

The Cambridge Handbook on the Material Constitution

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Contents

	<i>page</i>
<i>List of Contributors</i>	ix
Introduction: The Return of the Material Constitution Marco Goldoni and Michael A. Wilkinson	1
PART I HISTORY	
1 The Tradition of the Material Constitution in Western Marxism Marco Goldoni and Michael A. Wilkinson	25
2 The Soul of the State: The Question of Constitutional Identity in Carl Schmitt's <i>Verfassungslehre</i> Jens Meierhenrich	45
3 Laski's Materialist Analysis of the British Constitution Martin Loughlin	64
4 Rudolf Smend's Legacy in German Constitutional Theory Tim Wihl	76
5 The Constitution in the Material Sense According to Costantino Mortati Lucia Rubinelli	89
6 The Material Constitution of the Dual State Lars Vinx	100
7 'A Certain Shadowy Totality': In Search of the Material Constitution of the United States Rob Hunter	112
8 The Material Constitution in Greek Constitutional Thought Nikolas Vagdoutis	124

9	The Constitution As Social Compromise: Hybrid Constitutionalisation and the Legacy of Wolfgang Abendroth Kolja Möller	136
10	‘Self-Justifying Law of Constitutional Law’: The Material Constitution in Rudolf Wiethölter’s Critical Systems Theory Gunther Teubner	150
PART II CHALLENGES		
11	The Material Constitution and Imperialism Eva Nanopoulos	171
12	The Material Constitution of Federations Signe Rehling Larsen	188
13	The Materialist Turn in Constitutional Thought Emilios Christodoulidis	199
14	Three Registers of the Material Constitution Neil Walker	210
15	What Matter(s)? A Processual View of the Material Constitution Mariano Croce	223
16	The Material Constitution and the Rule of Recognition Francesco Bilancia and Stefano Civitarese Matteucci	233
17	Constitutional Matter and Form: An Exploration of Constitutional Language Denis Baranger	246
PART III ANALYSES		
18	A Material Understanding of Constitutional Changes: Revisiting ‘Constitutional Maintenance’ Doctrines Graziella Romeo	261
19	The Material Constitution in Latin American Courts Mariana Velasco-Rivera and Joel Colón-Ríos	275
20	A Materialist Analysis of the Indian Constitution Sandipto Dasgupta	288
21	China’s Material Constitution Ngoc Son Bui	301
22	The Material Constitution and Extractive Political Economy: Lessons from Mongolia Jennifer Lander	313

23	The Military in the Material Constitution of Turkey Tarik Olcay	325
24	The Material Constitution of International Investment Law Jessica Lawrence and Tom Flynn	335
25	The ‘Terrible’ Functional Constitution of the European Union: ‘Sound’ Money, Economic Freedom(s) and ‘Free’ Competition Agustín José Menéndez	351
	<i>Index</i>	367

The Constitution As Social Compromise

Hybrid Constitutionalisation and the Legacy of Wolfgang Abendroth

Kolja Möller

In the post-war era, constitutional theorist Wolfgang Abendroth elaborated a sophisticated approach to the democratic constitution as a social ‘compromise’.¹ He argued that the German Basic Law (*Grundgesetz*) did not constitutionalise either a liberal-capitalist or a socialist order but instead transferred these issues to democratic decision-making. Abendroth mainly drew on Articles 20 and 28 which defined the *Bundesrepublik* as a ‘democratic and social federal state’ and ascribed constituent power to the people (‘All state authority is derived from the people’). To Abendroth, these articles represented a clear commitment to the welfare state as a ‘structural principle of constitutional law’² which emanated from a class compromise between organised labour and the ruling class. The result was an open situation in which the existing social order remained at the disposal of democratic will-formation. In the words of Abendroth, the ‘societal and economic order is subjugated to being shaped by those organs which represent the self-determination of the people’.³ In bringing this interpretation of the Basic Law to the fore, Abendroth participated in foundational constitutional conflicts in post-war Germany.

A left-leaning legal scholar, Abendroth assumed a chair of political science at the University of Marburg in the 1950s. Previously – from the 1920s to the 1940s – he had been a public intellectual and political activist, socialised in the ‘middle-currents’ of the Weimar republic’s workers movement – most notably the ‘Communist Party Opposition’ (KPO) which aimed at establishing pro-democratic united front policies between the social-democrats and the communists. He was incarcerated from 1937 to 1941 and then, at the end of the Second World War, fought against fascism as a partisan in Greece.

In the 1950s, Abendroth became famous through his controversy with Ernst Forsthoff, a disciple of Carl Schmitt. Forsthoff, in contrast to Abendroth, interpreted the *Grundgesetz* as a liberal rule of law constitution which did not have a ‘specific social content’.⁴ Forsthoff argued that the ‘social norms’ should be seen as ‘programmatic sentences’. He denied their legal status by arguing that they are located in the ‘forecourt of current constitutional law’.⁵ Abendroth

¹ W. Abendroth, ‘Zum Begriff des demokratischen und sozialen Rechtsstaates im Grundgesetz der Bundesrepublik Deutschland (1954)’, in M. Buckmiller, J. Perels and U. Schöler (eds.), *Gesammelte Schriften Band 2* (Offizin, 2008), 354.

² *Ibid.*, 339.

³ *Ibid.*, 341.

⁴ E. Forsthoff, ‘Begriff und Wesen des sozialen Rechtsstaates (1954)’, in E. Forsthoff (ed.), *Rechtsstaatlichkeit und Sozialstaatlichkeit* (Wiss. Buchgesellschaft, 1968), 185.

