




## ‘A few practical things’: *The Redress of Law* and the irritation of (critical) constitutional theory\*

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### Abstract

This Article discusses Emilios Christodoulidis’s *The Redress of Law* as a major contribution to contemporary critical constitutional theory, with a focus on its relationship with other lines of critical thought; with systems theory and societal constitutionalism; and with legal pluralism and the global constitutionalism discourses. It argues that the most valuable contribution of *The Redress of Law* lies in its capacity to innovate current theoretical discourses, too often closed in on their conceptual assumptions, in turn modelled on liberal political theory.

**Keywords:** Critical legal theory; constitutional theory; systems theory; societal constitutionalism; global constitutionalism

### 1. The practicality of Christodoulidis’s constitutional theory

*‘No. It is not enough of a book, but still there were a few things to be said.  
There were a few practical things to be said.’*

E. Christodoulidis, *The Redress of Law*, 557

With these words, in conversation with Hemingway’s *Death in the Afternoon*,<sup>1</sup> Emilios Christodoulidis concludes *The Redress of Law* (557), his work of a lifetime. By reclaiming its insufficiency, he gives a sobering touch of humanity to an otherwise majestic, even intimidating book. Undeniably, *The Redress of Law* is a quite daunting work, based on an admittedly obsessive (3) attention to the symmetry in the distribution of contents. Further, it variably uses, discusses, and criticises a vast range of intellectual traditions and theoretical frameworks, from political phenomenology to legal theory, from political economy to systems theory, from critical aesthetics to constitutional history. Some of these traditions and frameworks have high terminological and conceptual entry barriers that might discourage the audience. Admittedly, Christodoulidis’s work might be exacting on the reader’s indulgence.<sup>2</sup>

However, *The Redress of Law* is also traversed by a gentle, even timid – but no less committed – touch, a sort of underground river that unveils the author’s deep connection to the topics of the

\*References in brackets in the text are to E Christodoulidis, *The Redress of Law* (Cambridge University Press 2021).

<sup>1</sup>Whose Epilogue has the following line: ‘If I could have made this enough of a book it would have had everything in it.’

<sup>2</sup>As underlined by A Somek, ‘Scholasticism and Aesthetic Enchantment: Notes on a Perplexing Quest for the Pouvoir Constituant’ 1 (2023) this issue.

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book. The sensitive reader perceives that the intellectual richness and the elaborate writing style of *The Redress of Law*<sup>3</sup> do not come from a position of self-indulgent narcissism. Rather, it comes from a long, conflicted, but unfinished – yes, unfinished – conversation that the author establishes with the reader and himself on how, starting from the critique of global market constitutionalism, to imagine a *political* constitutionalism centred around the ‘guiding distinction’ between constituent power and constituted power (152). This *incomplete* and, therefore, *fully human* quality of *The Redress of Law* makes it a fascinating discovery for the reader open to be overwhelmed by its richness. But I will come back to this below.

A first observation. *The Redress of Law* is a much-needed contribution to a theoretical discourse too often closed in on itself, on its conceptual straightjackets, on its somewhat suffocating vocabulary, oxidised talking points, and lack of institutional imagination, modelled on assumptions of liberal political theory: relatively rigid divides between state and society and between the public and private; focus on political power as the object of constitutional constraint; rigid divide between the domestic and international/global dimensions of legal systems; state-centred legal monism; a static conception of law, detached from the time and means of its application/dissemination; rationality of individuals, conceived as self-authorised, pre-social actors, removed from concrete societal constraints; over-reliance on courts and judicial review for the protection of rights. *The Redress of Law* aims to disrupt such discourses and rise to the level of theoretical complexity required by globalisation’s challenges to constitutionalism. I posit that the practicality of *The Redress of Law* – the ‘few practical things’ – lies in this disruption, in this attempt to open the windows of constitutional theory and let some fresh air – new semantics, new concepts<sup>4</sup> – in.

*The Redress of Law* points at the possibility of different analytical and normative horizons, but without pushing the reader to take a specific path. It does not aim at outlining a self-contained, full-fledged constitutional theory of globalisation. An attentive reader would not expect anything of that sort. *The Redress of Law* disappoints the expectation of those looking for ready-to-use solutions, especially if based on traditional conceptual paths. But – to use the much-execrated vocabulary of systems theory – *precisely* the disappointment of such expectations and the building of new meaning structures might have an ‘irritating’ effect on constitutional theory,<sup>5</sup> key to its evolution.<sup>6</sup> From the perspective of a *critical* constitutional theory of globalisation, *The Redress of Law* is a contribution to the ‘end of a new beginning.’ A good-faith reader who wants to meet *The Redress of Law* on its terms will assess the potential and limits of such an endeavour through this lens.

I will centre my observations around three main topics, namely the relationship of *The Redress of Law* with other lines of critical thought (Section 3); systems theory and societal constitutionalism (Section 4); legal pluralism and the constitutionalisation discourse (Section 5). Section 6 concludes. However, as many of such observations directly or indirectly refer to societal constitutionalism, I will first take a detour to outline the central tenets of such theory (Section 2).

<sup>3</sup>On the style, see below, section 6.

<sup>4</sup>See, from the perspective of systems theory, R Cordero, ‘The Negative Dialectics of Law: Luhmann and the Sociology of Juridical Concepts’ 29 (2020) *Social & Legal Studies* 3.

<sup>5</sup>See N Luhmann, *Theory of Society Vol. 2* (Stanford University Press 2013) 116–7, defining ‘irritation’ as ‘a state [...] that stimulates the continuation of the system’s autopoietic operations, but which [...] initially leaves it open whether structures have to be changed for this purpose; thus whether learning processes are initiated through further irritations or whether the system relies on the irritation disappearing by itself in the course of time because it is only a one-of event. Keeping both possibilities open is a guarantee for the autopoiesis of the system, as well as a guarantee of its amenability to evolution.’

<sup>6</sup>See *Ibid.*, 117: ‘In order to be open to irritation, meaning structures are built to form expectation horizons, which count on redundancies, hence with repetition of the same in other situations. Irritations are then registered in the form of disappointed expectations.’ See also G Teubner, ‘The Project of Constitutional Sociology: Irritating Nation State Constitutionalism’ 4 (2013) *Transnational Legal Theory* 44.

## 2. Detour: Societal constitutionalism as a critical constitutional theory

Current societal constitutionalism originates from the work of David Sciulli,<sup>7</sup> starting from the difficulty of liberal constitutional theory in detecting authoritarian drifts within civil society *in conceptual terms*, even when state structures remain liberal–democratic in form. Such drifts are intrinsic rather than accidental tendencies of Western modernity, rooted in fragmented meaning, instrumental calculation, bureaucratic organisation, and charismatic leadership. From this perspective, anti-authoritarian counteractions cannot be based only on separation of powers, due process, fundamental rights, judicial review. Arbitrary power should also be addressed through reciprocal limitations among collective actors, involving relatively autonomous norm-producing institutions within society.

