The title of this Element indicates the object of its study. The drive to focus on the material dimension of the legal order is dictated by a timely concern, that is, the impulse to understand the legal relations that pertain to the contemporary political economy. This angle has taken up a new and urgent configuration with three of the most dangerous crises of this century’s first two decades: the financial and economic crisis of 2008, the Covid-19 pandemic, and the incipient environmental catastrophe. These issues have made the question of the materiality of law more pressing than ever. Yet, articulating the legal order within the perimeter of a concrete social and economic organisation is part and parcel of a more general enquiry into the connection between fundamental social relations and the activity of legal ordering through institutions and other non-institutional factors. That connection instantiates what could be defined as the ‘materiality relation’, the invariable aspect in it being that it concerns (fundamental) aspects of the social order and its reproduction. What the nature of that relation is and what its relata are remain controversial issues. One of the main problems is that the question has only intermittently been addressed in legal philosophy. For a proper reappraisal, it is necessary to analyse the nature and the features of the materiality relation. In other words, how does the legal order relate to its constituents? This Element won’t provide a definitive answer to this question, but it will articulate the range of relata that have been employed in the explanation of legal order’s formation and then propose a research agenda. Hence, it seems appropriate to start by reconstructing how the idea of materiality has been either excised from legal reasoning or conceived often in non-material terms (because the constituent social facts have been described in non-material terms), and not only in domestic legal theory but also within transnational legal theory.

The starting point of the enquiry is to explain how the dominant ways of conceiving of the emergence of the legal order within society have often excluded the question of its material organisation, that is, its constituent materials. This section will broach three of the main devices for explaining the relation between societal formation and legal ordering (via the constitution of legal authority). These are political theories whose explanatory power has exercised an enormous grip on the imagination of legal theorists. They are mostly responsible for establishing the frame for thinking about the rise of the legal order and its unfolding. In this way, they have set the scene for mainstream legal theories and how they conceive of their content while underlaying their societal dimension. Such obfuscation has been realised in two ways: either through the assumption that the processes of social organisation involved in shaping the legal order would remain external to that order or through the idea
that law would establish its authority on a basis that has nothing to do with its social underpinnings, only with constitutive principles. In the first case, an abstraction – usually, assuming the existence of officials (Roughan, 2019) – allows the theorist to ignore the material dimension of the legal order. In the second case, the legal order is supposed to bootstrap the material dimension into existence. In either way, the question of what we will call the materiality relation is marginalised when not left completely invisible.

In order to grasp the theoretical origins of this exclusion from legal thinking, it is important to recap how political philosophies have allowed or even realised the displacement of materiality with some of their most influential notions. As we shall see, part of the problem that concerns both political and legal philosophy is a certain obsession with the order’s origin. In particular, the removal of materiality is often dictated by the first move of the theory: locating the origin outside of the social and legal orders is a way of obscuring how the material organisation of society has been productive of order or is, at least, imbricated within the order in a way that cannot be easily ignored.

The first of these theories is possibly the most important modern political conception of the genesis of the social and legal order: the social contract. According to this theoretical device, the social and then the legal order are brought about through a hypothetical or real agreement by all the subjects of the social order itself. As is known, in the most common versions of the social contract the legal order emerges against the background of the state of nature, which is portrayed as a pre-socialised state where it is rational for agents to intend to escape it. Whether it is a dangerous place as in Hobbes’ conception or a milder but uncertain state as in Locke’s, it does not matter for the determination of the social contract’s function. In this fictional state of nature, cooperation is either unnatural or extremely fragile, and certainly insufficient. Accordingly, the question that drives the formation of the social contract is deeply shaped by this precarious condition. In other and more mature versions, when the state of nature is openly formalised as an epistemic device (for example, the original position as it is in Rawls’ first phase), it is presented as a way to assess our ethical theories and their underlying assumptions (Rawls, 1971, s. 3). In both cases, interests are rightly put at the centre of social formation, but the whole point (and leverage) of the social contract is that it provides a solution for the protection of certain interests that are deemed to be formed already in the pre-social phase. In this way, the relational formation of interests is obliterated and the main aspects of the organisation of the social order are defined on the basis of an abstraction that does not know of any process of socialisation. The legal order and its objectives are also conceived as being external to the process of socialisation.
The problem for legal theory is that this fiction is fabricated in a way that displaces the role of constitutive social relations. In fact, the social relations that pertain at the time of the so-called origin (whether the state of nature or the original position) are then concealed, nullified by virtue of a thought experiment, but one that acts as a distorting lens because it de-politicises existing material conditions and social relations. Once translated into legal theory, the social contract also provides the frame for taking matters out of the ordinary political and social processes of contestation. In other words, the material aspect of the legal order is entirely (and deliberately) concealed from view at the very important point of societal formation and organisation. The political theory of the social contract is then one that rationalises the relation between the rise of the social order and the formation of the legal order as a relation of separation. Accordingly, the reasons for having a political association – more concretely, for having that specific political association – can be left outside of the development of the legal order because they do not form part of the legal fabric. The social contract is a device for theorising the irrelevance of co-operation and interaction (i.e., social organisation) for the formation of the legal order. Strangely enough, this is a device that, at least in certain versions, is supposed to give moral reasons for entering into society (cf. Rousseau, 1994). But the logic of contract – if truly contractarian – is usually one of predetermined self-interest. As noted by a prominent critic: ‘Those who enter contracts typically are concerned with their own benefits and need not care about the benefits to their partners in trade’ (Hardin, 2013, p. 23). It is not relevant for the topic of this section whether social contract thinking is the most effective way of dealing with issues of collective co-ordination and the composition of different interests. In its own terms, it might be. But it is essential to note that placing the origin of the social order outside of the legal order leaves its materiality outside of legal knowledge.