⁵ *Ibid.*, 169.

emerged in a difficult position: though he was initially elected to the board of the *Vereinigung deutscher Staatsrechtslehrer*, the conservative members refused to hear his 1953 report on the ‘Concept and essence of the social constitutional state’. While Forsthoff could enter the stage to make his case, Abendroth was subsequently marginalised. However, in the long run, his approach appeared to score some late victories: in recent judgements on social benefits, the Federal Constitutional Courts partly adhered to Abendroth’s position. It interpreted the welfare state as a constitutional principle which commits political legislation to guarantee ‘material preconditions’ for ‘participation in societal, cultural and cultural affairs’.⁶ And only recently, echoing Abendroth’s claim that the economic sphere is open to societal intervention, it obliged the state to safeguard ‘life and health’ against the ‘threats from climate change’ and to engage in ‘internationally oriented action in favor of global protection of climate’ in order to achieve the 1.5°C target of global warming.⁷

In this chapter, the contribution reconstructs Abendroth’s approach to the constitution as social compromise, clarifies its historical background and asks for its potential with regard to current challenges of constitutionalisation. In Section 9.1, it will be demonstrated how the concept of ‘balance of social forces’ was used in the context of the labour movement in Austria and Germany in order to approach constitutional issues. This is expanded in Section 9.2, where the contribution turns to an investigation of Abendroth’s theory of social compromise. In Section 9.3, it is argued that this approach can make sense of the subsequent evolution of constitutionalism and international law after the Second World War. However, its main weakness consists in the focus on the central role of industrial labour within social conflicts: the constitutional compromises were often affected or even shifted by unforeseen agents of change which exceeded the sphere of blue-collar workers. Finally, Section 9.4 addresses how Abendroth’s approach can be used in order to refine current attempts to re-establish a ‘balance of social forces’ through either hybrid constitutionalisation (sociological constitutionalism) or counter-institutions (plebeian constitutionalism).

9.1 THE BALANCE OF SOCIAL FORCES

Abendroth’s approach relied on long-standing background assumptions about the relationship between constitutional forms and social structures. It is important to recall that the theoretical debates in the labour movement of the 1920s and 1930s foreshadowed his theory of constitutional compromise.⁸ In the aftermath of the revolutions in 1918, new constitutions had been established in Germany and Austria. The labour movement participated in the constitution-making processes and was successful in establishing social rights and economic co-determination.⁹ However, there was lively discussion about how to make sense of these new arrangements.

In the Austrian case, the social-democrats Hans Kelsen and Karl Renner, who both took part in drafting the constitutional document, interpreted the constitution from a basically proceduralist perspective. To them, the advent of parliamentary legislation provided the framework for a dynamic interplay of government and opposition and this had to be seen as the prime ground for

⁶ BVerfG, Urteil des Ersten Senats, 9 February 2010.

⁷ BVerfG, Beschluss des Ersten Senats, 24 March 2021.

⁸ For a genealogy of the discussion on the *Rechtsstaat*, see C. Maier, ‘The Weimar Origins of the Westgerman Rechtsstaat, 1919–1969’ (2019) 62 *The Historical Journal* 1069.

⁹ For an overview see R. Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford University Press, 2014), 36 ff.

social democratic action.¹⁰ The leader of the Austrian Social Democratic Party and intellectual Otto Bauer took a slightly different stance and reconstructed the constitution as emanating from a ‘balance of class forces’.¹¹ Thus, the constitution must be seen as depending on a social substrate, namely the balance between the labour movement and the ruling class in which ‘neither the bourgeoisie nor the proletariat is able to dominate the state’.¹² In the Austrian case, the social democrats had renounced the introduction of socialism through civil war and abided by a strategy of defensive violence.¹³ According to Bauer, the constitution of 1920 reflected an undecided and open status of societal development which was committed neither to liberal capitalism nor to socialism.

In Germany, critical constitutional thought echoed Bauer’s approach with regard to the Weimar constitution: the critical legal theorist Franz L. Neumann, a member of the first generation of the Frankfurt School, used the notion of *soziale Rechtsstaat* in his constitutional interpretation and highlighted its progressive character.¹⁴ Otto Kirchheimer, another important figure of the early *Institut für Sozialforschung*, argued that the ‘precondition of formal democracy’ consists in ‘an approximate balance of classes in their struggle’.¹⁵ He observed that, within the emerging executive of the Weimar Republic, a ‘sphere of direction’ (attached to the ruling class) confronted ‘a sphere of distribution’ in the administration of social and economic affairs.¹⁶

Widespread reliance on the notion of a ‘balance of social forces’ was not accidental. Friedrich Engels already utilised this notion in his meditations on historical evolution. He modified unidirectional schemes of development by arguing that there are long periods ‘when the warring classes are so nearly equal in force that the state power, as apparent mediator, acquires for the moment a certain independence in relation to both’.¹⁷ Admittedly, the transfer of these motifs to constitutional thought, as endorsed by Bauer, Kirchheimer, Neumann and – later – Abendroth, was controversial. It was discussed and attacked both by more formal approaches to the constitution as well as by the radical left, which saw every constitution under the sway of bourgeois rule. However, it was the starting point for a distinct approach to constitutionalism which embraced a decisive strategic option: if the constitution brings a compromise to the fore, a ‘double strategy’ is plausible which aims at shifting the balance of class forces in the shadow of a consciously endorsed constitutional compromise.¹⁸ The hope was that the compromise could

¹⁰ Karl Renner, who is now mainly known for his path-breaking works on the public dimension of private law, considered state and law to be ‘technical means’ which could be employed for a vast range of ends, see: K. Renner, ‘Probleme des Marxismus (1916)’, in H. Sandkühler and R. De La Vega (eds.), *Austromarxismus: Texte zu “Ideologie und Klassenkampf”* (Europäische Verlagsanstalt, 1970), 296; see, in a similar vein, H. Kelsen, *Sozialismus und Staat: Eine Untersuchung der politischen Theorie des Marxismus [1920]* (Wiener Volksbuchhandlung, 1965), 170 ff.

¹¹ O. Bauer, ‘Das Gleichgewicht der Klassenkräfte (1924)’, in H. Sandkühler and R. De La Vega (eds.), *Austromarxismus: Texte zu “Ideologie und Klassenkampf”* (Europäische Verlagsanstalt, 1970), 79–97.

¹² *Ibid.*, 79; see also Kelsen’s critique of Bauer: H. Kelsen, ‘Otto Bauers politische Theorien (1924)’, in G. Mozetic (ed.), *Austromarxistische Positionen* (Hermann Böhlau Nachf., 1983), 212; on the debate in general, A. Scott, ‘Introduction to the Kelsen–Bauer Debate on Marxist State Theory and the Equilibrium of Class Forces’ (2021) *Thesis Eleven* 72.

¹³ See the reflections in O. Bauer, *The Austrian Revolution* (L. Parsons, 1925).