Building on Luhmann's theory of functional differentiation<sup>8</sup> and an autopoietic conception of law,<sup>9</sup> Gunther Teubner has expanded societal constitutionalism, focusing on the processes of autonomisation/transnationalisation triggered by globalisation.<sup>10</sup> Today, societal constitutionalism takes seriously Böckenförde's dilemma, whereby 'the liberal secularised state lives by prerequisites which it cannot guarantee itself',<sup>11</sup> with the consequence that even modern constitutional states ultimately have to rely on transcendent or not strictly rational forms of legitimation.<sup>12</sup> Societal constitutionalism reformulates this problem arguing that, under conditions of functional differentiation, no form of political legitimation can impose its fundamental principles on distinct social systems (economy, science, education, religion, art), developing their own meaning structures and sources of legitimacy. In modern societies, political procedures cannot determine or generate scientific truth, economic profitability, religious faith – at least, not directly. Put in a yet different way, functional differentiation triggers and accelerates the *polycontexturality* of modern societies, that is, the fragmentation of society into a multitude of social systems requires a multitude of perspectives of self-descriptions which in turn leads to a plurality of conflicting normativities.<sup>13</sup>

Societal constitutionalism, then, focuses on politics, economy, press, science, law as functionally differentiated systems of modern society and on their distinct communication media (power, money, information, truth, juridical authority).<sup>14</sup> Constitutional problems do not come only from the power imperative of politics or the monetisation imperative of economy, but also from the knowledge imperative of science, the innovation imperative of technology, the information cycle imperative of the press, the juridification imperative of law. Effective constitutionalisation takes place only to the extent that the norms emerging within and between social systems perform both constitutive and limitative functions towards such communication media.<sup>15</sup>

Further, societal constitutionalism focuses on the transnationalisation and autonomisation of functional systems. Indeed, constitutional questions related to formal organisations (states,

<sup>7</sup>D Sciulli, *Theory of Societal Constitutionalism: Foundations of a Non-Marxist Critical Theory* (Cambridge University Press 1992).

<sup>8</sup>N Luhmann, *Social Systems* (Stanford University Press 1995).

<sup>9</sup>G Teubner, *Law as an Autopoietic System* (Blackwell 1993).

<sup>10</sup>G Teubner, 'Societal Constitutionalism: Alternatives to State-centred Constitutional Theory?' in C Joerges, I-J Sand and G Teubner (eds), *Transnational Governance and Constitutionalism* 3–28 (Hart 2004).

<sup>11</sup>EW Böckenförde, *Staat, Gesellschaft, Freiheit – Studien zur Staatstheorie und zum Verfassungsrecht* (Surkamp 1976) 60.

<sup>12</sup>See A Jr Golia and G Teubner, 'Societal Constitutionalism: Background, Theory, Debates' 15 (2021) ICL – Vienna Journal of International Constitutional Law 357, at 360.

<sup>13</sup>G Günther, 'Life as Poly-Contexturality' in G Günther (ed), *Beiträge zur Grundlegung einer operationsfähigen Dialektik*, vol. 1 283–306 (Meiner 1976).

<sup>14</sup>Understood as the 'effect mechanisms' of the functionally differentiated society. Communication media '[...]' are based on symbols which are thought to be effective in communication – eg, symbols of money, power, truth or love –, and which as such effective symbols motivate other social actors to do something they would not have done without this effective use of symbols' (R Stichweh, 'Systems Theory' in B Badie, D Berg-Schlosser and L Morlino (eds), *International Encyclopedia of Political Science*, vol 8 2579–2588 (SAGE 2011)).

<sup>15</sup>G Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press 2012) 81 ff.

corporations, international organisations) and regimes (global politics, international investment law, global science law) increasingly emerge and need to be addressed beyond states' borders.

Moreover, societal constitutionalism embraces legal and constitutional pluralism. It argues that, with globalisation, legal systems go through processes of differentiation/autonomisation that make it impossible for one single legal system to perform the function to stabilise normative expectations. Therefore, different, variably interconnected organisations and regimes increasingly develop their own legal norms. This does not mean that such 'fragments' exist in a vacuum. Rather, they observe each other and the environment according to their *own* legal/illegal distinctions,<sup>16</sup> based on distinct principles of legitimacy, in turn rooted in the communication medium to which they are oriented (power, money, truth, etc.). In this constellation, *effective* constitutionalisation may occur if the norms emerging *in* and *among* functional systems simultaneously constitute *and* constrain the communication processes that, following globalisation, have been at least partially 'freed' from the constrictions of state-centred politics. Therefore, societal constitutionalism questions the identification of law with state law and the necessary link between state and constitution. In this way, it opens the possibility<sup>17</sup> of constitutionalisation processes not exclusively centred around states.

Societal constitutionalism is also based on an autopoietic conception of law.<sup>18</sup> Under such a conception, law is a social system itself, that is, a self-contained system of meaning based on its own code: the legal/illegal distinction.<sup>19</sup> Its fundamental function is the generalisation/stabilisation of normative expectations. Law can generalise/stabilise normative expectations emerging from its social environment (eg, moral, religious, economic norms) only if it does not immediately identify with them. Law can 'read' and solve conflicts emerging from society only through the legal/illegal distinction, continuously re-framed by law's own *internal* operations: legal procedures, acts, norms, doctrinal concepts. *This* is the specific legal formalism embraced by societal constitutionalism.<sup>20</sup> Rather than to textualist methodologies, this formalism relates to the preservation of the legal/illegal code as distinct from others (moral/immoral, profitable/non-profitable, superior/inferior, etc.). *This* formalism also allows modern law to generate its own validity through the internal translation/misunderstanding of impulses coming from its environment. In this way, legal systems re-generate their meaning within the possibilities allowed by existing patterns but in unpredictable, contingent, 'blind' ways.

Finally, societal constitutionalism rejects the impossibility of democracy in global/transnational settings and contests approaches aiming at compensating for the lack of democratic legitimacy of non-state systems only through statist models (eg, chains of delegation/authorisation starting from national parliaments). In contrast, societal constitutionalism advances a theory of democracy where the principle of representation is generalised through the *institutionalisation of self-contestation*.<sup>21</sup> Under such a view, a system is democratic if and to the extent it stabilises the possibility for bottom-up variations. Therefore, various decision-making fora should mirror a plurality of democratic legitimation schemes, going also through transnational organisations, grassroots movements, trade unions, NGOs. The 'political' (*le politique*) is not limited to 'politics' (*la politique*) and increasingly emerges in private or hybrid arenas.<sup>22</sup> In this framework, however, state politics remains crucial in generating external pressures and designing the internal cognitive

<sup>16</sup>G Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' 13 (1992) *Cardozo Law Review* 1443.

<sup>17</sup>Golia and Teubner (n 12), 378.

<sup>18</sup>G Teubner (ed), *Autopoietic Law: A New Approach to Law and Society* (de Gruyter 1988); Teubner (n 9).

<sup>19</sup>T Vesting, *Legal Theory* (Beck-Hart 2018) 19–84.

<sup>20</sup>And the systems theory underlying it: see N Luhmann, 'Positivität als Selbstbestimmtheit des Rechts' 19 (1988) *Rechtstheorie* 11.

<sup>21</sup>G Teubner, 'Quod omnes tangit: Transnational Constitutions Without Democracy?' 45 (2018) *Journal of Law and Society* 5, 14–5.

<sup>22</sup>G Teubner, 'Societal Constitutionalism and the Politics of the Commons' 21 (2012) *Finnish Yearbook of International Law* 2.

and normative infrastructures of other systems. Moreover, alternative arenas of contestation, discussion, and decision-making complement rather than replace state politics. At the normative level, this view calls for reconciliation and productive use of impulses coming from states and their constitutions; and for the strengthening of the learning capacities of other systems.