From the perspective of the social contract, constitutionalising certain principles and rights is admitted as a device to keep the order together (say, for example, with the constitutionalisation of the maximin principle), by protecting some of the interests that allegedly existed already before their entry into society. But the point of observation provided by the social contract does not allow us to question the modality of formation of the order and does not provide an understanding of how it was formed or what was, in that process, the role of the legal order. The legal order is basically introduced by the social contract, but it remains external to social relations. Rather, it is applied to social relations as law comes to be seen as an instrument of protection of already established social roles and functions.
The most important alternative to the social contract tradition is represented by the conventionalist approach. This is one of the most developed and sophisticated explanations and justifications of legal orders and particularly of liberal-democratic orders (for a classic defence, see Hardin, 1999). Since at least the publication of David Hume’s work, the idea that the organisation of society and the creation of a government are the products of a social convention has been acquiring a lot of traction. In recent times, the study of conventionalism has been revived by David Lewis (1969), who has provided an extensive analysis of what a convention is. In legal and political theory, the idea has become prominent after having been taken up first by H. L. A. Hart (1994) and then by Gerald Postema (1982) and by Andrei Marmor (2008). Furthermore, the idea has gained enormous influence for two reasons. First, conventions are an apt device for explaining the co-ordination necessary to achieve the complex organisation of pluralist societies. As they do not exercise a mandatory force on the basis of substantial reasons, conventions provide a useful point of convergence for different perspectives and values without frustrating the expectations of each agent in an unreasonable way. In fact, according to the classic understanding, a convention is followed mainly because other people follow it (Postema, 1982, p. 167). To follow a convention is to engage in a common form of behaviour and to meet the expectations of others, while having expectations oneself regarding the behaviour of others (Spaak, 2018, p. 334). In other words, a convention can solve problems of co-ordination,1 deep disagreement, and game-theory challenges in a more effective way than the social contract device. It does not entail the demanding expectation of a general and explicit agreement on all the essentials of the legal order.

The biggest influence of conventionalism can be seen in the impact made by a conventionalist reading of the rule of recognition in contemporary legal theory. As is known, Hart himself (1994, p. 255) came to endorse that interpretation of the rule of recognition in his postscript. The relevance of this approach to legal theory for the current section is evident. One could study the connections among politics, law, and the economy as existing in an equilibrium set by certain conventions among legal officials. This is not a taxing conception as it does not mobilise the substantial norms of a constitutional order (or, at least, not directly). But, precisely for these reasons, it does not capture the ground of the legal order, either.2 This is not surprising because the deeper the agreement on the point of a common behaviour, the higher the probability that there will be conflict or

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1 Postema (1982, p. 197) is the most explicit in stating that there are at least three levels of co-ordination: between citizens; between citizens and officials; and between officials.