¹⁴ F. L. Neumann, ‘Die soziale Bedeutung der Grundrechte in der Weimarer Verfassung (1930)’, in F. L. Neumann (ed.), *Wirtschaft, Staat, Demokratie: Aufsätze, 1930–1954* (Suhrkamp, 1978), 68 ff.

¹⁵ O. Kirchheimer, ‘Zur Staatslehre von Sozialismus und Bolschewismus’, in W. Luthardt (ed.), *Von der Weimarer Republik zum Faschismus: Die Auflösung der demokratischen Rechtsordnung* (Suhrkamp, 1976), 35.

¹⁶ O. Kirchheimer, ‘Weimar und was dann? Entstehung und Gegenwart der Weimarer Verfassung (1930)’, in O. Kirchheimer (ed.), *Politik und Verfassung* (Suhrkamp, 1964), 47.

¹⁷ F. Engels, ‘Der Ursprung der Familie, des Privateigentums und des Staats (1884)’, in K. Marx and F. Engels (eds.), *Werke Band 21* (Dietz-Verlag, 1975), 167 f.

¹⁸ See K. Möller, ‘The Red Polybius: Otto Bauer’s Theory of the Democratic Republic’ (2017) 27 *Studies in Social and Political Thought* 76.

foster a ‘socialist democracy as a form of organization for a classless socialist society’ founded ‘on the regulative idea of a society of free-willing humans (. . .)’.¹⁹ Instead of abiding by either purely reformist-institutional or by radical extra-institutional politics, it would be necessary to combine both in an intelligent manner. On these grounds, theorists such as Bauer, Neumann or Kirchheimer could envisage a peaceful transformation of society in the long-run without risking potentially self-destructive civil-war scenarios.²⁰

In the late 1920s, this approach was also adopted in order to make sense of the fascist surge. Most prominently, Karl Marx’s analysis of French Bonapartism was rediscovered.²¹ In his text on the ‘18th Brumaire of Louis Bonaparte’, Marx had investigated how the precarious balance of social classes and power blocs in the revolutionary process in 1848 France opened the window of opportunity for an authoritarian movement under the leadership of Louis Bonaparte, which toppled the parliamentary constitution. Taking up these insights, critical constitutional thought casted fascism as a lingering counter-possibility in the background of democratic constitutions, since the balance of class forces could also be shifted in a regressive direction. Reform need not necessarily pave the way for peaceful transformation, but also for regressive takeover which could – as was the case in Fascism – destroy constitutionality as such.

Initially, Abendroth was having some reservations toward the reformist penchants of the Austro-Marxist movement²² and became involved in the circles of an oppositional communist current in the late 1920s. He started as a member of the communist party’s youth branch and, later, belonged to the current which criticised the ultra-leftist orientation of the party leadership and its endorsement of the so-called theory of social-fascism from 1928 onward.²³ It considered the social-democrats and established trade-unions as opponents. They were not seen as potential partners in a united front strategy anymore. The foundation of the Communist Party Opposition (KPO) in 1928 was a reaction to these tendencies. Subsequently, its adherents were excluded from the party. Being led by influential figures such as Heinrich Brandler and August Thalheimer, the KPO members tried to initiate broad coalitions between social democrats, communists and the trade-unions in the late Weimar Republic.²⁴ One of the KPO’s defining characteristics was the fact that it drew heavily on a reinvigorated variant of Marx’s theory of Bonapartism. Accordingly, both a possible socialist transformation as well as the defeat of fascism had to rely on a united front approach of the labour movement. The main task consisted in neutralising the fascist threat, neither through a mild constitutional patriotism which renounced

¹⁹ O. Bauer, ‘Demokratie und Sozialismus (1934)’, in H. Sandkühler and R. De La Vega (eds.), *Austromarxismus: Texte zu “Ideologie und Klassenkampf”* (Europäische Verlagsanstalt, 1970), 113.

²⁰ Admittedly, Neumann refrained from his optimism in the early 1930s, see C. Offe, ‘The Problem of Social Power in Franz L. Neumann’s Thought’ (2003) 10 *Constellations* 211.

²¹ A. Thalheimer, ‘Über den Faschismus (1928)’, in W. Abendroth (ed.), *Faschismus und Kapitalismus: Theorie über die sozialen Ursprünge und die Funktion des Faschismus* (Europäische Verlagsanstalt, 1972), 19–38; M. Kitchen, ‘August Thalheimer’s Theory of Fascism’ (1973) 34 *Journal of the History of Ideas* 67; see also Marx’s classical text: K. Marx, ‘Der 18. Brumaire des Louis Bonaparte (1852)’, in K. Marx and F. Engels (eds.), *Werke Band 8* (Dietz-Verlag, 1972), 111–207.

²² Cf. the reservations in W. Abendroth, ‘Das Programm der Austromarxisten (1926)’, in M. Buckmiller, J. Perels and U. Schöler (eds.), *Gesammelte Schriften Band 1* (Offizin-Verlag, 2008), 37–41.

²³ Cf. Abendroth’s autobiographical reflections: W. Abendroth, *Ein Leben in der Arbeiterbewegung* (Suhrkamp, 1976), 78 ff. See also A. Diers, *Arbeiterbewegung – Demokratie – Staat. Wolfgang Abendroth: Leben und Werk 1906–1948* (VSA Verlag, 2006), 209 ff.

²⁴ Such a split could also be observed in the social-democratic camp: In 1931, a left current with a united front approach split from the SPD and founded the Social Democratic Labour Party (SAPD) – among its members was the later chancellor Willy Brandt.

transformative ambitions, nor through voluntaristic mass action, but by combining the defence of existing achievements with the quest for social transformation.

9.2 ABENDROTH'S THEORY OF CONSTITUTIONAL COMPROMISE

After being imprisoned and then having fought in Greece as partisan, Abendroth returned to Germany and was working as a professor at the Universities of Leipzig and Jena. However, he was critical of the repressive politics of Eastern authorities and finally 'fled' back to Frankfurt in 1948.²⁵ From 1950 onward, he received a professorship at the University of Marburg and took an active part in the establishment of political and legal sciences in post-war Germany.²⁶ In order to make sense of the constitutional order of the *Grundgesetz*, he renewed his lines of thought from the 1920s and 1930s. In a systematic sense, his notion of constitutional compromise can be reconstructed as a (1) norm-compromise which relies on specific notions of (2) constituent power and of (3) social transformation.