### 3. Relationship with other lines of critical thought

After this detour, it is time to come back to *The Redress of Law*. Christodoulidis's work presents an eclectic and brave critical theory of constitutionality. It is eclectic because it combines elements of different lines of thought often regarded as mutually incompatible and re-elaborates them in productive and original ways. From Luhmann, it takes the main framework to read the specificities of constitutional normativity ('constitutionality'<sup>23</sup>) within modern legal systems and the mutual irreducibility of social systems of meaning (193–228)<sup>24</sup> but with a non-Luhmannian (or only partially Luhmannian) understanding of the political system.<sup>25</sup> From Foucault,<sup>26</sup> it takes genealogical analysis (334), but without the Foucaultian decentring of the subject.<sup>27</sup> From Teubner,<sup>28</sup> it takes strategies of militant formalism (461–79) without endorsing constitutional pluralism. All combined with the deep humanism of Simone Weil<sup>29</sup> (43–71) and Alain Supiot<sup>30</sup> (229–58). *The Redress of Law* is a demonstration of how to do militant, eclectic scholarship without self-referentiality and with a non-negligible degree of courage. Indeed, *The Redress of Law* scores points in both critical and constitutional theory while relying to an unprecedented extent on Luhmannian systems theory. The latter, with few exceptions, is fiercely opposed in both 'receiving' camps<sup>31</sup> that, in different ways, have been influenced by Habermasian discourse.

Christodoulidis's critique of Habermas (97–102, 443–55) is one of the most powerful of the past few years, especially from *within* European critical theory. Habermas is a crucial target of *The Redress of Law*, whose influence on current constitutional theory has been 'staggering' (444).<sup>32</sup> Famously,<sup>33</sup> Habermas contrasts 'strategic action' and authentic 'communicative action', the latter aimed at reaching understanding and consensus and turning around practices of deliberation providing citizens with reasons that determine their action that they can accept because

<sup>23</sup>Understood by Christodoulidis, following Luhmann, as 'the modality of law's self-reflection' (193–4, 200). Somek (n 2), § 1, 5) shows some discomfort with Christodoulidis's use of the term, as it might confuse 'people trading in constitutional doctrine' and is allegedly presented as though it had always been the same or an idea in the Platonic sense. I argue that – if it is the case – such 'confusing' use is an asset and, most importantly, denotes the emergence and permanence in time of a set of specific features in a legal system that are not captured by the ordinary use of the term ('the quality of being in accordance with the constitution', as Somek reminds us). As for the a-historicity of the (use of the) term, a good-faith reading of *The Redress of Law* (and of Luhmann's most relevant work on the matter: N Luhmann, 'Verfassung als evolutionäre Errungenschaft' 9 (1990) *Rechtshistorisches Journal* 176)) makes it clear that the emergence of constitutionality is not understood as an intrinsic, a-historical feature of legal systems but it is rather contingent on specific socio-historical conditions emerged with (Western) modernity and particularly on functional differentiation as the dominant mode of societal organisation.

<sup>24</sup>See Luhmann (n 8).

<sup>25</sup>N Luhmann, *Trust and Power* (Wiley 1979). I will come back to this below, § 4.

<sup>26</sup>See, among many, M Foucault, *Language, Counter-memory, Practice: Selected essays and Interviews* (Cornell University Press 1977).

<sup>27</sup>On this, see only A Hunt and G Wickham, *Foucault and Law. Towards a Sociology of Law as Governance* (Pluto 1994).

<sup>28</sup>Teubner, *Law as an Autopoietic System* (n 9); Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (n 15).

<sup>29</sup>See esp S Weil, 'On Human Personality' in D McLellan (ed), *Simone Weil: Utopian Pessimist 273–288* (MacMillan 1989 [1957]).

<sup>30</sup>A Supiot, *Homo Juridicus: On the Anthropological Function of Law* (Verso 2007 [2005]).

<sup>31</sup>I will come back to this below, § 4.A.

<sup>32</sup>Especially after the publication of J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1996), there has been a sort of alignment of mainstream constitutional theory and some strands of critical legal theory, especially in continental scholarship.

<sup>33</sup>J Habermas, *The Theory of Communicative Action. Vol. 1: Reason and the Rationalization of Society* (Beacon Press 1984).

they have contributed to them. The institutional modality to build the ideal speech situations that might set the scene for authentic communicative action is individuated in the law, as a 'special case of practical reason.'<sup>34</sup> Law has a central role to play because it 'shores up processes that promise to ground the correctness of normative statements on consensus, even where the latter remains forever only potential'; and 'sustains individuals' participation in the public sphere by sanctioning both capacity and autonomy' (448–9).

However, *The Redress of Law* rejects the de-politicising potential of the artificial distinction between strategic and communicative action. It exposes not just the practical limits of such theoretical proposal but, most importantly, the *conceptual* ones. The latter do not relate only to the overestimation of the capacities of social integration of law and legal rationality.<sup>35</sup> At an even deeper level, fully communicative reason – deployed in ideal speech situations based on mutual understanding – might well be exclusionary. To prove this point, Christodoulidis makes the example of three speech acts offered in the modality of illocution that can still be fully exclusionary: 'you do not interest me'; 'do you understand?'; 'you understand' (452–5).

To be sure, Christodoulidis's critique of Habermas is not isolated in critical theory. One might think, for example, of Nancy Fraser. I refer in particular to Fraser's work because her critique of Habermas is based, among other things, on his alleged and still excessive reliance on systems-theoretic thinking.<sup>36</sup> This, I think, gives an idea of how brave Christodoulidis's 'Luhmannian' move is. However, despite its intellectual richness, the relationship of *The Redress of Law* to the broader galaxy of contemporary critical theory remains relatively unclear, if not underdeveloped.

Christodoulidis's work, as I read it, focuses and aims to mobilise the practice, the experience of labour. In this experience lies the beating heart of the process of becoming-a-subject, reclaiming contingency, rebuilding the political sphere, and thinking 'the given otherwise' (1). Another reason why I recalled Nancy Fraser is the fact that, like other critical thinkers, she draws upon postmodernism and works with the concept of intersectionality, never discussed explicitly in *The Redress of Law*. However, if, as I suspect, Christodoulidis agrees that the problem of global capitalism is not only the competitive alignment of systems of labour protection (3, 260, 389) but *also* the pluralisation of the processes of self-subjectification – which makes it more difficult to federate movements, reclaim contingency, escape single-issue politics, *also* for workers – if this is part of the problem, the reader is left with the curiosity on the absence of any engagement – even a critical one – with the concept of intersectionality and the debates surrounding it. This question is even more interesting considering that intersectionality – especially (but not only) in the US – has come to play a central role as a theoretical framework in industrial relations scholarship, to make sense, for example, of developments in the relationship between unions and migrant workers.<sup>37</sup>

Another stone guest that I would like to bring to life is space. Christodoulidis seems to show an overall disinterest towards the real-life conditions of social communication. But isn't the spatial dimension relevant *as such* – that is, independently from the social and the material – to a *critical* constitutional theory? To be sure, Christodoulidis discusses space, but at a quite high level of abstraction, in the relatively narrow field of how legal orders construct their borders, especially in his discussion of Hans Lindahl's theory of a-legality<sup>38</sup> (511–7). But what does not enter the

<sup>34</sup>See already R Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as a Theory of Legal Justification* (Clarendon 1989).

