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Introduction to the Material Study of Global Constitutional Law

This article engages with the debate(s) on global constitutional law and constitutionalism¹ with the aim of showing that some of its insights cannot be ignored, and it is actually fruitful, in terms of constitutional analysis, to take them into account. However, the valuable introjection of these intuitions depends on the adoption of a material angle of analysis. Hence, the main task of this article is to sketch out what means to address global constitutional law from this methodological point of view.² I will first introduce the origins of the idea of the material study of the constitutional order by focussing on the notion of the material constitution in the Marxist and institutionalist canons; in the second section I will highlight some limits of these approaches, in particular the absence of a proper reflection on its conception of the political economy. In the third and fourth sections, I will use these lenses in order to address some aspects of the phenomenon of global constitutional law with a view to show how this has mostly affected state's constitutional law. Finally, I will highlight one of the main contributions of global constitutional law, that is, the confirmation of the relational (and not absolute) nature of sovereignty. This implies that while the debate on global constitutional law tends to be pitched often at the level of purely normative or functional understandings, in the opposite field (almost exclusively State-centred) an inaccurate or inflated conception of sovereignty provides the intellectual background of a position that is prevented from recognising the recent remarkable transformations of the state. A material approach to global constitutional law, while maintaining the centrality of the state as the main unit of analysis, can circumvent the difficulty of an absolutist conception of sovereignty.

I. The Material Study of the Constitutional Order

The starting point for a material study of the constitutional order is the notion of the 'constitution in the material sense'. This notion has been taken up by constitutional and political theorists at important and specific junctures of historical constitutional developments. First, the notion has been used, with peculiar materialist and determinist traits by Marxist scholars. The idea is that in order to explain and understand the constitutional order it is necessary to look into the formation and reformation of societal order. From a Marxist perspective, this means that the organisation and regulation of modes and relations of production is critical – as it works as the lynchpin of societal reproduction. Yet, this first wave of studies of the constitutional order inspired by Marxist

¹ For the purposes of this article I will take into account all those strands that have taken up the challenge of the globalization of constitutional norms and principles, from global constitutionalism to the constitutionalisation of international law, despite, it goes without saying, crucial differences among these positions. Forms of supranational law (such as the EU or the Council of Europe) are also taken into consideration. For an overview of the debate see C. Schwöbel, 'Situating the Debate on Global Constitutionalism' (2010) 8 *International Journal of Constitutional Law* 611-635.

² For an accurate analysis of the legitimacy claims in favour or against global constitutionalism see C. Mac Amleigh, 'Harmonising Global Constitutionalism' (2016) 5 *Global Constitutionalism* 173-206.

doctrines has been incredibly reductionist both in its conception of the law and in its relation with society. Marx himself allows for this interpretation, most famously in his 'Preface to the Critique of Political Economy': 'The totality of [...] relations of production forms the economic structure of society, the real basis from which rises a legal and political superstructure, and to which correspond specific forms of social consciousness'.³ This is known as the formalisation of the structure/suprastructure frame of understanding of the relation between the production and reproduction of society and the legal order. If interpreted rigidly, it invites the idea that the law is an ideological mask applied over already existent social relations (of production) and, at best, it serves as a veneer of legitimacy over deeply unfair arrangements. No autonomous status is granted to the constitutional order, which is reduced to the mere reflexion of already established processes of production.

In constitutional thought, the most visible contribution came from Ferdinand Lassalle in the 19th Century. In a series of conferences on the nature of constitutions, he juxtaposed the formal to the 'real' constitution with the intention of 'unmasking' the role of the former as a legitimating cover for the undergirding relations of power and domination. In many places, Lassalle states forcefully that what really holds a constitutional order together is the political economy of the productive relations of society. 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'.⁴ This is because, fundamentally, Lassalle thought that 'constitutional questions are not primordially legal questions, but a matter of relations of force'.⁵ By stating that the constitution is the fundamental law of the country, Lassalle assumed that it has higher value than ordinary law and that it has its own grounding, so that 'it must be none other than what it is. Its basis will not permit it to be otherwise'.⁶ The political character of constitution-making is here purified from any contingency and associated with an idea of necessity. The ground of the constitution has to be found 'always and exclusively in the real effective relations among social forces in a given society'.⁷ What remains unclear is whether the real constitution, that is, the constitution of the dominant forces, is also a juridical constitution or only a state of affairs which cannot be changed. Lassalle's imperativist conception of law makes the nature of the real constitution ambiguous and, accordingly, the same can be said of its relation with the formal constitution. The relation between society and constitution is still portrayed as an *external* one, as if society would first take a concrete shape and then it would either use the formal constitution as a cover up for pursuing fundamental aims or as a mere registration of undergirding social dynamics. In short, the constitution of society is represented as independent from constitutional ordering. Furthermore, the limit of such a rigid and dogmatic materialist take is that it underestimates the political potential of subjectivity formation. Relations of production are rightly put at the centre of the analysis, but they are represented as static and set up from the perspective of capitalist primacy. How those relations came to take up those *modes* and *forms* of production is never turned into a constitutional question. This type of reductionist analysis

³ K. Marx, 'Preface to the Critique of Political Economy', in id., *Later Political Writings* (Cambridge University Press 1991) 159-160.

⁴ F. Lassalle, 'On the Essence of Constitutions' (1862). All quotes are from the English translation available at <https://www.marxists.org/history/etol/newspape/fi/vol03/no01/lassalle.htm>

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

would not see much of a role for global constitutional law, except for the registration of a change undergone at the level of global political economy. Yet, not all Marxist-inspired analyses of legal and political orders have been prey of this reductionism and they actually became more sophisticated and nuanced. For example, a different judgment should be given about the reflection of Antonio Gramsci and of its legacy in constitutional and political analysis. In a nutshell, and without any pretence to be exhaustive, Gramsci complicated the vulgar materialism of the base-superstructure view. Contrary to the latter, he thought that each and every constitutional and political system was the outcome of a number of struggles around many sites (not only economic, but cultural, social and political as well), all driven by the aim of establishing forms of hegemony.⁸ This take on materialist analysis provided the basis for more recent interventions on law and globalisation (under the umbrella of the critique of 'new constitutionalism')⁹ and some of its main tenets will be expanded in the second half of this article. In fact, by avoiding a form of reductive economicism, this type of materialist approach can introject other important ordering factors into its analysis.