9.2.1 Norm-Compromise

In a first step, Abendroth reconstructed central articles of the *Grundgesetz* as norm-compromises. In his perspective, Article 20, which stipulates that the *Bundesrepublik* is a 'democratic and social federal state', combines liberal rights with welfare state principles. This, again, is emphasised in Article 28 where 'principles of a republican, democratic and social state governed by the rule of law' are invoked. Further, Article 20 ascribes constituent power to the people ('All state authority is derived from the people') and Article 14 allows for legislative interventions in private property relations, even through expropriation: '(2) Property entails obligations. Its use shall also serve the public good. (3) Expropriation shall only be permissible for the public good.' To Abendroth, these norms must be seen as compromises which open up the societal order to re-negotiation. The 'social and economic order' lays at the 'disposition of democratic will-formation of the people'.²⁷ Further, the norm-compromise extended to the role of mass parties and free trade unions (Art. 21). The constitutional acknowledgement of such mass organisations indicated that the relationship between society and the state should be arranged as vertically, where 'society' assumes constituent power over constituted organs. Abendroth was well aware that this was a counterfactual assumption and one which was regularly undermined; foremost in capitalist societies, where the state performs important functional tasks in safeguarding property relations. However, he saw parties and trade-unions as collective agents which could inhibit these tendencies. In the long run, these counter-powers should be able to transform society from within the constitutional framework: 'The *Grundgesetz* takes a long period into account where existing society is converted to social democracy and has, therefore, opened up the constitutional-legal possibility for continual intervention in the order of property relations.'²⁸

²⁵ Diers, *Arbeiterbewegung – Demokratie – Staat*, 474 ff.

²⁶ In Marburg, he was the founder of a critical scholarship tradition: cf. L. Peter, *Marx on Campus: A Short History of the Marburg School* (Brill, 2019). Abendroth was *inter alia* the supervisor of Jürgen Habermas' 'Habilitation'-thesis 'On the Structural Transformation of the Public Sphere' in 1961. In the Frankfurt circles of the *Institut für Sozialforschung*, Max Horkheimer considered Habermas to be politically too much on the left. This is why Habermas finally transferred his Habilitation-procedure to Marburg.

²⁷ Abendroth, 'Zum Begriff des demokratischen und sozialen Rechtsstaates', 346.

²⁸ *Ibid.*, 345.

9.2.2 Constituent Power and Background Conditions

The constitutional compromise, however, was not only a norm compromise. It had to be seen as a coupling of social forces and a determination of their respective intercourse in society. One can make sense of it as the coupling of two processes of constitutionalisation. The first is the constitutionalisation of norm-compromise in the written constitution. But it relies on a second process of constitutionalisation in the societal sphere. Here, the self-constitutionalisation of parties and trade-unions is decisive because it creates the conditions of possibility for the compromise and is necessary in order to subsequently maintain it.²⁹ In that regard, Abendroth's work echoes the theory of Bonapartism mentioned in Section 9.1: as the ruling classes tend to introduce authoritarian answers in response to recurring crises and social inequality, the self-constitutionalisation of subaltern powers is a necessary prerequisite for neutralising these dynamics. Abendroth started from the assumption that 'either the formal democracy of state institutions extends to the social democracy of society (...) or the economic power-holders of partial interests in society strip off the democratic form of political organisation (...) and leave the liberal tradition behind'.³⁰ Large groups of society will be intrigued by 'irrational actions and movements with a decisionistic character' which are instigated by 'parts of the economic ruling classes'.³¹

Abendroth's approach diverges from corporatist constitutionalism: trade-Unions and labour parties not only advance the particular interests of members and voters related to the economy, they also assume a universalist role in establishing the constitution and defending it against authoritarian takeovers. They must be seen as the 'natural guardians of democracy'.³² The densest expression of this argument can be identified in Abendroth's thoughts on the right to strike. To him, strike activities do not only revolve around the particular interests of employees, but bring to the fore that the 'workers represent with their interests at the same time the general interest of democracy (...)'.³³ Hence, the 'democratic character' of a 'formally democratised parliamentary system' hinges upon 'forces' which are themselves 'democratic' and are, in particular, 'eager to defend the democratic content and the democratic structural elements of the formal constitution' by 'extra-parliamentary' action.³⁴

From the perspective of the distinction between *pouvoir constituant* and *pouvoir constitué*, one has to start from the assumption that constituent power is mainly located in the second process of self-constitutionalisation – it is here that the social substrate can be found which either prevents democracy from being undermined by authoritarian takeovers or induces the social energy which pushes for societal transformation. It is important to note that, in order to play out as constituent power, parties and trade-unions must demonstrate a certain autonomy vis-a-vis the constituted norm-compromise: strikes and autonomous activities which not only address the corporate sphere but the social whole are vital as they set the interplay of constituent and constituted powers in motion. Most importantly, they remind the constituted organs and ruling

²⁹ W. Abendroth, 'Demokratie als Institution und Aufgabe (1954)', in M. Buckmiller, J. Perels and U. Schöler (eds.), *Gesammelte Schriften Band 2* (Offizin, 2008), 412 ff.

³⁰ W. Abendroth, 'Zur Funktion der Gewerkschaften in der westdeutschen Demokratie (1952)', in M. Buckmiller, J. Perels and U. Schöler (eds.), *Gesammelte Schriften Band 2* (Offizin, 2008), 222.

³¹ W. Abendroth, 'Die politische Wissenschaft unter dem besonderen Gesichtspunkt der Staatslehre (1952)', in M. Buckmiller, J. Perels and U. Schöler (eds.), *Gesammelte Schriften Band 2* (Offizin, 2008), 218.

³² Abendroth, 'Zur Funktion der Gewerkschaften', 229.

³³ W. Abendroth, 'Der Kampf um das Streikrecht (1953)', in M. Buckmiller, J. Perels and U. Schöler (eds.), *Gesammelte Schriften Band 2* (Offizin, 2008), 310.

³⁴ Abendroth, 'Demokratie als Institution und Aufgabe (1954)', 413.

classes that not only reformist, but also radical change remains a possibility. Hence, the role of unions and mass parties cannot be restricted to democratic deliberation in society. Their role is also to provide forceful background conditions understood in terms of latent but available courses of action which influence the calculus of decision-making in strategic interaction. Constituent power is not only a matter of democratic legitimation, but also of substantive and transformative options which threaten to disempower the constituted organs and elites.