2 For a different reading that tries to adapt the rule of recognition to the metaphysics of grounding and anchoring, see Epstein (2015, ch. 7).
disagreement. However, it is possible to imagine that the conventionalist explana-
tion of the legal order might come across as compatible with the material study of it, suggesting an understanding of the rule of recognition as the articulation of the materiality relation. The possibility of reading the rule of recognition as the coupling between the positive and the social normativity of law confirms that this would not be an eccentric move. For this reason, it is worth unpacking further the notion of a conventional rule of recognition. According to one of the most prominent theorists of the conventional rule of recognition, Andrei Marmor (2008, pp. 14–15), all conventional rules respect two conditions: a condition of dependency and a condition of arbitrariness. The former postulates that one of the reasons for following a convention is that others do the same. A group of people follow a rule R if they have certain reasons to follow it. But the members of the group do not have to follow the rule because of those reasons. As Joseph Raz (1990, p. 178) puts it, ‘they must conform to the rule but they do not need to comply with it’. Marmor implies that members of the group do not even need to be aware of the reasons so that their obligation depends on the compliance of the others. The rule of recognition instantiates these features in its most visible form because it links political and social morality with authoritative normativity. As Marmor reminds us, the reasons to obey the law belong to moral considerations, but these considerations cannot be inferred or derived ‘from the norms that determine what the law is’ (Marmor, 2011, p. 152).

The second condition assumes that there is an element of arbitrariness in the choice of convention. The conventional rule can be arbitrary (i.e., it could have been otherwise) even if it reflects moral or political convictions (Marmor, 2001, p. 21). Ultimately, it is the rule-following behaviour that makes it a conventional rule more than its substantial content. The reason for following conventional rules is adhesion to the convention of the relevant agents. In other words, the key organising factor of the legal order is conventional, while other substantial principles and aims enter the picture only if allowed and introjected via the fundamental social convention. The social convention on which the order is based, while different in its driving logic from the social contract because it assumes that the convergence operates through adjustment of expectations, shares with the social contract the fact that the constitutive rules of the legal order do not make reference to the organisation of social relations. In brief, although not indifferent to co-operation and the function of socialisation of interests and expectations, the conventionalist view does not thematise these as the main reasons behind the formation of the convention. The social convention is a way to solve the problems generated by issues of co-ordination, co-operation, and conflict of interests, but always from a position external to the content of social relations.
A common alternative to the previous two approaches is represented by the social and political theories that focus on the symbolic origins of the legal and social order. The gist of these political theories as currently used in legal and sociological studies is typically modern and advances the idea that social orders in the age of the state are formed around an ordering principle like that of sovereignty (see Loughlin, 2003, ch. 5). Unlike contract or convention, sovereignty mobilises a different type of motivation and cannot be explained simply in terms of game theory or co-ordination issues. Its political psychology makes the principle of sovereignty rather different from these other alternative explanatory devices. Individual interest is not the main motive behind the principle of sovereignty. In fact, the dimension addressed by sovereignty is not primarily the negotiation or bargaining between interests or the rational deliberation about the best design for a community’s legal order. Rather, it is a particular achievement, the general will, that puts into motion collective political action. This achievement is not parasitical on a previous pre-political arrangement because it makes the rise of the political sphere the key moment of community formation and provides symbolic access to a dimension of political meaning. This is already evident in Rousseau’s conception of sovereignty and his emphasis on the discontinuity between the principle of sovereignty and government. According to Rousseau (1994), forming a sovereign political community entails giving up one’s natural rights in order to receive back the goods of the civil condition. This is a process that radically changes the participants. Unlike the previous strategies of explanation about the formation of the social and legal order, contract and convention, the emergence of sovereignty in Rousseau requires indeed a transformation of the individual from private person to citizen. In the end, the logic at play in the institution of a sovereign association is everything but contractual: ‘[N]othing is truly renounced by private individuals under the social contract . . . [I]nstead of abandoning anything[,] they have simply made a beneficial transfer, exchanging an uncertain and precarious mode of existence for a better and more secure one, natural independence for liberty, the power of hurting others for their own safety’ (Rousseau, 1994, p. 70).

Contrary to how it might appear prima facie, this is not contractualist thinking. In Rousseau’s social contract there is much more than the deployment of strategic rationality. The exit from the state of nature is led by recognition of the common interest. The complete alienation of one’s rights brings about nothing less than a profound change in the subject. The logic of association entails the acquisition of moral status via the concept of the general will. Sovereignty is then manifested through the exercise of the general will and for this reason cannot be represented or transferred. The distinction between
sovereignty and government derives from this notion of the general will. Rousseau is worried about the extension of government’s powers not because he wants to protect individual autonomy but because the expansion of governmental reach might encroach upon the sovereign and limit its powers. Government can only apply and implement the law through decrees and decisions, but the set-up of the political community is a competence of the sovereign and its general will.