<sup>35</sup>See G Teubner, 'Alter Pars Audiatur: Law in the Collision of Discourses' in R Rawlings (ed), *Law, Society and Economy* (Clarendon 1997), spec. 163.

<sup>36</sup>See already N Fraser, 'What's Critical about Critical Theory? The Case of Habermas and Gender' 35 (1985) *New German Critique* 97. See more recently, for similar criticisms, T Jütten, 'Habermas and Markets' 20 (2013) *Constellations* 587.

<sup>37</sup>See, among many, TL Lee and M Tapia, 'Confronting Race and Other Social Identity Erasures: The Case for Critical Industrial Relations Theory' 74 (2021) *ILR Review* 637; J Lobato, 'Imaginar lo (Im)posible. Aportes feministas-sindicales para repensar el Derecho del Trabajo post COVID-19' 13 (2022) *Investigaciones Feministas* 65.

<sup>38</sup>H Lindahl, *Fault Lines of Globalization. Legal Order and the Politics of A-Legality* (Oxford University Press 2013).

picture is how (constitutional) law may participate in the reconstruction in the spatial conditions that make possible strategies of redress, in the restoration of the symbolic spaces of social relations open to struggle and contradiction, in recovering the meaning of labour as a political project. Do really Lefebvre<sup>39</sup> and Deleuze,<sup>40</sup> among others, have no relevant contribution to make to a critical constitutional theory in the age of globalisation? Especially Lefebvre's early rural studies on anti-fascist Resistance, up to the 1965 book on the Paris Commune<sup>41</sup> had quite some influence on the leftist movements. This question is even more interesting, given that many of the concrete experiences recalled by Christodoulidis refer to struggles anchored to precise spatial realities, notably the city and the factory.

Finally, and bringing together previous remarks on intersectionality and space, *The Redress of Law* shows a relative but still quite surprising disinterest in the critical scholarship – both legal and sociological – linked to the Global North/Global South divide. This is surprising because Christodoulidis discusses, for example, Pinochet's 'cheating constitution' in some detail (464–8); and part of such literature has been deeply influenced by Wallerstein's 'world systems analysis',<sup>42</sup> which also *The Redress of Law* relies on (85). I think, for example, of the works on 'globalisation from below' of Boaventura de Sousa Santos,<sup>43</sup> confined to a minor footnote (264, nt. 7), but also to more recent and ever-expanding critical scholarship – be it Marxist or not – investigating strategies centred around political and mass strike,<sup>44</sup> also in connection to transnational feminist movements.<sup>45</sup> In this same sense, I wonder if Christodoulidis sees any productive connection between his critical theory of constitutionality and the 'law & political economy' approaches currently emerging both in Europe and in the US.<sup>46</sup>

Intersectionality, space, Global South, 'law & political economy'. Christodoulidis is certainly aware of these debates. Although it is an already extremely rich book, *The Redress of Law*'s relative lack of engagement with them is clearly not the result of ignorance. If, as I suspect, such lack is *also* in itself a critique towards them – for example, for the alleged potential to fragment social unities (self)created alongside the capital/labour conflict – if that is the case, Christodoulidis could have made his position clearer, in an ultimate act of intellectual courage.

#### 4. Relationship with systems theory and societal constitutionalism

##### A. The analytical use of systems theory: A contribution to a 'critical turn'

To be sure, *The Redress of Law* does not lack courage, in as far as it relies on systems theory to such a great extent. Christodoulidis clearly states that he borrows four 'theoretical suggestions' from it (11–2): 'processes of meaning-creation are tied to differentiated systems; [...] forms of closure accompany the processes of meaning-creation; [...] these moments of closure remain unaddressable, as blind spots, from the point of view of the systems themselves; [...] the inter-traffic of cross-cutting and under-cutting identifications marks the history of democratic struggle, as struggle over and against political ascriptions and given semantics.' This clarification at the very beginning sets the grid for the entire book and should be welcomed as an attempt to deploy systems

<sup>39</sup>H Lefebvre, *The Production of Space* (Wiley-Blackwell 1992).

<sup>40</sup>I Buchanan and G Lambert (eds), *Deleuze and Space* (Edinburgh University Press 2005).

<sup>41</sup>H Lefebvre, *La Proclamation de la Commune* (Gallimard 1965).

<sup>42</sup>See I Wallerstein, *World-Systems Analysis. An Introduction* (Duke University Press 2004).

<sup>43</sup>See B de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (3rd edn, Cambridge University Press 2020); and B de Sousa Santos and CA Rodriguez-Garavito (ed), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press 2005).

<sup>44</sup>See, as an example, the recent special issue of the South Atlantic Quarterly (Vol 121, Issue 2), with a collection of articles on 'Law and the Critique of Capitalism' edited by Corinne Blabock and a focus section on national strike and social uprising in Colombia: <<https://read.dukeupress.edu/south-atlantic-quarterly/issue/121/2>>.

<sup>45</sup>C Arruzza, *Tithi Bhattacharya and Nancy Fraser, Feminism for the 99%. A Manifesto* (Verso 2019).

<sup>46</sup>See, eg, PF Kjaer (ed), *The Law of Political Economy. Transformation in the Function of Law* (Cambridge University Press 2020).

theory's analytical potential in a progressive and even transformative theory of constitutionality. From this perspective, Christodoulidis is one of the few theorists in the current intellectual landscape to take seriously the incommensurability and mutual irreducibility of social discourses centred around distinct communication media and their ultimate principles of legitimacy.

*The Redress of Law* will become a point of reference in the debate over the (possibility of a) 'critical turn' in systems theory. The discussion within *both* systems theory *and* critical theory about the sustainability of such a turn is quite heated. On the one hand, hardcore system theorists generally reject this possibility.<sup>47</sup> On the other hand, critical theorists – especially in Germany<sup>48</sup> – normally depict systems theory as a dehumanising socio-legal approach that reifies distinct systems of social interaction, artificially isolating them from each other and denying agency to individuals and other social actors as *effective* subjects of history. Within this debate, and after the seminal works of Wiethölter, *The Redress of Law* exercises a 'gravitational pull', to use Christodoulidis's own words (1) and today, next to Wiethölter and Fischer-Lescano,<sup>49</sup> he is certainly one of the current protagonists of critical systems theory.

### **B. The irritation of constitutional theorists: A pushback on political/legal constitutionalism and 'structural coupling'**

However, quite unsurprisingly, given the targets and the disruptive potential of systems theory and societal constitutionalism, the most caustic criticisms come from 'people trading in constitutional doctrine', a shorthand for more or less traditional liberal constitutional theorists. In this special issue, their voice are powerfully represented by Alexander Somek.<sup>50</sup> A defence of *The Redress of Law* in this regard is not and cannot be the goal of these observations. However, I would like to enter the conversation at two points, notably the political/legal constitutionalism debate and the use of the concept of 'structural coupling'.