A second wave of material thinking about constitutional orders emerged with the crisis of the liberal State and the 1929 financial and economic crises. Here, the transformations of the concrete organisation of the State and its political system made visible that the formal constitutional order was not enough for capturing the reality of the newly constituted order. This is the case because in the liberal State, in light of its objectives, a formal separation of powers and the recognition of a series of civil rights were the only necessary constitutional conditions in order to let the dominant political forces pursuing their aims. With the crisis of that State, the enlargement of the franchise and of trade unionism, the material organisation of the State changes substantially and in a way that cannot be ignored any longer. It is in this context that the most developed and systematised theory, produced along with an institutionalist conception of law, are offered in Germany by Rudolf Smend and in Italy by Costantino Mortati.¹⁰ The gist of Smend's contribution has to be seen in the idea that the constitutional order is basically an integration process which boosts or guarantees social homogeneity, without resorting to the monopoly of force. Actually, his main concern seems to be how to avoid that the loss of organic links within society, due to the rise of the multi-class state,¹¹ brings about destructive effects upon the unity of the state itself. The way to cope with this crisis of political unity is to conceive constitutional development as a form of social integration. This concern is based on material grounds because the loss of organic links produces distortive and unhealthy dynamics (of psychological and sociological nature) between the individual and the community. Reflecting on his own intellectual development, Smend would later remember that the originating factor of the integration theory was 'the sight of the political chaos of the sickly constitutional state of the 1920s, out of which emerged a desire to offer in contrast the original healthy sense of the constitution'.¹² Only a dynamic conception of the constitutional order can ensure that this 'sickly constitutional state' will eventually recover. However,

⁸ See, for an updated critical analysis, P. Anderson, *The Antinomies of Gramsci* (Verso 2017).

⁹ S. Gill, C. Cutler (eds), *New Constitutionalism and the World Order* (Cambridge University Press 2014).

¹⁰ C. Mortati, *The Constitution in the Material Sense* (Routledge 2019, forthcoming).

¹¹ Cf M. Severo Giannini, *Il pubblico potere. Stati e amministrazioni pubbliche* (Il Mulino 1986), chapter 3.

¹² R Smend, 'Integrationslehre', in *Handwörterbuch der Sozialwissenschaften* (Fisher 1959) 301fn (quoted by S. Koriath, 'Rudolf Smend', in A. Jacobson, B. Schlink (eds), *Weimar: A Jurisprudence of Crisis* (University of California Press 2002) 210.

Smend gives a particular twist to that dynamic and pitches his enquiry at the psychological level of the individual conscience. The stability of the legal order depends largely on the psychological convictions of the individual in relation to the wider community. As we shall see, the problem with this kind of institutionalism is that it still suffers from a deficit of materialism.

A different and still timely approach is put forward by Costantino Mortati, according to whom the material constitution is organised around a series of *political goals* which attract a number of other ordering factors : a spatial and temporal matrix (usually instantiated by the political unity represented by the sovereign state as a synthesis of these elements)¹³ whose unity is held together by the governing function, a series of one or more political 'bearers' (that is, political subjects) of the whole constitutional project (which would be identified by Mortati in the system of political parties) and political goals which imprint a sense of direction or purpose to the constitutional project. In Mortati's time, the state provides the basic framework where the governing function is exercised through a series of powers (or other functions: note that the governing function is not executive power and should not be confused with other state powers).¹⁴ The governing function is the glue that holds a constitutional order together and the pursuing of fundamental goals is a constitutive part of the governing function. As we will see later, the recognition of the unifying function of governing is essential to re-conceive State sovereignty as well.

Crucially, from a methodological perspective, what made Mortati's conception innovative compared to similar contemporary approaches, was the way he conceived of the relation between the ordering of society and constitutional formation. For example, some of the early socialists' conceptions of the material constitution were based on a unidirectional representation of the relation between societal ordering and constitution, the latter being treated as an epiphenomenon or even as a mask for covering undergirding relations of social and economic power.¹⁵ Contrary to that, Mortati thought that law and politics are always intertwined in the processes that shape societal organisation and its development. As we shall see, this is a precious methodological point because it pushes constitutional studies to take into account the coupling of law and politics. Crucially, Mortati believes that the constitutional lawyer ought to extend its knowledge to the "juristic level": '[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'.¹⁶

The focus on the relation between societal and constitutional orders is not exclusive to Mortati: this is a tenet that he shares with other authors such as the institutionalist Schmitt (that is, the Schmitt of the *Three Types of Juristic Thought*), Heller, and Santi Romano, to name but a few. The material sense of the constitution became evident to these authors

¹³ On the material dimension of this spatial and temporal matrix see the pages by N. Poulantzas, *State, Power, Socialism* (Verso 1980) 88-101.

¹⁴ On this point, in very clear terms, M. Loughlin, *the Idea of Public Law* (Oxford University Press 2003) chapter 3.

¹⁵ For an illustrative example of this form of determinism, see C. Beard, *An Economic Interpretation of the US Constitution* (MacMillan 1913).

¹⁶ C. Mortati, *Una e indivisibile* (Giuffrè 2007) § 18.

because of the transformations of the modern State over the interwar period, when constitutions and political systems, after the widening of the franchise and the introduction of material and social rights became more 'inclusive' under the pressure of outstanding new needs for integration in society of previously excluded masses. Mortati added an important analysis on top of the focus on the internal relation between societal ordering and constitutional formation. In fact, the formation of the material constitution by political and social forces is the outcome of a condensation of these forces around certain specific political aims. According to Mortati, and in crucial different ways from the vision put forward by many socialist authors, such a formation constrains the same forces; therefore, the material constitution (and, to a certain extent, the formal one) cannot be changed at a whim. Governing while pursuing a number of fundamental goals entails a series of compromises and constraints: even the hegemonic forces are subject to some of these limitations as a condition for the stability and the efficiency of the material constitution.¹⁷ The equilibrium among forces realised through the material constitution has its own logic and this one cannot be bent arbitrarily (unless one is willing to pay the price of dissolving the material constitution). Even exceptions or states of emergencies are conceived not as threats to the constituted order, but as a way to stabilise or even enhance the main tenets of a concrete material constitution (by absorbing what is deemed to be extraordinary or abnormal into the normality of the societal order).

