terms of constitutional science, the risk is not only to fall prey to a form of circular reasoning, but also to a vulgar version of relativism. Whoever manages to impose its will on the fundamental objectives of the polity is the sovereign or the dominant political force. Negri's original contribution lies in the philosophical methodology that allows him to read the development of a capitalist political economy as an ontology of labour. Against a dialectical conception of materialism (still inspired by the looming presence of Hegel), Negri postulates that it is labour (and living labour more specifically) that 'makes' capital as a social relation. In other words, labour is the essential component of the capitalist social relation and capital is parasitical on that relation. Famously, on the basis of this assumption, Negri inaugurated the intellectually fertile workerist approach.<sup>78</sup> Labour is described as an autonomous force and the basis of any political economy. Labour is the substance of productive processes and, for this reason, is constitutive in its relationship with capital. The importance of this move is recognition of the political capacity and agency of labour movements including the potential autonomy of non-wage-based labour.

Against a formalist reading of the constitutional order, Negri recognises that there are two engines driving the development of the constitution: the organisation of the productive process and the conflictual dynamic which lies at the core of the capitalist social relation (i.e., class struggle). Only a Marxist-materialist conception of the material constitution allows us to grasp the constitutional relevance of these intuitions. With an incisive but rather abstract turn of phrase, the material constitution is defined by Negri as 'the level of *political agreement of the*

<sup>76</sup> See Chapter 25, by Agustín Menéndez.

<sup>77</sup> Negri discusses the notion of the material constitution at length in the following publications: A. Negri, *Il lavoro nella costituzione* [1977] (Verona, 2009), 12–16; A. Negri, 'Toward a Critique of the Material Constitution', in *Books for Burning* (Verso, 2005), 180–220.

<sup>78</sup> Cf. S. Wright, *Storming Heaven* (Pluto Press, 2017).

*regime that establishes the tendency toward unity of the constitutional project*'.<sup>79</sup> This captures the most salient aspects of the constitutional order as a necessary component of a capitalist political economy: (1) a tendency toward political unity of the constitutional order; (2) the purposive character of the constitutional order ('project') as it strives toward the realisation of its potential, which is latent in the idea of tendency;<sup>80</sup> (3) the layered composition of class which affects both the capitalist and the working class, and the evolution of the composition in a way which directly affects the formation of the material constitution and (4) the resort to command by capital, which is not only exercised by forcing workers into a state of necessity, but also with the coercion and management exercised by the State. While capital command is driven by the law of value, labour's political activity is inspired by what Negri defines as self-valorisation, that is, the struggle for supplanting the needs and values imposed upon workers by capitalist command with self-determined needs and values.

From an epistemic perspective, Negri's view is productive for understanding the material constitution. It avoids a strict form of economism as it allows for a certain slack between capital's capacity of command and the political autonomy of labour. It makes social classes the subjective bearers of the material constitution without providing a static account of their composition. In this way, the classic ruling relation – the governing and the governed classes – which is at the centre of political jurisprudence, is reframed in terms of commanding and resisting classes. It also identifies class struggle as the driver of the constitution's material development: it is an antagonistic process of valorisation that determines the material constitution, based upon the primacy of production as the key organising moment of social reality. For this reason, Negri adopts an ontological approach not only to the notion of labour, but also to politics. But – crucially – it is an ontology of labour that makes sense of class struggle and of the engine of constitutional development. By postulating that labour is ontologically autonomous and independent from capital, Negri suggests that political autonomy is not an abstract objective to be pursued, but is embedded in the ontological condition of labour.

As insightful and powerful as this is,<sup>81</sup> the risk of an ontological approach is to elide constitutional reality in terms of the objective dimension of power relations. Moreover, it underestimates capital's capacity for political initiative by reducing its activities to processes of real subsumption and technological reorganisation. In more recent iterations of his theory, Negri has pushed his concept of labour further, to the point of covering almost every aspect of society. This expansion tracks a long trajectory which is described as a move from, first, the professional worker to, second, the mass worker and, finally, the socialised worker. With the latter instantiation, a new class composition emerges as a result of the restructuring and decentralisation of production. The new class composition, based on the communication and sociability made

<sup>79</sup> Negri, 'Toward a Critique of the Material Constitution', 187 (original emphasis). More recently, Negri and Hardt will define the material constitution as the 'continuous formation and reformation of the composition of social classes': M. Hardt and A. Negri, *Empire* (Harvard University Press, 2000), v.

<sup>80</sup> Tendency is a technical word in Negri's work; it refers to the trends and potentialities within the development of capital and the working class that might materialise in the near future. The identification of a tendency is important for two reasons: it allows the observer to understand the dynamics of constitutional development and it provides important information for the formulation of organisational, strategic, and tactical activities.

<sup>81</sup> Think of the intimate connection between class composition and the form of political institutions: to each class composition corresponds a political subject and a form of government (e.g., to the mass worker corresponds the Welfare State, the national trade union and the reformist political party).

possible by new technologies, brings about a profound transformation of the material constitution. Accordingly, the key bearing subject of the new material constitution is the multitude.<sup>82</sup>

The notion of the ‘multitude’ fails to convince for two reasons: it pushes the notion of material constitution to a limit where it becomes almost entirely congruent with the notion of a globalised societal organisation (and in this way, it loses analytical purchase); or the composition of the multitude is so broad that it is difficult to identify any inner class dynamics. Although the intuition behind this conception of the contemporary material constitution is powerful (i.e., the idea that the political is not a separate and autonomous sphere, but penetrates all social systems),<sup>83</sup> it is doubtful that this new understanding of the material constitution of the empire (as the political form associated with the rise of the socialised worker) is tenable in light of the increased relevance of processes of differentiation along multiple lines (race, gender, sex, territory, to name a few). The price to be paid for the primacy of ontology over politics is, as a constitutional matter, quite high.

### 1.8 CONCLUSION

Marxist political thought has been the cradle of the material constitution. In this chapter, we have provided an overview of the implicit notion of the material constitution that can be retrieved from Marx’s critique of political economy. We then tracked the development of this approach to the material constitution in the first work that explicitly discusses the material constitution (Lassalle) and in some of the most influential followers of Marx (Lenin and Luxembourg). The limits of a determinist conception of the material constitution have led authors to investigate other ordering factors: this expansion beyond economic determinism was central to the innovative thought of Antonio Gramsci and of other (non-Marxist) political thinkers of the interwar period. Finally, we tracked the marginalisation of the materialist approach after the Second World War but singled out two notable exceptions emerging out of the social movements of the 1960s and 70s (Balibar and Negri). Ultimately, the work of these two authors shows that, by avoiding reductionist shortcomings, the critique of political economy still provides essential and fresh insights into the material constitution. Conversely, Marxist thought itself has much to gain by engaging with constitutional phenomena.

<sup>82</sup> For the most recent formulation, see M. Hardt and A. Negri, *Assembly* (Oxford University Press, 2016). For a reconstruction of Negri’s intellectual trajectory see T. Murphy, *Negri* (Routledge, 2012).

<sup>83</sup> There is some affinity between the last version of Negri’s political thought and societal constitutionalism: see the interesting exchange between Gunther Teubner and Negri in ‘Law, Property, and New Horizons’ (2010) 21 *Finnish Yearbook of International Law* 1.