Among many other things, Somek criticises<sup>51</sup> *The Redress of Law's* overall disinterest (194–5) towards the political constitutionalism<sup>52</sup>/legal constitutionalism debate, which has come to dominate especially British constitutional scholarship.<sup>53</sup> However, it seems to me that the disinterest for such distinction – as usually framed – does not come from a position of blind theoretical self-sufficiency, condescension, or reliance on 'intellectually blind-folded dogmatics'. Rather, it is an attempt to free the constitutional discourse from the straitjacket set by (mostly Anglo-American) constitutional discourse, which – forgive the oversimplification – is largely a consequence of the fetishisation, contestation, and eventual(?) disenchantment with judicial review and (strategic) litigation. Furthermore, to the extent such debates address problems largely deriving from and created by the conceptual toolkit they deploy, they do not seem any less 'scholastic' than systems theory. And even while theories of judicial review try 'to determine the legitimate scope of the latter vis-à-vis other branches of government', as Somek reminds

<sup>47</sup>For a mapping of the debate, see M King, 'What's the Use of Luhmann's Theory?' in M King and C Thornhill (eds), *Luhmann on Law and Politics Critical Appraisals and Applications* 37–52 (Hart 2006).

<sup>48</sup>At least since the 1971 Luhmann/Habermas debate: see J Habermas and N Luhmann, *Theorie der Gesellschaft oder Sozialtechnologie: Was leistet die Systemforschung?* (Suhrkamp 1971).

<sup>49</sup>See esp. A Fischer-Lescano, 'Critical Systems Theory' 38 (2012) *Philosophy and Social Criticism* 3, recalling the relevant works of Wiethölter. See also A Philippopoulos-Mihalopoulos, 'Critical Autopoiesis and the Materiality of Law' 27 (2014) *International Journal for the Semiotics of Law* 389; and A Philippopoulos-Mihalopoulos, *Niklas Luhmann. Law, Justice, Society* (Routledge 2010).

<sup>50</sup>See again Somek (n 2).

<sup>51</sup>*Ibid.*, § 5.

<sup>52</sup>Focusing on an understanding of constitutionalism that perceives normative constraints anchored in shifting arrangements of social forces and emphasises the merits of democratic participation vis-à-vis judicial review.

<sup>53</sup>See, among many, R Bellamy, *Political Constitutionalism. A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007); M Loughlin, *Against Constitutionalism* (Harvard University Press 2022); M Goldoni and C McCorkindale, 'Three Waves of Political Constitutionalism' 30 (2019) *King's Law Journal* 74.



us, they almost inevitably end up with constitutional design proposals which only reproduce the inner limits of liberal political theory.

*The Redress of Law*, for its part, refuses to be trapped and tries to fly a bit higher. It envisages another political constitutionalism, one that does not limit normative constitutional theory to the tunnel-vision of liberal political theory. In this sense, arguing that Christodoulidis ‘endorses a legal constitutionalism that regards all commitments as rooted in something that is not amenable to rational insights’<sup>54</sup> is at least a misrepresentation of *The Redress of Law*. Escaping well-established, well-recognised semantics, codes, and talking points of dominant constitutional law scholarship is neither an act of elitist self-marginalisation nor a complete disregard for the importance of judicial review and separation of powers. Rather, it is an act aimed at reclaiming (a different) constitutional language, something that constitutional scholarship has not seen – not to this degree at least – at least since Oklopcic’s *Beyond the People*.<sup>55</sup> It is in itself an act of *redress*, of *critique* that simultaneously aims at ‘irritating’ and ‘expanding’ constitutional theory.<sup>56</sup>

Another target of Somek’s irritation is the widespread use of ‘structural coupling’,<sup>57</sup> a key concept of systems theory indicating a situation where ‘a system presupposes certain features of its environment on an ongoing basis and relies on them structurally (. . .) the forms of a structural coupling reduce and so facilitate influences of the environment on the system.’<sup>58</sup> One is left wondering, Somek argues, what ‘structural coupling’ really is, whether it triggers operations within the structures of both systems, or whether the operation of one system is conditioned by the other. He also suggests that, in the case of constitutional normativity, the structural coupling merely consists of ‘behaving politically under the auspices of legal constraints and manipulating or exploiting legal rules in the pursuit of political objectives.’<sup>59</sup> In any case, the concept would not really offer any valuable intellectual contribution, not least because – *horribile dictu* – it departs from well-recognisable Madisonian parlance. The need for the concept of structural coupling would only derive from the inner constraints of systems theory and a ‘scholastic enchantment’ of its own making.

Here, I would like to note that the notion of structural coupling has a conceptual density that goes beyond the ‘law depends on politics, politics depends on law’ to which Somek wants to reduce it. In the field of constitutional law, it simultaneously signifies *at least* three elements.<sup>60</sup> First, structurally coupled systems do not only co-depend on each other but co-evolve. Communications based on the constitutional/unconstitutional code (eg, judgements of a constitutional court) (co)determine how political forces organise themselves, shape their ideologies, pursue their strategies and their relation to (constitutional) law. Second, constitutions not only link the structures of the distinct communicative process of politics and law but also prevent their confusion. In functionally differentiated societies, constitutions not only link politics and law but are also obstacles to their de-differentiation.<sup>61</sup> Therefore, they reinforce the dynamics underlying the emergence of functional differentiation as the prevailing mode of social organisation in modern societies. Law does not collapse into politics and politics does not collapse into law *also* and *precisely* because of the historically contingent emergence of modern constitutions. Third, the co-evolution of law and politics – or, for what it matters – of structurally coupled systems – is ‘blind’. This means that, once set in motion, the respective communicative processes may follow paths largely divergent from or even conflicting with the historically contingent needs driving the emergence of modern constitutions in the first place. These are only three analytical advantages brought by the

<sup>54</sup>Somek (n 2).

<sup>55</sup>Z Oklopcic, *Beyond the People: Social Imaginary and Constituent Imagination* (Oxford University Press 2018).

<sup>56</sup>G Teubner, ‘The Project of Constitutional Sociology: Irritating Nation State Constitutionalism’; G Teubner and A Beckers, ‘Expanding Constitutionalism’ 20 (2013) *Indiana Journal of Global Legal Studies* 523.

<sup>57</sup>Somek (n 2), spec. § 10.

<sup>58</sup>N Luhmann, *Law as a Social System* (Oxford University Press 2004) 382.

<sup>59</sup>Somek (n 2), §9.

<sup>60</sup>See again Luhmann (n 23).

<sup>61</sup>See also N Luhmann, *Grundrechte als Institution: Ein Beitrag zur politischen Soziologie* (Duncker & Humblot 1965).

deployment of the ‘exotic’ and allegedly useless concept of structural coupling, advantages that are hardly found in the toolkit of liberal constitutional theory.

To be sure, constitutional theorists are aware of the problems of polycontextuality in modern societies. However, most choose more or less consciously to confine them to the realm of constitutional sociology rather than incorporating them into *legal* theories of constitutionality. *The Redress of Law* is a valuable contribution precisely because it does not take the usual path of self-induced (and self-forgiving) intellectual blindness. It addresses the problem and – importantly – does so from *within* constitutional theory.<sup>62</sup> *The Redress of Law* is not based on a ‘sociology without society’.<sup>63</sup> Rather, it gives a contribution to a renewed understanding of society, one that aims to align constitutional theory to social processes as they *actually* unfold. I see this contribution as not only beneficial but also essential, as it aims to reset our understanding of the social pre-conditions of constitutionality, both in analytical and normative terms.