Of course, given the contextual origins of this doctrine, one should not adopt Mortati's insights in an indiscriminate and uncritical way. To provide an evident example, the role of political parties cannot be described in the same way any longer because parties are not what used to be in the 20th century and because the goals of a particular constitutional order can be pursued, in contemporary times, by other subjects as well.¹⁸ Nonetheless, the core of this approach is applicable to a number of other state constitutional orders. For example, even the 19th Century liberal state had its own material constitution which required a liberal legal order, the rule of law and the protection of civil rights (mainly the right to property, but not only this one). Only in this way, the state would have let the productive forces of civil society unfold and realise the main aims of economic growth and individual freedom of enterprise. The same can be said for the contemporary form(s) of global constitutional law. Starting from this assumption, the following section will introduce a series of corrections to this approach to the study of the material constitution.

II. Renewing the Material Study of Constitutions

The first wave of doctrines of the material constitution described above has been extremely helpful in pinpointing alternatives to what was at the time the dominant doctrinal and formal approach of the positivist school of constitutional studies¹⁹. Those alternative views were formed by conceiving the relationship between society and constitutions in *internal* terms and not as an external application of a constitutional order to an already structured and fully-formed society. This means that the formation of constitutional orders is directly involved in the shaping of societal organisation. The material basis of constitutional orders

¹⁷ Something similar was also advocated by EP Thompson in *Whigs and Hunters* (Pantheon 1975).

¹⁸ Mortati himself recognised the limits of the party-based political system at the end of his academic career: *Costituzione* (1962), in *Una e indivisibile* (n 14) 143.

¹⁹ Paul Laband, Hans Kelsen, Carre' de Malberg, and Vittorio Emanuele Orlando, can be deemed to be the most representative authors.

can be traced back to this level. For this reason, the materiality of modern constitutions concerns processes of production and reproduction of societal order, predominantly (but not exclusively) through the setting up of modes and relations of production. In political and constitutional thought, the processes that lie at the core of the formation of the material constitutional order can be defined as *differentiation* and *specification*. Both hark back to the internal relation between societal formation and constitutional ordering. The process of differentiation realises at least two essential components of modern constitutional orders. The first one, and most important, is the distinction between those who command and those who obey. In brief, this distinction introduces a structure of authority into the constitutional order. For institutionalist thinkers of the likes of Romano and Mortati, the structure of authority based on the dichotomy command/obedience is the fundamental one. The governing function is premised on this distinction. As remarked more recently by Martin Loughlin, 'the business of governing invariably requires the drawing of a distinction that has become fundamental to the activity: the division between rulers and ruled, between a governing authority and its subjects'.²⁰ But given that differentiation is a process taking place internally to society, it is not only limited to the formation of the political and constitutional order. In fact, differentiation operates at different systemic levels across society and, as highlighted by the material approach to the constitutional order, it is a key ordering factor of production and reproduction. Through internal differentiation, the political unity of the State (or of any other type of political form) is achieved via the organisation and distribution of roles and functions across society. Once again, this process has an inherent political quality as it cannot be but organised via collective subjects or groups. At this stage, the key institutionalist intuition is the idea that those collective subjects are already structured around a set of ideas and principles which carry with them a normative force and the latter will later radiate throughout the constitutional order.²¹ The principle of specification implies the identification of the social and political forces whose role is essential for steering the governing function. If constitutional analysis is centred on production, then the definition of its political economy entails the specification of how modes and relations of production are organised. The principle of specification distributes functions and roles to different groups, but one ought to avoid the mistake of conceiving differentiation as a process utterly distinguished from specification. It is most likely that these two principles operate at the same time on the organisation of the political economy of the constitutional order. The individuation of which groups are attributed certain functions is generally intertwined with the organisation and differentiation of functions and roles themselves.²²

²⁰ M Loughlin, *The Idea of Public Law* (n 12) 5.

²¹ It would be predictable to trace back this type of material analysis to the influential (in particular in the Italian context) of Gramsci's notion of hegemony. This is noted among others by G. Volpe, *Il costituzionalismo del Novecento* (Laterza 2000) 122-7. As known, Gramsci strongly believed that the only way for obtaining a remarkable constitutional change was dependent on the rise of a 'new prince' (a revival of Machiavelli's point made in *The Prince*) which in his view ought to be the political party. This resonates with a peculiar Italian tradition of political and constitutional thought, recently highlighted as 'Italian Thought' by Roberto Esposito, *A Philosophy for Europe* (Polity 2016) 220-3.

²² A fair question, at this point, concerns the possibility of a populist constitutional order as populism is usually revolving around one simple set of differentiation and specification: the elite vs the people. The realism of the material study of the constitution invites a caution attitude towards populism in constitutional law. For an analysis see J. Werner-Müller, *What Is Populism?* (Penguin 2016); P. Blokker, 'Populism as a Constitutional Project' (forthcoming in *International Journal of Constitutional Law*).

Despite its relevance, one has to note that the material study of the constitution shows some outdated aspects besides the risk of economic determinism. In particular, two tenets are problematic: one concerns the relation among different material constitutional orders, and the other concerns the idea of materiality itself. As for the former, the material study of the constitution has been traditionally dedicated to the formation of domestic orders. Therefore, it has often postulated that the constitutional order is internal to social relations contained within an already defined political unity. Most frequently, such political unity has been identified in the modern State whose sovereignty has been conceived as practically absolute.²³ On the interaction between the political economy undergirding the State and its connection with external (i.e., non-domestic) elements no attention is paid, as if that political unity were completely autarchic.

The second problematic aspect concerns the definition of the material level, that is, the materiality of the constitutional order. What makes up the constitution of society? In works such as those of Smend or Mortati, the material dimension of social organisation was organised (if not exhausted) by subjects of mediation such as the nation or the political party. Again, in Mortati's thought the whole work of moulding society is fundamentally delegated to the political system which, in a rather traditional way, operates as connector between society and the state.