What is of interest here is the different logic undergirding this important tradition of sovereignty, one that identifies its order-generative capacity in a dynamic that is not of strict reciprocity but is still normatively oriented towards equality. The association generates more power than is given up by subjects; it also socialises interests, making possible the emergence of the general will over the will of all. In this way, sovereignty is productive of social co-operation and order. Another non-contractual mode of conceiving of the emergence of the social order as a sovereign device begins not with interest but with desire, and it operates according to the logic of political sacrifice. It is possible to identify a powerful exemplification of such a sacrificial logic in the work of René Girard (1972). His starting point is neither the pre-political interest of social contract thinking nor the indifference to reasons typical of the conventionalist approach, but desire and its mimetic nature, by which Girard means the logic of reproduction of desire, a logic based on the tendency to imitate someone else’s desire. In brief, human beings are desiring animals, but they do not know what they want to desire. Hence, desire is generated by imitation, that is, through the mediation of a model. By definition, multiple desires over the same object cannot all be satisfied and this fact might generate rivalry. Manufacturing the social order out of this condition is demanding because rivalry can quickly escalate into violence and open up a cycle of revenge. Only a sacrificial action, according to Girard, can interrupt the cycle of violence engendered by mimetic desire and potential revenge. This is made possible by the individuation of the scapegoat, which is produced by ‘a deliberate act of collective substitution performed at the expense of the victim and absorbing all the internal tensions, feuds, and rivalries pent up within the community’ (Girard, 1972, p. 31).

3 At its core, this is a non-reciprocal logic the aim of which is to contain and channel the latent unleashing of social violence intrinsic to mimetic desire. The aim is obtained by choosing a victim.

Sacrifice becomes the political device for protecting the legal order from its own violence: ‘The sacrifice serves to protect the entire community from its own violence; it prompts the entire community to choose victims outside itself’ (Girard, 1972, p. 32). One of the problems of Girard’s account is that it implies that sacrifice is an anthropological feature of all social orders, as it is the origin of the social bond. But this is an overly inclusive claim.
The outcome of this process of victimisation produces a sacred and symbolic dimension with ordering capacity (Wydra, 2015, pp. 1–18). But this is far from being only a limitation of violence within the community (although it is an important containment); it also participates in the constitution of the social order by instituting a symbolic sphere. Girard’s intuition, however, has been given a twist by modern legal theorists. Instead of looking into the rational choice and preference-based types of explanation or justification of the political community, this type of political anthropology puts exposure to sacrifice as a constitutive aspect of ancient and modern associations. But, unlike Girard’s version, the possibility of sacrificing is not part of a process of victimisation. Rather, it is an act with which a subject sacrifices something for the existence or preservation of the legal order. As brilliantly described by Moshe Halbertal (2011, p. 55), this means that in modern legal orders the sacrificial logic takes the form of ‘sacrificing for’ rather than the ancient practice of ‘sacrificing to’.

The potential unevenness that lies at the core of the social order is owing to the exposure of people (willingly or unwillingly) to sacrifice for the sake of the creation or maintenance of the legal order (Kahn, 2004, ch. 5). The legal order is portrayed as the formalisation of a certain political dynamic, but, even more importantly, its existence remains dependent not only on the political willingness to invest at least potentially the body politic with a sacrificial economy, often in the form of conscription, but also on exposure to potential mass destruction as is the case with terrorism and nuclear weapons (for an influential take, see Agamben, 1998).

This position offers a powerful critique of the idea that a political association is a contractual mechanism or a conventionalist procedure. But the pars construens is less convincing and leaves the function of holding a political community together to an impalpable and flimsy concept like political will. At best, this approach approximates a version of political theology that is helpful in providing a critique of the formalism affecting the social contract tradition and conventionalism by emphasising the necessary symbolic dimension of the social order. But it severs the connection between the symbolic and how society is organised while making access to the symbolic dimension transcendental. Perhaps it is also true that the sacrificial logic behind it can trigger a form of legal imagination in virtue of its capacity to reach the

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4 For this reason, sacrifice can be ritualised and obtaining the right distance from the community becomes one of the objectives of the ritual. If the distance were not enough, the sacrifice would just trigger another cycle of violent revenges and if it were too much, the sacrifice would fail to register as such and would qualify as a crime.
symbolic level, but it is not clear why this would be the only available associative logic or why it would shape a legal order into a concrete form (Girard, 1986). Anthropologically, it is questionable to state that political sacrifice is the necessary and unavoidable feature that generates authentic and stable social ordering. The sacrificial argument, usually employed against market fundamentalists and instrumentalists of almost any sort, does not enjoy anthropological universal validity.