9.2.3 Social Transformation

While in the 1920s the young Abendroth was still hesitant with regard to the Austro-Marxist strategy of peaceful transformation, he revived this tradition in the 1950s. Starting out from the norm-compromise (1) and extending it to a conception of constituent power (2), Abendroth also addressed the pertinent challenge of social transformation (3). The role of constituent power was not restricted in his account merely to correcting constituted powers and, thereby, to conserving the social compromise. He hinted at the possibility of an encompassing social transformation as well. A revolution in the literal sense, which changes power and property relations, can be pursued from within the framework of the constitutional compromise. Accordingly, the hierarchy between constituted powers of the state and constituent powers could be reversed without suspending the constitution:

In the hands of the workers, political democracy can be expanded to a social democracy through changes in the legal order, through the systematic transmission of the principle of democratic equality and democratic will-formation to economy and society by law, where the state loses its repressive character and transforms itself into the common self-management (*Selbstverwaltung*) of the social process.³⁵

In sum, Abendroth's theory of constitutional compromise re-located notions of democracy, constituent power and revolution by connecting them to the structure of capitalist societies. Most importantly, Abendroth argued that state, society and the capitalist economy are constituting different social spheres.³⁶ Taking up the Marxist legacy, he started from the assumption that these spheres are functionally connected to each other since only their interplay can provide for societal regulation by – at the same time – being crisis-ridden through internal contradictions. Abendroth took a nuanced stance: on the one hand, he was clear that typical affinities between the state apparatus and the ruling class constitute an obstacle to the social transformation he envisaged. However, on the other, he saw the constitutional nexus as a fertile ground for subaltern social forces to re-enter the circuits of rule and to fundamentally transform them.

9.3 THE EVOLUTION OF SOCIAL COMPROMISE: FROM INTERNATIONAL LAW TO NEOLIBERAL CONSTITUTIONALISM

It needs to be acknowledged that Abendroth elaborated his constitutional theory in the age of industrial capitalism. The decisive class divide, for Abendroth, was located in the industrial

³⁵ This is how Abendroth envisaged the aims of the social democratic party in his alternative proposal to the SPD's Godesberger Programm from 1959: W. Abendroth, *Antagonistische Gesellschaft und politische Demokratie* (Luchterhand, 1967), 414.

³⁶ Cf. how Abendroth stressed the contradiction between constitutional law and economic powers, in W. Abendroth, 'Aufgaben einer deutschen Linken (1963)', in M. Buckmiller (ed.), *Gesammelte Schriften* (Offizin, 2013), 520 ff.

sphere and was articulated by strong labour parties and trade-unions with mass membership. Though he published selective attempts to transfer his approach to European integration and international law,³⁷ he took the nation-state as the central unit of constitutionalisation. However, it is possible to generalise some of his assumptions and make fruitful use of them when it comes to reconstructing the evolution of constitutional compromises. In the post-war era, being influenced by Roosevelt's 'New Deal' in the United States and anti-fascist popular front approaches, constitutional orders were committed to both civil *and* social rights and kept the question of whether the societal order is liberal-capitalist or socialist open.³⁸ This is true for post-war constitutions in Western Europe as well as for international law and the foundation of the United Nations. They were characterised precisely by the compromise that Abendroth investigated.

However, Abendroth's theory tends to be too static to trace the evolution of these compromises because it resurrects an enduring 'war of position' (Gramsci) between organised industrial labour and the ruling classes. As the subsequent development of constitutional compromises demonstrates, the overall approach has to be reformulated in more dynamic terms: modern societies are capitalist societies. But capitalist societies are – as already observed by Marx – functionally differentiated: They establish an interplay of different social systems, most notably the economy, politics and law. In this interplay, each system reproduces itself in a self-referential and dynamic manner. Not least, the political and legal system are formally detached from the economy.³⁹ However, in this ensemble the capitalist economy exerts a structural dominance as law and the political state are configured in a way that guarantees the self-reinforcing process of capital accumulation. Since social systems (re-)produce their own contradictions between dominant and subaltern social forces, antagonistic conflicts spread beyond the industrial sphere and the capital/labour divide. The 'causal nexus of functional differentiation and class struggle, of functional disorder and legitimization crisis' is not reducible to the economic sphere, rather 'one should take the conflict of capital and labour as a paradigm case for the critical analysis of other functional spheres of modern society'.⁴⁰

Admittedly, the appeal of 'class' as a category stemmed not only from highlighting economic domination, but from determining a societal force which is able to lever the blockades of social evolution through its functional role within industrial production. However, historically, other well-organised social groups and labouring classes established effective alliances which transformed the course of social evolution by drawing on contradictions such as those between the global north and the global south or between men and women. Following these insights, there is a compelling case to re-specify the notion of class in terms of subaltern social forces. This dynamisation can be observed in the subsequent evolution of constitutional compromise from the 1960s onward. In western societies of that period not only blue-collar workers, but civil rights and black power movements, student groups, feminists and new working classes were able to instigate a democratisation of society. They challenged dominating structures in families, schools, companies and political institutions and paved the way for a radical reformism: the

³⁷ See, for an overview, A. Fischer-Lescano and G. Stuby, 'Wolfgang Abendroth und das Völkerrecht', in A. Fischer-Lescano, J. Perels and S. Thilo (eds.), *Der Staat der Klassengesellschaft: Rechts- und Sozialstaatlichkeit bei Wolfgang Abendroth* (Nomos, 2012), 237–56.

³⁸ See H. Brunkhorst, *Critical Theory of Legal Revolutions* (Bloomsbury Academic, 2014), 83 ff.; S. Kott, *Organiser le monde: Une autre histoire de la guerre froide* (Seuil, 2021), 35 ff.

³⁹ See the differentiation of 'organised forms' in law, politics and the economy in Marx early writings: K. Marx, 'Kritik des Hegelschen Staatsrechts (1843)', in *Marx-Engels-Werke Band 1* (Dietz-Verlag, 1972), 232.