A key difference with the previous tradition of the material study lies on the undergirding assumption of the type of societal production that is behind it. In other words, it is assumed that the majority of societies of contemporary constitutional orders are organised according to capitalist social relations. This is a key feature which cannot be ignored by the material study. In other words, a contemporary material study of constitutional law cannot escape the dimension of valorisation which is immanent to those kinds of social relations. Predictably, this entails that the material constitution has to be understood as the organisation and composition of social forces with a view to generate and increase the production of value.²⁴ In a nutshell, each material constitution has its own political economy and the two aspects (that is, constitutional ordering and production) are co-implicated. Therefore, parts of the fundamental aims of each and every material constitution will be partially dictated by the plexus constitution-political economy.

Let's pause and clarify this passage. The material constitution is a juristic construction which is based on a coupling between the legal order and the political regime. The structuring of the material constitution entails that legal and political aspects are an important (indispensable) part of the composition and re-composition of social forces. At the same time, consolidating a certain asset of social forces around a material constitution requires particular forms of law and of political action because sheer facticity, by itself, does not have ordering qualities. Here lies the legal institutionalist core of the doctrine of the material constitution: certain social formations contain in themselves ordering properties. Crucially, such an organisation of social forces is based mostly on the production of societal relations. In modern capitalism (and constitutionalism), this means a specific division of labour as the most efficient way for producing value while consolidating and stabilising the social order at the same time. This entails that even though the material constitution provides a stable structure for the constitutional order, social composition of forces is always subject to pressures and conflicts (and this is another reason why a formal

²³ More on this point will be said in the last section.

²⁴ A. Negri, *Books for Burning* (Verso 2005) 235.

constitution can help in stabilising the material constitution). Methodologically, the consequences cannot be underestimated. As said, the material constitution is a realist juridical doctrine, but in the version advocated by Mortati, the realism is still prey to sociological relativism (in an almost *occasionalist* fashion).²⁵ The hegemony built by the governing political forces is described in terms that remind closely to the elitist school of modern political science,²⁶ as if the battle for hegemony was the product of a fully autonomous political field. In other words, the formation of a material constitution is left to the choices of powerful political wills. According to this perspective, the fundamental political aims would be left to the autonomous choice of the most relevant political actors. But from a material perspective this is both insufficient and inaccurate. It is inaccurate because if the focus is the production of value in societal organisation, then even the political contest for hegemony cannot be reduced to an arbitrary struggle among utterly subjective wills, but it has to be inscribed into the framework of a robust political economy.²⁷ The choice of fundamental political aims does indeed make sense only within that framework. And for this reason, the political system by itself (even if autonomous) cannot fully determine the quality and nature of social relations of production. Other factors and other subjects have to be factored in for a proper representation of the material level.

III. The Materiality of Global Constitutional Law

Why tracking the material basis of constitutional law is an important epistemic operation? As already noted, this is because it gives a more accurate understanding of constitutional developments and their underlying logic. The material constitution is part of a wider constitutional order which includes the formal constitution as well. The key point is the internal relation between the constitutional order and societal formation. Given that such an arrangement is a construction based on the condensation of certain social forces around selected fundamental political aims,²⁸ it is therefore at this level that the analysis of the constitutional order ought to be pitched in the first place.²⁹

In light of these remarks, two prominent views of global constitutional law will be criticised for its manifest lack of concrete material underpinnings. Both in its pluralist and non-pluralist variations, global constitutional law is formalised in ways that seem to represent bits or sections of constitutional law simply upscaling to the transnational or global level. One of the defining traits of all proposals by global constitutionalists lies in the recognition of the exhaustion of state's centrality. While the description of the constitutionalisation of certain parts of global or transnational law is usually described in terms which cannot be straightforwardly assimilated to juridification, these processes are still described in fairly normative terms which remain largely unconnected to their material basis. Either global constitutional law is the product of a type of constitutional reasoning whose legitimacy lies

²⁵ M La Torre, 'Costantino Mortati and the Fascist Doctrine of Public Law', in C. Joerges (ed), *Darker Legacies* (Hart 2003) 305-20.

²⁶ E.g., Wilfredo Pareto and Gaetano Mosca.

²⁷ There is no space here to develop further this point, but the material constitution does not create an autonomous political field. In the last section it will be outlined why this is the main difference with other state-based approaches such as political jurisprudence.

²⁸ On the selective character of the material constitutional order (but framed in a different language), see B. Jessop, *The State* (Polity Press 2017).

²⁹ It seems that this is the level engaged by Mark Tushnet in his contribution to this special issue: 'The Globalization of Constitutional Law as a Neo-Liberal Project'.

ultimately in the quality of the reasoning itself and on its normative weight,³⁰ or, in different forms, it is functionally created in order to manage global or supranational needs, either in the form of administrative law or in the form of transnational rights.³¹

Given that some of these versions of global constitutional law make reference to a social base either in the form of practices or by focussing on the formation of contemporary society, it is worth further unpacking this criticism. In the first case, global constitutional law is the outcome of the expansion of constitutional principles' normative force beyond the jurisdiction of the state at the supranational and international level. The argument, suggested with great insight by Mattias Kumm,³² is based on what he defines as the 'practice conception of constitutionalism'. The authority of constitutional law is not conceived in positivist terms according to its pedigree and, in this way, it can be properly expanded and projected beyond the state framework. According to this view, constitutional orders can be established by just about any legal or political procedure. Negatively, constitutional authority is disentangled from the source thesis, and it is made to derive 'from the constitutional principles it claims to instantiate and give concrete shape to'.³³ Positively, constitutional principles are obtained by the reconstruction of practices whose main point is usually included in principles themselves. However, the practices behind these principles are already constitutional and they are described in the following terms: 'the practice conception of constitutionalism connects the underlying ideas of constitutionalism more directly and deeply with constitutional practice, without mediation by the voluntarist positivist, nationalist statist conceptual framework [...] the normative presuppositions of constitutionalism are translated directly into a set of basic formal, jurisdictional procedural, and substantive legal principles that are conceived as underlying existing legal and political practices and in light of which that practice can be reconstructed and assessed'.³⁴ Constitutional principles are understood as structural features, but their status seems to be free-floating. In particular, the principles that govern the relationships between different transnational and state-based constitutional orders do not themselves derive their authority from either one or the other. Their validity stems from the reasons they convey, though it is not made explicit against what those reasons are judged. The rationality of global constitutional principles is in the end detached from social relations and it does not bear any link with the relative political/constitutional form. Its validity is effective thanks to its reasonableness which is tied to classic constitutionalist values.³⁵

A radically different take, more sociological in approach, has been advanced in its most developed and sophisticated form by Gunther Teubner. He sees in the globalisation of constitutions a series of fragments which have been 'internally' constitutionalised.³⁶ The fragments that become constitutional at a global or supranational level are such for functional reasons: for example, the systems of science and economy tend to strive toward global reach for inner reasons. Their internal functionally-oriented rationality is a potent driver which brings these systems decisively beyond the boundaries of the modern State.