Nor is it clear why it is always the case that sacrifice represents the cornerstone of political commitment. As noted by Wendy Brown (2015, pp. 213–14), ‘sacrificing for’ can also become a device for hampering imagination when it is associated with economics-driven rationality. As Brown remarks, the sacrificial device can be turned on its head and become a shared sacrifice for the sake of only some parts of the community or, in the case of the rhetoric about austerity, for economic growth. For example, this is the logic undergirding the recent constitutionalisation of austerity (cf. Christodoulidis 2021, ss. 3.2 and 3.3). But this last instantiation cannot be fully grasped if sacrifice is understood as generative first of all of a symbolic dimension. As it is for social contract thinking, in this version sovereignty belongs to an extraordinary moment that remains external to the ordinary organisation of social relations. It sets them into motion by remaining external to them, hence the possibility of imagining that the principle of sovereignty can transcend civil society. The material aspect works rather as a bearer of the extraordinary function of sovereignty, but, although it invests citizens’ bodies, it does so as a marker and not as a principle of social organisation. Rather than remaining anchored to untenably vague notions of life and body, charisma and sovereignty, the rationality of the principle of sovereignty is better grasped when attached to processes of social differentiation and organisation. In the end, the coupling between sovereignty and sacrifice clearly invests a material dimension, but political theology reduces sacrifice to a mark on the body of the citizen. This view fails to capture the ordering properties of sovereignty. There is no visible and clear relation between exposing the body to political sacrifice and a specific organisation of the legal order, unless the theory contents itself with a reconstruction of the mystical foundation of authority. This approach might be able to explain the symbolic dimension of the legal order, but certainly not its materiality, and one is left wondering whether it would be enough to understand the identity of the order.

The uneven and non-reciprocal aspects of the conception of sovereignty illustrated so far nonetheless contain some precious insights, in particular the idea that the formation of the legal order does not need to postulate any fictitious equal exchange. The process of social organisation tends to be based (though
not exclusively) on a distribution of roles and functions, which can be driven by patterns of reciprocity or of other nature (see Polanyi, 2001, ch. 3). The materiality of the legal order is given shape around these focal points of social organisation. Specifically, in modern times, the process of societal formation has been driven by differentiation and specialisation (Thornhill, 2011; Christodoulidis, 2022; and, for a different and ‘hybrid’ view, Latour, 2006). Because of these traits, it is necessary to limit certain claims concerning the materiality of the legal order only to modern legal experiences, that is, orders that have reached a certain level of complexity and functional specialisation. Accordingly, it is also better to avoid over-generalising claims about universal and exclusive ordering factors for each and every society. In a context of growing complexity and interdependence, the organisation of fundamental aspects of societal formation is a condition of existence and development that cannot easily go unnoticed. Unlike other political theories concerning the origins of order, a material perspective entails an immanent view. In other words, an analysis of the materiality relation should begin with the assumption that seeds of the legal order are already contained in patterns of social organisation: not as an effect of it, neither as a condition of possibility of that same social organisation. Rather, the legal order is immanent to social organisation.

Organisation and relations emerge as the twin objects of analysis for understanding the processes of how materiality migrates into the legal order. The moulding of social and legal orders is thus understood as a process of (according to the different perspectives) production, integration, assemblage, and composition (this is not intended to be an exhaustive list).

The second key move for approaching the materiality of the legal order without resorting to unique ordering methods is to focus the attention primarily on the ordinary processes of societal formation. Once the emphasis moves from the exception to normality, the possibility of accessing the materiality of the legal order becomes more concrete. The relation of materiality takes up its form not during exceptional moments but on an ordinary basis and with a view to finding a relatively stable and, indeed, normal order. The centre of this conception is the organisation of social relations that allows society to produce and reproduce itself. With a different terminology, it is legitimate to state that the organisation of society is the moulding of a set of social relations of which law is certainly an important subsystem, but not the only one. As already noted, the key starting point is that certain social relations are fundamental for the formation of a society, but they do not remain outside of it once society is formed. This means that the unfolding of certain modern phenomena (e.g., a society’s

5 The modern classic position in political philosophy is put forward in Spinoza (2000).