### C. The normative use of systems theory: The underexplored potential of societal constitutionalism

But let us move on from mainstream constitutional theory. Starting from the four suggestions recalled above, Christodoulidis bridges the gap between the analytical and normative levels of his work, combining Luhmannian functional analysis<sup>64</sup> and Foucaultian genealogical method.<sup>65</sup> Functional analysis potentially contributes to de-naturalise problem constructions and opens to critical and genealogical analyses, which cut ‘into historical trajectories to look at how at crucial junctures certain options were discarded and certain options were installed as conditions of the full range of further developments’ (334).<sup>66</sup> Also from this normative perspective, *The Redress of Law* shows that systems theory can guide strategic actors who aim to force the appearance of contradictions, of antagonistic events (1, 41, 141, 532–40) – which, in Christodoulidis’s understanding, are at the core of the ‘political’ – and thus to de-reify the given, especially when this appearance is associated to strategic variations in social communication and the unveiling of contingency (4, 23, 70, 78, 220, 297, 530). By these same means, *The Redress of Law* also contributes to ‘humanise’ systems theory, putting to use elements present in the works of Luhmann<sup>67</sup> and Teubner<sup>68</sup> about the role of human actors in sociolegal evolution but often (strategically) overlooked by their detractors. Indeed, and importantly, systems theory is not ‘for’ structure and ‘against’ agency. Rather, it is ‘for’ events which produce structures. It is ‘for’ individuals<sup>69</sup> and ‘for’ persons<sup>70</sup> and their capacity to create variations in social communication based on distinct communication media (power, money, truth, juridical authority, faith).<sup>71</sup>

<sup>62</sup>The burden of proving that in functionally differentiated societies the principles of political legitimation are directly relevant to economy, science, religion, law, and other social systems is on constitutional theorists focussing on the law of state politics. Since they cannot really meet this burden, they rather ignore reality, blinding themselves with the conceptual and sociological assumptions elaborated in Western early modernity that might have been inaccurate even back then.

<sup>63</sup>As alleged again by the irritated Somek (n 2), § 7.

<sup>64</sup>Seminal: N Luhmann, ‘Funktion und Kausalität’ 14 (1962) *Kölner Zeitschrift für Soziologie und Sozialpsychologie* 617. See also N Luhmann, ‘Funktionale Methode und juristische Entscheidung’ 94 (1969) *Archiv des öffentlichen Rechts* 1.

<sup>65</sup>First deployed in M Foucault, *Discipline and Punish* (Vintage/Random House 1979).

<sup>66</sup>In this sense, I would argue that functional and genealogical analysis are more complementary than what Christodoulidis himself argues.

<sup>67</sup>See, among many works, N Luhmann, ‘How Can the Mind Participate in Communication?’ in HU Gumbrecht and KL Pfeiffer (eds), *Materialities of Communication* 371–387 (Stanford University Press 1994); Luhmann, *Law as a Social System*, 84.

<sup>68</sup>Teubner (n 9), 44–6; G Teubner, ‘Rights of Non-Humans? Electronic Agents and Animals as New Actors in Politics and Law’ 33 (2006) *Journal of Law and Society* 497.

<sup>69</sup>Understood as the social actors in their bio-psychological reality.

<sup>70</sup>Understood as the social actors in their communicative reality. See N Luhmann, ‘Die Form “Person”’ 42 (1991) *Soziale Welt* 166.

<sup>71</sup>See above, section 2.

Here, societal constitutionalism comes in. *The Redress of Law* shows that societal constitutionalism offers useful strategies – as Christodoulidis puts it – to guide ‘the selective withdrawal of certain areas of social action from the logic of the price’ (477). In other words, Christodoulidis conjures societal constitutionalism’s understanding of legal formalism – the irreducibility of the legal/illegal distinction to the codes guiding the reproduction of other communicative media – to create defence mechanisms against their colonisation by market constitutionalism and economic rationality. From this perspective, societal constitutionalism’s understanding of legal formalism is deployed to propose ‘backstop’ strategies and safeguard instruments against excessive learning triggered by the pressure of cognitive expectations deriving from the unconstrained reproduction of the medium of money at the global level (282, 356, 358, 433).<sup>72</sup> In other words, the inner communicative and symbolic resources of (constitutional) law – rooted in its specific dogmatics – may serve the cause of normative, even militant constitutional theory, *while remaining formalist*. In this sense, and contrary to Somek’s reading,<sup>73</sup> *The Redress of Law*’s celebration of legal dogmatic is by no means eccentric but fully coherent with its embrace of societal constitutionalism.<sup>74</sup>

However, I wonder if the strategic value of societal constitutionalism can be limited to its ‘formalism’ and does not offer something more to Christodoulidis’s project. Here, I would like to point two directions.

First, Christodoulidis argues that, to the extent globalisation consists in the competitive alignment of national – especially labour protection – systems (3, 260, 389), state-centred constitutionalism simultaneously enables the global expansion of capitalist exploitation and obstructs the very possibility to *think* and *act* in terms of transnational counteractions, and particularly of transnational democracy. This observation can strategically be used in a critical direction, to place the political at the basis of the reflexivity of systems (475). However, by limiting the usefulness of societal constitutionalism to its formalism, Christodoulidis gives in to state-centred constitutional theorists who, overlooking the transformative potential of societal constitutionalism, suggest its total capture by capitalism’s forces as a neoliberal strategy. But they ignore important parts of societal constitutionalism’s intellectual trajectory, going back to the initiatives for the constitutionalisation and democratisation of non-state institutions of progressive socialists,<sup>75</sup> as well as societal constitutionalism’s points of contact with transformative and even revolutionary legal theories: socialist political and legal pluralism and associative democracy,<sup>76</sup> critical legal scholarship,<sup>77</sup> up to the contestatory constitutionalism of Hardt and Negri.<sup>78</sup> Instead, I would argue that *The Redress of Law* goes in the same direction as societal constitutionalism, to the extent the latter decentres states as the sole *loci* of the political (*le politique*) and tries to deploy institutional and legal imagination beyond the structures of state politics (*la politique*).<sup>79</sup>

A second use of societal constitutionalism concerns what Christodoulidis calls strategies of rupture and the link to the ‘practice of negation’ (480 ff). Here, too, societal constitutionalism’s transformative potential is more pronounced than what is acknowledged. To make an example, societal

<sup>72</sup>See G Teubner, ‘The Constitution of Non-Monetary Surplus Values’ 6 (2020) *Social and Legal Studies* 1.

<sup>73</sup>Somek (n 2), § 6.

<sup>74</sup>On societal constitutionalism’s strategic use of constitutional law dogmatics and concepts against forms of normativity based on economic rationality, see Golia and Teubner (n 12), 393, recalling the constitutionalising potential of *ordre public* in international private law, of *Solange* and *controlimiti* doctrines in European Union multi-level constitutionalism, of the *Calvo* doctrine in Latin-American constitutionalism.

<sup>75</sup>Particularly the works of Hugo Sinzheimer, Rudolf Wiethölter, Brüggeimeier and later (the first) Habermas, Selznick, Sciulli, and most recently Horatia Muir-Watts. See *Ibid*, 363–4.

<sup>76</sup>Particularly the works of Ehrlich, Gurvitch, Laski, De Munck. See *Ibid*, 364–7.

<sup>77</sup>G Teubner, ‘How the Law Thinks: Towards a Constructivist Epistemology of Law’ 23 (1989) *Law and Society Review* 727.