³⁰ M. Kumm, 'The Best and the Worst of Times', in P. Dobner, M. Loughlin (es), *The Twilight of Constitutionalism* (Oxford University Press 2010) 201-19.

³¹ See, for example, N. Walker, *Intimations of Global Law* (Cambridge University Press 2015).

³² For a first formulation, see M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *European Journal of International Law* 907-31.

³³ Kumm, (see n 30), 214.

³⁴ Ibid.

³⁵ It is not by accident that three of these principles are the rule of law, democracy and human rights.

³⁶ G. Teubner, *Constitutional Fragments* (Oxford University Press 2011).

Their 'constitutionalisation' comes with their coupling to some constitutional rights which makes possible to introduce a certain level of reflexivity internal to the system itself. Hence, according to this approach, constitutionalisation³⁷ beyond the State happens in two steps: 1) there is a second-order moment where rules or principles about the fragments of supranational or global law are reflexively discussed or modified, so that it is possible to correct (either functionally or normatively) the legal status of these fragments; 2) human or fundamental rights provide a mediation in the process of constitutionalisation. The picture that emerges out of this reconstruction is of a series of fragmented constitutionalised systems that communicate with their environment through their respective codes. In brief, constitutional fragmentation is the form of global law. The marginalisation of the state (and of the governing function) is part and parcel of this project and cannot be avoided as fragmentation is 'merely an ephemeral reflection of a more fundamental multi-dimensional fragmentation of global society itself'.³⁸ There seems to be a social basis undergirding this hypothesis: the proliferation of constitutional sites is guided not by territorial but social-sectoral lines. Yet, the lack of a material level of analysis which cuts across social systems is the reason why Teubner refers to fragmentation, while a more appropriate description would probably be 'constitutional asymmetries' between the state and the global levels. It is not surprising that many global constitutionalists identify the main vectors of the global upscale in constitutional rights. This is indeed common to different strands of the debate, from sociological to normative constitutionalists.³⁹ The constitutionalisation of rights is the vector for the creation of global fragments of constitutional law for two reasons: rights make the upscale intelligible from a constitutional perspective and rights seem to be more flexible and open to be decontextualized more easily than other institutions of modern constitutionalism. Now, the problem is that it is not clear why the constitutional tool that is chosen for developing constitutional law at the global and transnational levels are rights and not, say, other classic modern constitutional instruments such as separation of powers or federalism. In this sense, normativist and functionalist conceptions of global constitutional law are under-descriptive because they can possibly justify but not *explain* the forms taken by the process of constitutionalisation. This is a problem that affects functionalist explanations of constitutional law: it is not clear why constitutional law (and, in this case, global constitutional fragments) has taken up a determined or concrete form, and not another one, unless one postulates the absence of functional equivalents. From the perspective of the material study, this remains a crucial question for constitutional analysis.

IV. The forms of global constitutional law

The question of the form taken by constitutional law is central to the material study. In order to avoid any misunderstanding, it is better to pinpoint that the material constitution is not the opposite nor the hidden engine of the formal constitution. With the exception of cases of sham constitutions, the relation between the two constitutions is one of integration, not of stark opposition. More specifically, the material constitution provides the

³⁷ See the critical discussion of this term by M. Loughlin, 'What is Constitutionalisation?', in M. Loughlin, P. Dobner (eds), *The Twilight of Constitutionalism* (n 28) 69-72.

³⁸ A. Fischer-Lescano, G. Teubner, (2004) 'Regime Collisions: The Vain Search for Legal Unity Join the Fragmentation of Global Law', 25 *Michigan Journal of International Law* 999, 1004.

³⁹ See K. Möller, *Global Constitutional Rights* (Oxford University Press 2012); C. Thornhill, *A Sociology of Constitutions* (Cambridge University Press 2011).

key for understanding why the constitutional order has taken up certain forms. In other words, the material study of the constitution sheds light on the rationality of the form of law by replying to the question: why this social order has given to itself these forms of law and not others? Often, these forms can function as a glue for holding the dominant social and political forces together, as it is the case in many post World War II constitutional settlements. This is in clear contrast with a functionalist understanding of the relation between social organisation and constitutional norms. In the functionalist account of sociological constitutionalism, constitutional developments are explained in terms of systemic inclusion,⁴⁰ usually through the means of rights. Global constitutional law is often correctly described as a series of fragments which upload some systems (science, technology, trade) to the global level,⁴¹ while leaving others within the boundaries of the modern State, or, in the version offered by Chris Thornhill, as the development of international norms that are introjected by the nation State (in this way, internationalisation is actually a way to strengthen the national level as well).⁴² No *concrete* explanation of why certain institutions (and not others) were functional for the inclusionary qualities of a constitutional order is offered. There can always be functional equivalents which might perform the same function of already established institutions. Such an approach to global constitutional law does not address the constitutional question of why this form of law (if there is any form of law at all) and not another one.⁴³

At this point, two questions are pressing: What are the main forms of global constitutional law? And why global constitutional law has taken this scattered and asymmetrical form? The first question really puts the idea that there is something constitutional about global or supranational forms of regulation under a lot of pressure. In fact, the question whether global constitutional law is truly a genuine form of constitutional law is a fair one. The uploading to the global level of sections of constitutional law has been realised in many forms and only some of them can be deemed to be constitutional in any meaningful sense. Often, in light of the informality of certain practices, global governance (rather than constitutionalism) seems to capture the interaction among national, supranational and global actors in a more accurate way. Perhaps, some global constitutionalists would simply dismiss these practices as irrelevant to constitutional law or, as Krisch advocated a few years ago, as a series of practices that basically comprise a new pluralist structure of postnational law.⁴⁴ Be that as it may, an overview of these forms of global law show that some of them are necessarily located in a grey area which might turn out to be legally neutral. But from the perspective of the material study, these practices can also be reconstructed as part and parcel of a composition or re-composition of social forces around concrete political goals. These are legal or para-legal forms that have a shaping effect on certain practices, but ultimately, they can be linked to the control of the governing function of the state. The latter, it should be recalled, always rests on the principle of differentiation between those

⁴⁰ For a recent overview, see P. Blokker, C. Thornhill (eds), *Sociological Constitutionalism* (Cambridge University Press 2017). This collection shows that the current sociological study of constitutionalism is a refined and complex field whose richness cannot be taken into account in the space of an article. In brief: not every sociological approach to constitutional studies is functionalist. See, for example, K. Lane Scheppelle, 'Constitutional Ethnography: An Introduction' (2004) 38 *Law & Society Review* 389-406.