⁴⁰ Brunkhorst, *Critical Theory of Legal Revolutions*, 76.

balance of forces was not unilaterally changed in favour of industrial labour, as envisaged by Abendroth. Rather, a more pluralistic scenery of social conflict could be observed. Nevertheless, in many countries, substantive shifts toward democratisation in fields such as the educational systems, the family and the economy took place and a strengthened bargaining power of trade-unions was emerging. Even the radical groups could be considered as playing a vital role for this shift. They provided the necessary background scenarios which threatened existing office-holders, and, at least in part, created windows of opportunity for progressive reformers.⁴¹

It is worth noting that the evolution of constitutional compromises extended to international law as well. The two covenants on civil rights and political rights and economic, social and cultural rights from 1966 reflected the balance between liberalism and socialism. But, again, the compromise was shifted from an unexpected direction. The successes of anti-colonial national liberation movements, which aimed for self-determination at a distance from both western capitalism and real-existing socialism, transformed the scene. Though pursuing different national pathways, the countries of the global south established international coordination with a view to effectuate changes in world politics, most notably against the attempt of powerful nations to exert dominance through foreign military interventions, economic exploitation and neo-colonial dependencies.⁴²

Countries in the global south engaged in a constitutional politics in the vein suggested by Abendroth and combined an institutional strategy with a quest for social transformation. The so-called non-aligned countries had established the United Nations Conference on Trade and Development (UNCTAD) in 1964 and organised themselves as the ‘Group of 77’. The group was able to constitute a majority in the UN’s General Assembly. It pushed the resolution on a ‘New Economic International Order’ in 1974 which aimed at dissolving the dominance of former colonial powers and establishing more sustainable pathways of economic development.⁴³ It made constructive use of the UN General Assembly, constructed its own institutions and brought its own interpretation of international law to the fore. However, the Group of 77 conceived of itself as representing the world’s masses and dispossessed and, thus, as constituent power against the former colonial countries. The NIEO resolution stated: ‘The developing countries which constitute 70 per cent of the world’s population, account only for 30 per cent of the world’s income. It has proved impossible to achieve an even balanced development of the international community under the existing international economic order.’⁴⁴ An influential figure of the non-aligned bloc, the international lawyer Mohammed Bedjaoui, saw the movement as a forerunner of the whole world community by proposing a ‘new world-wide legal, economic and political order, based on the integrated development of the whole earth and on the right to progress of all peoples’.⁴⁵ The Charter of Economic Rights and Duties of States echoed these ambitions.⁴⁶ It was called for ‘Joint consideration of and concerted action

⁴¹ See, for example, in the case of Germany how even the progressive circles of the liberal party FDP (which entered a coalition with the social-democrats in 1969) considered themselves as depending on the scene of social movements and reform forces, cf. R. Appel and M. Kleff, *Grundrechte verwirklichen, Freiheit erkämpfen – 100 Jahre Jungdemokrat*innen* (Academia-Nomos, 2019), 137 ff.

⁴² J. Bockman, ‘Socialist Globalization against Capitalist Neocolonialism: The Economic Ideas behind the New International Economic Order’ (2015) 6 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 109.

⁴³ UN Declaration on the Establishment of a New International Economic Order, Res. 3201, 1974.

⁴⁴ *Ibid.*

⁴⁵ M. Bedjaoui, *Towards a New International Economic Order* (Presses Universitaires de France, 1979), 13; see also U. Özsü, ‘“In the Interests of Mankind as a Whole”: Mohammed Bedjaoui’s New International Economic Order’ (2015) 6 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 129, 131.

⁴⁶ UN Charter of Economic Rights and Duties of States, General Assembly Resolution 3281, 1974.

regarding international economic problems' in order to take steps in the direction of a 'just and rational development of all parts of the world'.⁴⁷ This project had already resonated in the speech of Chilean President Salvador Allende before the UNCTAD in 1972. Here, Allende argued that 'our community is not homogeneous, but divided up into peoples that have grown rich and peoples that have remained poor'.⁴⁸ In his speech, Allende invoked 'us, the peoples of the third world' and accused the 'affluent countries' of pursuing their selfish interests with 'bulldog tenacity'.⁴⁹

The obstacles faced by the non-aligned bloc also reflected Abendroth's diagnosis of constitutional politics. Starting out from existing international law, the non-aligned bloc achieved new norm-compromises and engaged with the institutional structures of the UN. As an organic intellectual of the international free trade system warned: 'The catalogue of development-political demands as e.g. formulated in the Charter of Algier (1967) and the action program of Lima (1971) by the trade-union-like organized Group of 77 leads to an overall revolutionary revision of traditional international economic law from the viewpoint of development policies.'⁵⁰ However, this shift was ultimately thwarted by a counter-revolution from above – a danger that Abendroth already elaborated on in his thoughts about the risk of Bonapartist seizures of power. Once social transformation becomes a possibility, ruling classes are likely to renege on the compromise and establish less democratic modes of political rule. With economic globalisation already under way, neoliberals were able to ally with political forces in different countries such as Chile, the United States, Germany or the United Kingdom and propagate their world-view. In sum, the quest for a 'New Economic International Order' was undermined from the 1980s onward through a distinct constitutional project as meticulously demonstrated in recent studies on the advent of neoliberalism.⁵¹

The central ambition of the neoliberal turn was to undermine socialist tendencies by shielding central tenets of capitalist society – such as private property and investment – from democratic intervention, and, thereby, destroy the social compromise that Abendroth had reconstructed. In scholarly debates, this turn was investigated as a 'new constitutionalism' which was successful in providing a framework for a transnational neoliberal order by dint of institutions such as the IMF, the WTO and the ICSID.⁵² As Agustin Menendez recounts in Chapter 25, neoliberalism also became hegemonic in the EU's constitutional development with the affirmation of private property as the sovereign value of European law, which becomes a powerful *external constraint* that constitutes, disciplines and fragments public power.

9.4 ABENDROTH BEYOND ABENDROTH: NEW DIRECTIONS IN CONSTITUTIONAL THEORY

In the last decade, the pitfalls of the neoliberal project became more and more visible. The constitutional compromise was wrecked, the 'new constitutionalism' was unable to establish societal cohesion and sharp crisis tendencies were constantly revealed, ranging from the

⁴⁷ Ibid., Preamble.

⁴⁸ S. Allende, 'Address at the Inaugural Ceremony', in UN Documents, *Proceedings of the United Nations Conference on Trade and Development, Third session Santiago de Chile* (United Nations, 1973), 349.