<sup>78</sup>A Negri, *Insurgencies: Constituent Power and the Modern State* (University of Minnesota Press 1999 [1992]); M Hardt and A Negri, *Commonwealth* (Harvard University Press 2009). For points of contact and differences, see Golia and Teubner, ‘Societal Constitutionalism: Background, Theory, Debates’ 407–11.

<sup>79</sup>Golia and Teubner (n 12), 369, recalling Unger.

constitutionalism has been referred to in order to explore the strategic use of the legal right of resistance – as positivised in constitutional texts – in setting the scene for the emergence of the contradiction, of the *dissensus*, of the form-giving event through which political subjects may at the same time create themselves, protect the institutional achievements of political constitutionalism, and contribute to the constitutionalisation of transnational regimes.<sup>80</sup> Understood in this way, the constitutional right of resistance is placed precisely at the intersection between legal formalism and practices of negation. But even the mass strike – which has so much relevance in *The Redress of Law* (494–507) – has sometimes been conceptualised through the lenses of the right of resistance. Whether this interest in law’s own rupture – for its self-transcendence<sup>81</sup> – keeps societal constitutionalism within *Luhmannian* systems theory is a different issue.<sup>82</sup> However, it is a point worth highlighting to fully appreciate the potential of societal constitutionalism for Christodoulidis’s project. To sum up, societal constitutionalism cannot be limited to strategies of ‘militant formalism’. They come together with legal and institutional imagination and ‘strategies of rupture’. To be sure, these are not (only) speculative observations but find some ground in the practice of activists who have started referring to societal constitutionalism, for example in the uprising and subsequent constituent process in Chile.<sup>83</sup>

#### D. The limits of the selective use of systems theory: A sanitised picture of the political

Moving on from societal constitutionalism, I would like to point to the relatively selective use of systems theory and problematise how *The Redress of Law* frames the political and economic systems. The gloomy picture of the current stage of neoliberal global capitalism made by Christodoulidis, associated with an intellectually hegemonic market constitutionalism (297–430), is realistic. Still, Christodoulidis denies the economic system the flexibility and the inner transformative capacities that even Luhmann acknowledged. In a way, Christodoulidis is more Luhmannian than Luhmann himself, especially when it comes to the distinction between code and program<sup>84</sup> within the economic system. For example, Christodoulidis tends to completely ignore historical experiences of democratisation of the economy – especially in Northern Europe – showing the inner flexibility of the economic code (payment/non-payment)<sup>85</sup> when linked to programs different from the absolute maximisation of profits.

At the same time, the political is depicted in a somewhat idealised way, bracketing its destructive potential, that is, the inner compulsion to the accumulation of power. This is understandable, as the main target of Christodoulidis’s work is market constitutionalism. However, the *inner* expansive tendencies of political systems do not seem to enter the picture. The code of the political system, which enables the reproduction of political communication based on the medium of power, remains superior/inferior. Only under certain and contingent circumstances is converted into government/opposition.<sup>86</sup>

Instead, Christodoulidis takes the political system and pits it against the economic system at an *already* constitutionalised stage. This emerges also from the fact that his concept of the political ‘definitionally’ incorporates democracy (7, 475). One is left wondering what exactly Christodoulidis’s notion of democracy is.<sup>87</sup> To be sure, as already pointed out, Christodoulidis’s use of systems theory is

<sup>80</sup>See, if you want, D Bifulco and A Jr Golia, ‘The Right of Resistance as a State Law Basis for Transnational Regimes Self-Contestation’ 45 (2018) *Journal of Law and Society* S94.

<sup>81</sup>G Teubner, ‘Self-Subversive Justice: Contingency or Transcendence Formula of Law?’ 72 (2009) *Modern Law Review* 1.

<sup>82</sup>For differences within systems theory, see already the Luhmann–Teubner debate in Teubner (n 9).

<sup>83</sup>See C Bartoli, *Chile Revolts. From the Uprisings to the Constitutional Process* (Accademia University Press 2022) 168–9.

<sup>84</sup>The latter understood as complexes of conditions of the application of the code: see C Baraldi, G Corsi and E Esposito, *Unlocking Luhmann. A Keyword Introduction to Systems Theory* (Bielefeld University Press 2021) 181–4.

<sup>85</sup>See N Luhmann, ‘The Economy as a Social System’ in N Luhmann (ed), *The Differentiation of Society* 190–225, 386–390 (Columbia University Press 1982); Niklas Luhmann, *Die Wirtschaft der Gesellschaft* (Suhrkamp 1988).

<sup>86</sup>Luhmann (n 25); N Luhmann, *Die Politik der Gesellschaft* (Suhrkamp 2000).

<sup>87</sup>On this, see below, § 5.

consciously selective, and *The Redress of Law*'s eclecticism is one of its merits. However, in this case, this selection results in a subtle, surgical replication of what Luhmann described as a 'certain functional synthesis'<sup>88</sup> between the political – here described as 'relatively uncontroversially'(!) democratic (7) – and (constitutional) law. Only in this way can the constituent/constituted dichotomy be represented as *foundational* of political constitutionalism, because the constituted is *already there as a given*. In a way, Christodoulidis makes a category error when he compares the normative promise of politics with the gloomy reality of the economy. More correctly, he should have compared the normative promise of a capitalist economy with the promise of democratic politics on the one side and the destructive practices of untamed capitalism with totalitarian politics.

But most importantly, this selective use of systems theory results in the absence of any problematisation, of any *critique* of politics *as such*. Can there really be a critical theory of constitutionality that does not focus on the power/politics complex as such? This removal is particularly apparent when it comes to the consequences of the so-called 'fatigue of power', that is, the increasing difficulty for the political system, under conditions of functional differentiation, to generate consensus-based, collectively binding decisions,<sup>89</sup> with consequent internal tendencies towards oligarchisation and systemic corruption.<sup>90</sup> The political system, too, has inner tendencies to over-determine the future in constitutional terms. Wasn't Pinochet's 'cheating constitution' – which *The Redress of Law* describes in its function of 'binding the future' in neoliberal terms – still a manifestation of political but undemocratic rationality? Likewise, the distinction internal/external – one could say, sovereignty – which is foundational to modern political thinking, is not exploited only by market constitutionalism through the competitive alignment of labour protection systems. It is exploited also by politics for pure power accumulation, for example through the selective withdrawal from normative systems that would limit the uncontrolled reproduction of power at the global level. The highly selective engagement of the US with legally binding international human rights law is part of its politics of global – both political *and* economic – hegemony. Similarly, the production and 'management' of ever newer crises are dictated *also* by political systems as such, as a way to de-complexify their social environment to the purpose of their decision-making processes.<sup>91</sup>

Creeping deconstitutionalisation trends due to the pandemic governance are not – at least not only – due to economic rationality. Scarcity may be created not only by the economic system, markets, and capitalism but also by power imperatives. Can we really argue that the global food crisis that we are facing following the war in Ukraine is caused *only* by global capitalism and the interests of a military-industrial complex in perpetuating a war? Or do other communicative and symbolic processes – nationalism, racism, quest for cultural hegemony, power dynamics of domestic elites – also play a role, even when they are not economically rational/efficient for the accumulation of profit? Can we really argue that the rise of global energy prices is not due *also* to politically motivated embargoes, for example on the oil and gas of Venezuela and Iran? In other words, don't we need a more nuanced picture of the political system, one that 'sees' the role of fully political but un-democratic rationality within national elites? Especially under conditions of globalisation, these are problems with global effects that a critical constitutional theory is called to address.