⁴¹ G. Teubner, *Constitutional Fragments* (n 36) chapter 1.

⁴² C. Thornhill, *A Sociology of Transnational Constitution* (Cambridge University Press 2016).

⁴³ A similar criticism against functionalist explanations is put forward by B. Tamanaha, *A Realistic Theory of Law*, (Cambridge University Press 2017) 44.

⁴⁴ N. Krisch, *Beyond Constitutionalism* (Oxford University Press 2010).

that are governed and those who govern. In a nutshell, the trajectory or the purpose of the material constitution contains (besides the essential normative elements derived from its institutionalist nature) a relationship of command and obedience.⁴⁵ This applies to the relation between the level of the State and supranational and global forms of constitutional law.⁴⁶

To the second question (why this form?) one might answer in terms of failure or incapacity to shape a fully-fledged global constitutional order. However, the material underpinnings of these scattered fragments of constitutional law seem to point more toward the implementation of a new series of conventions replacing old social and political compromises. A material analysis of global constitutional law emphasises the key role played by states at the supranational and global level as they remain the most important point of reference of legal developments. In that sense, fragments of global constitutional law cannot constitute an autonomous (meaning: original), but only a derivative set of legal orders.⁴⁷ The recognition of states' centrality in global constitutional law does not undermine the constitutional nature of the latter. States (or, at least, some of them) have allowed portions (sometimes quite conspicuous portions) of regulation to be delegated to the supra-State level in order to achieve a series of political goals which would not have been possible without coordination in the international field. Again, in a mediated form, these transnational or global fragments of law have taken up the consistency of a regime. A derivative regime, but nonetheless a regime, whose undergirding political economy can qualify as very close to other orders. The recognition of this state of affairs means that (1) we are observing changes in the nature of states' constitutional orders and (2) the ordering forces are an emanation of an effort of certain sectors of state's social factions, through a coordinating device that is often made possible by institutional forms at the supranational level (an example could be represented by the recent waves of free trade agreements, with some clauses containing the duty to respect certain rights or environmentally friendly clauses). The European Union and the World Trade Organisation represent obvious examples of this trend, but other regimes (for example, the regime of regulation of intellectual property) have also developed into derivative material constitutions.

In order to illustrate the previous points, I will stick only to one example, but one that is key for the organisation of important sectors of global constitutional law and, even more importantly for the thesis put forward in this article, for the exercise of the governing function at the level of the state. It is a classic case of mixing different levels of constitutional intervention and re-scaling the exercise of government. An international political regime based on financialisation has been forming and consolidating in the last three decades,⁴⁸ one that has shaped states' budgetary policies (through austerity measures

⁴⁵ This is a key difference with the Schmittian understanding of the absolute constitution, which still rests on the driving distinction between friend and enemy. Cf M. Croce, A. Salvatore, *The Legal Theory of Carl Schmitt* (Routledge 2013) chapters 2 & 3.

⁴⁶ Though it should be made clear that this implies observing global and supranational developments from the point of view of the state.

⁴⁷ On this distinction I follow S. Romano, *The Legal Order* (Routledge 2017). On Romano's thought see M Loughlin, *Political Jurisprudence* (Oxford University Press 2017) ch 7. A different question is whether there are non-State original constitutional orders, a question on which Romano would agree (canon law, for example). See also the brilliant analysis by R. Cover, 'Nomos and Narrative' (1983) 94 *Harvard Law Review* 4-64.

⁴⁸ I follow here the arguments made first by C. Lapavistas, *Profiting Without Producing* (Verso 2010); W. Streeck, *Buying Time* (Verso 2015); see, also, A. Negri, 'On the Constitution and Financial Capital' (2015) 32 *Theory, Culture and Society* 25-38; J. Vogl, *The Ascendancy of Finance* (Polity 2017).

and competition on financial markets for funding their public debt) and has contributed to the reform of labour markets across a wide spectrum of states and jurisdictions. Streeck has aptly defined this transformation as the passage from the 'fiscal' to the 'debt state'.⁴⁹ It is interesting to note that such an international political regime is both constituted by state and supranational institutions, comprising a derivative but new constitutional order and at the same time one that is impacting on the states's governing function, more specifically on the definition of its fundamental aims. The financial process of valorisation behind this section of global constitutional law directs (or helps) the contemporary state in steering the governing function toward new directions, forcing the re-ordering of specific social relations by setting up new 'condensations' of social forces.⁵⁰ Certain institutions and practices (some formal, other rather informal) underlie this financial convention: the delicate equilibrium of the international monetary system, the IMF, the Basel III criteria, the monetary dialogue among central banks, etc etc. In a nutshell, in the last few decades we have seen a transformation of the compromise among productive forces which marked many constitutions of the post-World War II settlement: from the Fordist compromise, which formed the material basis of many 20th century constitutions (with the explicit recognition of the compromise between capital and labour at their core and the relative support of the Bretton Woods international monetary system which pushed central banks in using the value of labour productivity as the measure for the monetary basis) to the international political regime based on financialisation,⁵¹ one in which the monetary sphere (finance capital, as a shorthand)⁵² establishes the political hegemony over social production and reproduction, and therefore also over division of labour.⁵³ To avoid any misunderstanding, such a financial regime cannot be pitted against modes and relations of production, as a late Polanyian reading might want to highlight.⁵⁴ The Welfare state becomes the consolidated state, with a restructuring of its fiscal capacities and all the consequences of such a change on productive social relations. Note that this entails that global constitutional law cannot be necessarily understood as an expansion of the constitutional realm within the scheme of a progressive narrative.⁵⁵ It should be added, indeed, that one of the main purposes (but not the only one) of global constitutional law is to transform the state and its form. In an

⁴⁹ Streeck (n 48) ch 2.