⁴⁹ Ibid., 349, 350.

⁵⁰ E. Petersmann, 'Die Dritte Welt und das Wirtschaftsvölkerrecht' (1976) 36 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 492, 496.

⁵¹ Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press, 2018), 263ff.; see also T. Biebricher, *The Political Theory of Neoliberalism* (Stanford University Press, 2018).

⁵² S. Gill and C. A. Cutler, *New Constitutionalism and World Order* (Cambridge University Press, 2014).

financial crisis in 2008 and the crisis of democratic representation to the incapacity to mitigate climate change. In constitutional theory, the ‘new constitutionalism’ was conceived of as taking up to the legacy of ‘authoritarian liberalism’; a distinct constitutional approach which was highlighted by conservative and neo-liberal circles in the 1930s and 1940s. It aimed at shielding private property, financial markets and the distribution of wealth from democratic intervention through the use of constitutional constraints and de-parliamentarisation of decision-making.⁵³ Since its hey-day in the 1990s and 2000s, the authoritarian liberalism of our time, obviously, became more and more crisis-ridden and faced a broad range of reaction patterns: on the one hand, attempts to safeguard its neoliberal kernel from re-negotiation were even exacerbated, for example, in the context of the Euro-Crisis from 2009 to 2013.⁵⁴ On the other hand, this kernel was recalibrated or even undermined – not the least in the light of new types of geopolitical conflict and the apparent need for public investment in order to keep the economy running.⁵⁵

Against this backdrop, it is not surprising that new directions in constitutional theory are investigating the potential of compromise and constitutional hybridity.⁵⁶ This is an important tendency because it re-orientates the debates on overcoming the democratic deficits of the neoliberal era. At least in constitutional theory, the struggles for inter- and transnational constitutionalism largely revolved around issues of procedural legitimation. The questions of whether to distribute competencies at the national, the supra- and/or the transnational level and how to design legitimate procedures were hotly debated.⁵⁷ From the perspective of social compromise in the vein of Abendroth, one would take a different starting point and ask not only how to apply democratic procedures in general, but how to embed them in the larger background conditions of societal co-evolution so that they contribute to inhibiting domination and, potentially, transforming constitutional orders.

In the contemporary world, this perspective has recently and compellingly been advanced by variants of ‘plebeian’ and ‘sociological’ constitutionalism. Taking its cue from the early modern thought of Niccolò Machiavelli, plebeian constitutionalism draws on a materialism of political power.⁵⁸ Accordingly, societies are split between the rulers and the ruled, which are driven by the competing *umori*. While the few who rule are driven by their hunger for domination, Machiavelli observed that the many tend to adhere to a different social psychology – they gather around the opposite affect of not being ruled.⁵⁹ Hence, nurtured by the few’s hunger for domination, constitutional orders are always characterised by the danger of ‘systemic corruption’ from above, which can be defined as ‘a form of political decay that manifests itself as an

⁵³ See M. Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press, 2021), 25 ff.; G. Chamayou, *The Ungovernable Society: A Genealogy of Authoritarian Liberalism* (Polity Press, 2021), 204 ff.

⁵⁴ Wilkinson, *Authoritarian Liberalism*, 215 ff.

⁵⁵ See, e.g. for the case of the WTO: E. Petersmann, ‘The WTO Legal and Dispute Settlement Systems in Times of Global Governance Crises’, in J. Cheng-Chia (ed.), *A New Global Economic Order* (Brill, 2021), 84–118.

⁵⁶ G. Teubner, ‘Quod Omnes Tangit: Transnational Constitutions without Democracy?’ (2018) 45 *Journal of Law and Society* 5; C. Vergara, *Systemic Corruption: Constitutional Ideas for an Anti-Oligarchic Republic* (Princeton University Press, 2020).

⁵⁷ See, e.g., A. Peters, ‘Dual Democracy’, in J. Klabbers, A. Peters and G. Ulfstein (eds.), *The Constitutionalization of International Law* (Oxford University Press, 2009), 263–341; M. Kumm, ‘The Cosmopolitan Turn in Constitutionalism. An Integrated Conception of Public Law’ (2013) 20 *Indiana Journal of Global Legal Studies* 605.

⁵⁸ J. P. McCormick, *Machiavellian Democracy* (Cambridge University Press, 2011).

⁵⁹ For the competing *umori*, see N. Machiavelli, *The Prince* [1532] (University of Chicago Press, 1998), 39; N. Machiavelli, *Discourses on Livy* [1532] (University of Chicago Press, 1996), 16.

oligarchization of power in society'.⁶⁰ In order to oppose this type of corruption, the plebeian current in constitutional theory stresses the importance of counter-institutions which 'empower common people against the powerful few (...)'.⁶¹ Thus, a hybrid constitutionalisation must be established which allows the many to control the elites through '(...) class-specific popular empowerment, and elite-constraining institutions'.⁶² Again, taking up the materialist tradition, these analyses start from a 'complex examination' which 'conceives of the constitution as an embedded set of norms that can be adequately grasped only if we integrate the political, economic, and social spheres into the analyses of forms of higher-law'.⁶³

However, the co-evolution of the political, the economic and other social spheres must be addressed. Admittedly, Machiavelli drew on the *umori* of different social classes and, for that reason, has always been considered as a materialist *avant la lettre*.⁶⁴ But it needs to be noted that he was a child of early modernity and committed to a cosmological worldview where society is ordered around constant proportions. As analysed, however, from the nineteenth century onward, societies are evolving, leaping forward, regressing backward, overcoming and negating themselves or even breaking down; they are in constant motion. They are not stratified, but functionally differentiated societies. Though Machiavelli's observations may be to some extent timely when it comes to contest clear tendencies of oligarchisation, the overall setup of modern societies does not consist of clearly demarcated class-segments (wealthy versus normal people) which are either repressed or expressed within the constitutional order. Most importantly, it is characterised by a combination of complex social systems and the dominance of the capitalist economy where conflicts between the many and the few are proceeded. Hence, one needs to engage with the paradoxes and contradictions of law, politics and the economy and how they are formally detached from each other while being constitutionalised as a mutually reinforcing systemic set-up of capitalist society.⁶⁵

To overcome a static materialism, what must be investigated is how social conflict is constituted and reproduced through abstraction and dynamism within social systems. Even Marx always stressed the importance of this aspect in his inquiries into the ambivalence of plebeian movements. Though he was a political activist in the 1840s who sympathised with revolutionary circles, he was suspicious of French insurrectionism for exactly this reason: as these movements replicated the symbolic inventory of the French Revolution and confined themselves to an insurrection from 'below', they were not able to take the emerging conflicts of modern society into account and, most prominently, its political economy. Marx feared that 'the proletariat will squander its energies – at least in the initial stages of the movement – in senseless, futile uprisings that will be drowned in blood'.⁶⁶ Thus, one has to analyse a complex process of co-evolution which not only revolves around the vital interests of 'normal people', but also

⁶⁰ Vergara, *Systemic Corruption*, 2.