⁵⁰ This reading had been already suggested, in a seminar article, published originally in 1973, now collected in N. Poulantzas, *The Poulantzas Reader* (Verso 2008) 220-57.

⁵¹ D. Harvey, *The Limits to Capital* (Verso 2006) 296.

⁵² The debate on the nature of finance capital (and whether this can be separated from productive capital) is as old as the works of Rosa Luxemburg and Hilferding. See C. Lapavistas, *Profiting without Producing* (n 48); N. Dodd, *The Social Life of Money* (Princeton University Press 2014) ch 8.

⁵³ On the problematic change of the constitutional nature of labour-related arrangements and problem of uploading these to the global realm see the brilliant pages by R. Dukes, *The Labour Constitution* (Oxford University Press 2015) ch 7.

⁵⁴ Echoes of this position are present in the otherwise extremely brilliant reconstruction by W. Streeck, *Buying Time* (n 48).

⁵⁵ This is the limit of an analysis which is otherwise extremely insightful, as the one provided by B. Ackerman, *We the People: Transformations* (Harvard University Press 1998). Ackerman would not agree that his theory of informal constitutional transformation can be read with material lenses, but at least the third constitutional moment (the New Deal) is a classic reconstruction of the constitutional relevance of the material constitution. However, given that Ackerman does not address the material dimension in explicit terms (and he prefers to adopt an Arendtian reading of modern constitutionalism), he has to postulate that each constitutional moment represents an expansion of the inclusionary capacity of the constitutional order (abolition of slavery, constitutionalisation of labour, civil rights redemption, etc etc).

important sense, Chris Thornhill is right when he draws a trajectory of the globalisation of constitutional law in five phases, with the latter being the introjection of human rights law into domestic constitutional orders.⁵⁶ However, a *caveat* ought to be added at this point: this introjection is not necessarily functional to the stabilisation of the state and it is not evident that the introjection of global fragments of constitutional law serves an inclusionary function at the domestic level. Hence, it does not necessarily stabilise state constitutional orders. Sometimes the opposite is the case. Even the introjection of international fundamental rights might bring about controversial effects within the domestic realm. The new arrangements concerning the governing function have generated an enormous pressure over states, at times bringing about de-constitutionalising outcomes or the transformation of the state material constitution.

Actually, this is the first of two main lessons that can be learned from the material study of global constitutional law. At times, global constitutional law is riddled with some potentially unsettling contradictions, usually because of the complexity of the governing arrangements sought after by certain fractions of constitutional law. In the longer term, tensions between the main driving forces of the material constitution might degenerate and de-stabilise the constitutional order (or dismantling important aspects of its legal fabric). Here, Polanyi's classic insight might be actually very helpful: it is not clear, at this point in time, whether certain arrangements are sustainable and whether they will bring about a counter-movement.

The second major insight is that law is not always a key element in the transformations behind global constitutional law. In particular, the emphasis on the positive or negative virtues of judicialisation seems to be exaggerated.⁵⁷ Courts have played an important role in certain circumstances, in particular in the context of European constitutionalism. However, besides the thorny issue of the legitimacy of arbitral arrangements (and whether arbitration can be qualified as a form of judicial power), other institutions or fora have emerged in the global scenario and they seem to have occupied a prominent role in exercising a governing function at both supranational and national levels. The recent financial crisis has not seen the judiciary at the forefront (except for the legalisation of controversial measures) but rather a constellations of different national and supranational institutions. It would be sufficient to mention, here, the governing role exercised by rating agencies upon State budgetary discipline, the coordinated intervention of central banks in many regions or the guidelines given by the European Commission during the European semester. In both cases, judicial intervention has appeared, at best, as a confirmation rather than a creation or development of new legal regimes.

v. Sovereignty and Government in Global Constitutional Law

As already noted, the material study of global constitutional law promotes an analysis centred around forms of constitutional and political unity, which in the contemporary context are still primarily represented by the state. This resonates with a strand of

⁵⁶ Thornhill, *A Sociology of Transnational Constitutions* (n 42) ch 2.

⁵⁷ For negative evaluation of the expansion of judicial power see R. Hirschl, *Juristocracy* (Harvard University Press 2004). A classic study of how to govern through judicial power is A. Stone Sweet, *Governing by Judges* (Oxford University Press 2000). Amnon Reichman is addressing some of the issues affecting judicial review after the globalisation of certain constitutional rights in his contribution to this special issue: 'The Patronizing Trap: Constitutional Rights, Risks, and the Transnational Dimension'.

constitutional studies focussed on the unity of the legal order and its preference for the state as the only non-derivative (i.e., sovereign) form of order. Yet, the latter strand is prone to dismiss too quickly the contribution of global constitutional law for the knowledge of state constitutional orders as, at best, a derivative form of law or just soft law whose impact is temporary and superficial.⁵⁸ But this judgment is based on an ungrounded assumption. More precisely, state-centred theories of modern constitutional law are often premised on the twin ideas of absolute sovereignty of modern statehood and the exceptional nature of that type of sovereignty.⁵⁹ According to this approach, the state is not a field of struggle around which gravitate different (and often antagonistic) social groups, but the form that enables the autonomy of politics. Hence, it is not surprising that other forms of constitutional law are marginalised or even not registered as constitutional:⁶⁰ they do not represent the type of achievement that is realised by a state constitution. Given the centrality of the latter for constitutional imagination, all other forms of supranational or global constitutional law are at best reconstructed as projection of state-centred law or, at worst, as threats to the integrity of the above mentioned constitutional imagination.

The core distinction of this constitutional approach is the separation between the principle of sovereignty and government, a constitutive and frequent feature of the European political and constitutional thought on the state.⁶¹ The separation is understood not as a matter of degree but as categorical: sovereign and ordinary powers belong to different levels. Indeed, there is deep discontinuity because sovereignty cannot be reduced to the ordinary institutions, while ordinary powers represent the constitutional normality. Hence, the modern state can always disentangle itself from the internal and external constraints imposed by governmental action with a sovereign decision. In other words, sovereignty and government belong to two separate levels. Constitutional imagination is shaped by sovereignty, not government.⁶² The latter operates always within already defined boundaries. Therefore, state sovereignty is conceived as a scheme of intelligibility which organises the significance of internal and external orders.⁶³ From this perspective, international law is the only other site of legitimate law because it derives from that imagination. Global constitutional law is reduced to an ephemeral phenomenon built on quicksand and therefore can often be called into question quite quickly.

⁵⁸ For example, Dieter Grimm notes that the international and the global level (unlike the EU) do not have the range of powers and organisational density to be able to qualify as constitutional. In other words, they do not have the capacity of forming political and constitutional unity. At the global level 'there are some isolated institutions with limited tasks, most of them single-issue organisations and with correspondingly limited powers. They are not only unconnected, but sometimes even pursue goals that are not in harmony with each other, such as economic interests on the one hand and humanitarian interests on the other. Rather than forming a global system of international public power they are islands within an ocean of traditional international relations': D. Grimm, 'The Achievement of Constitutionalism and its Prospects in a Changed World', in Dobner, Loughlin (eds), *The Twilight of Constitutionalism* (n 30) 18.

⁵⁹ I refer here to the works of three representative authors from different jurisdictions: P. Kahn, *Putting Liberalism in Its Place* (Princeton University Press 2004); id., *Political Theology* (Columbia University Press 2011); M. Loughlin, *Foundations of Public Law* (Oxford University Press 2010); id., *Political Jurisprudence* (Oxford University Press 2017); D. Grimm, *Sovereignty* (Columbia University Press 2017).

⁶⁰ P. Kahn, 'The Question of Sovereignty' (2004) 40 *Stanford Journal of International Law* 259-82

⁶¹ See, e.g., for historical analysis, R. Tuck, *The Sleeping Sovereign* (Cambridge University Press 2015); for a reconstruction of this distinction in Rousseau's thought: Loughlin, *Foundations* (n 57) 158-161.

⁶² M Loughlin, 'Constitutional Imagination' (2015) 78 *Modern Law Review* 1-25.

⁶³ Cf J. Scott, *Seeing like a State* (Yale University Press 1988).

This picture of state sovereignty is not only outdated, but inaccurate both historically (in terms of state formation and developments) and conceptually (in terms of the formalisation of the concept of sovereignty).⁶⁴ First, as illustrated by legal historians,⁶⁵ in concrete terms sovereignty has never been an absolute and transcendental source of power, but rather a relational principle which would develop in diverse ways according to different contexts. Hence, different sovereignties have been attached to different forms of state: for example, the sovereignty of the European state cannot be assimilated to the sovereignty of the developmental (and post-colonial) state. Rather than assuming sovereignty as a transcendental principle, sovereignty is understood as the mediating principle between the organisation of the social order (and of civil society) and the formation of political and constitutional unity. At this stage, an institutionalist take on sovereignty becomes necessary. Conceptually, such an understanding differs sensibly from the conception classically inspired by Hobbes. According to the latter, sovereignty emerges in order to overcome the state of nature and hence society is parasitical to the previous formation of the state order. The institutionalist idea of sovereignty embodies the logic at work in the relation between the social and the constitutional order. In brief, sovereignty maintains the relation between political unity and society without collapsing one into the other. There is nothing arbitrary about it and its operations in concrete situation does not postulate (as it happens with many sovereign-based approaches) that sovereignty precedes law.

Given the mediating role of the principle of sovereignty, it becomes clear that it cannot be separated categorically from the governing function. The formation of constitutional orders is always within the exercise of governmental power. The lessons of the institutionalist approach to the constitution are still valid on this point: the processes of formation and re-formation of political orders can be productive of sovereign units, but this is always the outcome of a mediating exercise of governing.⁶⁶ For this reason, the contemporary state (and in particular the European state above the others) can be described as a state that has introjected bits and pieces of supranational and global law as part of its material constitution. For example, this phenomenon has been aptly described (in accurate material terms) by Chris Bickerton with the idea that the European state has become a 'Member State'.⁶⁷

In conclusion, both narratives on the development of global constitutional law sketched out in the previous paragraphs shed a light on certain assumptions driving the current debate on the rise of global and supranational constitutional law. Both narratives are coins of the same medal.⁶⁸ They both offer important insights into the relation between state and global constitutional orders, but they share the problem of ignoring the material dynamics behind the development of contemporary constitutional law. The material study of global constitutional law maintains the narrative of the centrality of the state as the key political unity but does not consider it as an absolute achievement of the autonomy of politics, as it

⁶⁴ For the modification of the concept of sovereignty, see N. Walker (ed), *Sovereignty in Transition* (Hart 2003); cf H. Kalmo, Q. Skinner (eds), *Sovereignty in Fragments* (Cambridge University Press 2010).

⁶⁵ E.g., L. Benton, *A Search for Sovereignty* (Cambridge University Press 2010). Sociologically, this point has been made with great emphasis by S. Sassen, *Territory, Authority, Rights* (Princeton University Press 2006).

⁶⁶ It should be noted that Loughlin is rather attentive to the act of governing of sovereign states but it does not attribute to it a constitutive role: M. Loughlin, *The Idea of Public Law* (n 14) ch 3.

⁶⁷ C. Bickerton, *European Integration* (Oxford University Press 2012). Another analysis conducted along these lines (though without the same material undertones) is put forward by A. Somek, *The Cosmopolitan Constitution* (Oxford University Press 2014).

⁶⁸ S. Mezzadra, B. Neilsen, *Border as Method* (Duke University Press 2013) 218-20.

is the case for the advocates of the state-based perspective. The distinction between sovereignty and government is contextualised because the first concept is understood as a mediation between multiple social forces obtained through the establishment of a stable form of political unity and the second concept describes the processes that mobilise all constitutional powers in order to achieve and maintain that form. Sovereignty remains central in the contemporary context, but not as a site for exclusive political self-determination. Sovereignty remains essential for the production and reproduction of societal relations. For this reason, the material study of global constitutional law cannot do without an analysis of its undergirding political economy.