⁶¹ *Ibid.*, ix.

⁶² McCormick, *Machiavellian Democracy*, 16.

⁶³ Vergara, *Systemic Corruption*, 106.

⁶⁴ See L. Althusser, *Machiavelli and Us* (Verso, 2011); A. Gramsci, 'Anmerkungen zur Politik Machiavellis', in K. Borchmann and W. F. Haug (eds.), *Gefängnishefte – kritische Gesamtausgabe* (Argument-Verlag, 1991), 1532–622.

⁶⁵ See, e.g., how critical systems theory conceives of capitalism: 'In such a view, "capitalism" characterizes not only the functioning of the economic system, but a (historic) system formation, a very distinct situation of interdependence between the systems of politics, economy and law in the world's societal ensemble of institutions': A. Fischer-Lescano, 'Critical Systems Theory' (2012) 38 *Philosophy and Social Criticism* 3, 7. See also the approach to capitalism as functionally differentiated society, in: D. Schechter, *Critical Theory and Sociological Theory: On Late Modernity and Social Statehood* (Manchester University Press, 2019).

⁶⁶ K. Marx, 'Kritische Randglossen zu dem Artikel "Der König von Preußen und die Sozialreform. Von einem Preußen" ("Vorwärts!" Nr. 60) (1844)', in *Marx-Engels-Werke Band 1* (Dietz-Verlag, 1976), 407.

around economic innovation, cultural change, productive forces and administrative and technocratic non-popular passive revolutions and negative externalities. Admittedly, to confront the few in order to overcome the oligarchy can serve as a plausible political strategy. However, it must disclose how the co-evolution of constitutionalism and society actually operates. Therefore, it can encounter practical problems when it comes to identifying transformative potential which does not correspond to the many/few-divide but shifts the balance of class forces from unexpected directions (see Section 9.3).

What still needs to be addressed is how compromises interact with the existing arrangement of social systems. While drawing on hybridity as well, sociological constitutionalism has highlighted this dimension. It takes its cue from systems theory and observes that societies undergo an increased functional differentiation in the passage to transnational constitutionalism.⁶⁷ In that perspective, increasingly, global social systems tend to carry out their own particular constitutional regimes in fields such as the world economy, world politics, world health, etc. The call for hybrid constitutionalisation sneaks in because of the lingering tendency of these regimes toward self-referential closure and rationality-maximisation to the detriment of their respective social environment. From that perspective, systemic corruption and elite dominance are not identified as emanating from clearly demarcated social classes. Rather, it is assumed that each regime tends to totalise its rationality and expand its communicative media: this is not only true for the capitalist economy in the transnational economic regime ('money'), but also for the expansionary logic of the sciences ('truth') or of the political system ('power'). The respective rationalities should be domesticated through regime-specific communicative counter-cycles. It is assumed that 'democratization cannot be realized as a guarantee for the identity of rulers and ruled. But it can be realized as a guarantee for forceful organized dissent which challenges the decisions of power-holders effectively (...)'.⁶⁸

However, organised dissent must be re-specified in view of the fragmented structure of constitutional regimes and in order to react adequately to the respective expansionary tendencies. It can be seen as a plurality of contestations which calls ossified communicative self-reference into question. In sociological constitutionalism, these counter-cycles mostly stem from civil societal protest movements and transnational governance regimes. But such cycles are limited since they may not revoke functional differentiation which, in that perspective, amounts to a normative conception that allows the emergence of a plurality of social communication spheres. On these grounds, it is assumed that over-politicisation can also trigger a totalising dynamic, no less destructive than the regimes' universalising urge.⁶⁹ Though this is a nuanced approach to the co-evolution of constitutionalism and social structure, it aims at taming constituent powers' holistic dimension. Abendroth's approach reminds us, however, that the constitutional compromise relies on holistic threats such as scenarios of revocation and transformation which can be seen as a pre-condition of adequate hybridity.⁷⁰ This counts even for a central conception of sociological constitutionalism: the functional differentiation of liberal western societies. From an orthodox systems-theoretical perspective, functional differentiated societies are characterised by the interplay of constituted social systems which do not guarantee for the full inclusion of the individual in all systems but offers inclusionary perspectives through

⁶⁷ G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press, 2012); A. Fischer-Lescano and G. Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999.

⁶⁸ Teubner, 'Quod Omnes Tangit', 13.

⁶⁹ Teubner, *Constitutional Fragments*, 55.

⁷⁰ K. Möller, 'From Constituent to Destituent Power Beyond the State' (2018) 9 *Transnational Legal Theory* 32.

the welfare state. Nevertheless, it needs to be noted that this type of embedded liberalism was connected to potentially de-differentiating background conditions.

Taking up insights about the evolution of social compromise (Section 9.3) and new directions in constitutional theory (this section), one could argue that what was true for constitutional compromises in the post-war era may also be true for our contemporary world: the struggle for new compromises hinges upon the re-invigoration of constituent power and background scenarios. As the insights into the evolution of social compromise demonstrated, transformative options which pave the way for hybrid constitutionalisation may emerge in forms which neither correspond directly to the many/few distinction (plebeian constitutionalism) nor mirror functional differentiation (sociological constitutionalism) but emanate from unexpected places. While the quest for new types of transnational constitutional compromise are already under way and the ecological crisis becomes more and more pressing, Abendroth's legacy can be used as a starting point which connects the efforts for a global 'New Deal' to basic tenets of constitutional theory – thereby integrating in the calculus that the challenge cannot be reduced to correct the existing courses of constitutional evolution, but to overcome systemic blockades in order to achieve social transformation.