The sanitised picture of the political system has at least two further consequences. First, it prevents any problematisation of the concrete historical experiences of socialist countries, especially those that started with an *autogestionnaire* understanding of the political. In this regard, the

<sup>88</sup>N Luhmann, *Die Gesellschaft der Gesellschaft* (Suhrkamp 1997) 151. See also PF Kjaer, 'The Metamorphosis of the Functional Synthesis: A Continental European Perspective on Governance, Law and the Political in the Transnational Space' 2010 (2010) Wisconsin Law Review 489.

<sup>89</sup>Luhmann (n 25).

<sup>90</sup>See C Vergara, *Systemic Corruption: Constitutional Ideas for an Anti-Oligarchic Republic* (Princeton University Press 2020).

<sup>91</sup>Luhmann (n 25), 163–6.

systemic authoritarian compulsion of socialist models should be subject to the same level of scrutiny as those based on (market) capitalism. Second, it is reflected in the indeterminacy of the *concrete* strategies proposed, which mostly focus on strike and social action/public interest litigation. To be sure, *The Redress of Law* is not a programmatic book. But it still has a somewhat royal disinterest for the ‘how’ of the exercise of constituent power, the ‘politics of presence’. *On s’engage, et puis on voit*, proudly states Christodoulidis with a Napoleonic air (524). If he thinks that there cannot be or should not be any pre-imposed ‘how’ to constituent power, not even to evaluate it ex-post, then how do we assess whether such power is constituent and not destituent?<sup>92</sup> How and where do we direct our *dissensus*?

Moreover, isn’t this position on a collision course with (critical) Global South scholarship focusing on the procedural and substantive conditions aimed at enhancing authentic political deliberation and preventing manipulation of constituent processes? Here, Habermas might still have something to say.<sup>93</sup> From the same point of view, the landmark judgement of Kenya’s Supreme Court, declaring the unconstitutionality of a constitutional amendment for the violation of the procedural preconditions for the exercise of constituent power<sup>94</sup> is an interesting case study for a critical theory of constitutionality, one that brings together the ‘militant formalism’ of constitutional dogmatics (in that case, represented by the Basic Structure doctrine as a safeguard instrument) and the deliberative preconditions for the exercise of constituent power within civil society.

## 5. Legal pluralism and the constitutionalisation discourse

My last observations concern pluralism and the constitutionalisation discourse. Christodoulidis sees state-centred constitutionalism as a safeguard of constitutional normativity and the discourse surrounding constitutional pluralism and the constitutionalisation of international law as a watering down of that normativity. He describes the constitutional pluralism discourse as hopelessly captured by market thinking. Likewise, the ‘constitutionalisation’ of international law discourse, by centring on constitutionality as a never-ending, always unfinished process, would provide the conceptual vocabulary enabling economic rationality to escape a solid constitutional normativity, based on the rigid binary constitutional/unconstitutional distinction. However, I wonder whether *The Redress of Law* meets such discourses on their terms. In broader terms, I suspect that Christodoulidis can draw such a stark contrast only by presenting the sanitised picture of the political recalled above. But his arguments in this regard need to be explored separately.

Undoubtedly, especially until the late 2000s, market thinking has coopted a large part of the ‘global constitutionalism’ discourse and has been to some extent one of its drivers.<sup>95</sup> However, I would like to problematise this stark contrast between the allegedly watered down, fluffy constitutionalisation and pluralist discourses with the rigid constitutional/unconstitutional distinction and state-centred constitutional monism. If we take that discourse seriously, we should put them at two distinct levels of analysis. In the vocabulary of systems theory, constitutional/unconstitutional is a binary code that still operates at the level of the single operation, the ‘basic

<sup>92</sup>See K Möller, ‘From Constituent to Destituent Power Beyond the State’ 9 (2018) *Transnational Legal Theory* 32.

<sup>93</sup>On the role of the first Habermas (esp J Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Polity 1992 [1962])) in societal constitutionalism’s genealogy, see Sciuilli (n 7).

<sup>94</sup>The Supreme Court of Kenya, *The Attorney General & 2 Others v. David Ndii & 79 Others* Sc Petition No. 12 Of 2021, (Consolidated with Petitions Nos. 11 & 13 Of 2021), 31 March 2022. The core of the Court’s rationale concerned the president’s power to initiate a popular initiative. The Court argued that a popular initiative could only be instigated by the constituent power (the people) and not the president. Therefore, the president’s active role in the entire process rendered it flawed.

<sup>95</sup>See, among many, D Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise* (Cambridge University Press 2008). On the ‘social turn’ in global constitutionalism/constitutionalisation of international law discourse, see recently A Peters, ‘Against a Deconstitutionalisation of International Law in Times of Populism, Pandemic, and War’ (forthcoming) *Journal of Constitutional Justice*.

self-reference' (202). The single constitutional judgement ('who has a legal right to what?'), the single act of individuation of legislative competence ('who can make law on what?'), and so on are already manifestations of the legal system's self-reference, as they apply the legal code to legal acts. But this dynamic does not say much about whether the legal system can actually constrain the excessive accumulation of power (or money, or faith, or information, etc.). This is where the notion of (de)constitutionalisation *taken seriously* provides a valuable analytical contribution, capturing what happens at the level of the system's reflexivity and self-reflection.

Here, the distinction between code and program comes again. Christodoulidis discusses the point at length and at different points of the book. However, he focuses only on the role of values as goal-oriented programs providing *negative* limits to variations in the validation of the basic code. In this way, he operates two reductions.

First, Christodoulidis reduces programs to values and the latter to their 'negative' side, as blocking devices (478). Seen from this perspective, pursuing a strategy of formalism and defending the rigidity of the constitutional/unconstitutional distinction *as such*, valuing only its 'blocking' function while demonising informal law and (constitutional) pluralism, does not assure much in terms of *actual* constitutionalisation, that is, the capacity of law to constitute and limit the reproduction of the underlying medium. Only to make an example, the US Supreme Court decisions upholding the 'Jim Crow' laws of southern states<sup>96</sup> were applying the constitutional/unconstitutional code. More accurately: specific programs – preservation of the legal principles of federalism and 'separate but equal' – provided direction to validate the application of constitutional/unconstitutional code in a certain direction. However, the effect of those decisions was the de facto deconstitutionalisation of the Fourteenth Amendment for more than half a century.

Second, Christodoulidis frames constitutional pluralism as a scholarly discourse largely instrumental to market thinking, not as a fact of the 'real world' with which political constitutionalism has to somehow deal. Instead, legal (and, potentially, constitutional) pluralism is 'out there', it is connected to the mutual irreducibility of different social discourses and epistemes, as well as to their organisational structures and decision-making processes. In other words, taking pluralism seriously means taking into consideration how, historically, the 'improbable achievement' of political constitutionalism was due *also* to its capacity to recruit non-political normativities for the purposes of democratic legitimation and the protection of rights. Here again, Christodoulidis seems to outline a sort of idealised pre-globalisation political constitutionalism where the political is identified with democratic will formation. But even then, the reality of political constitutionalism and democracy – of authentic bottom-up social variations – was more often than not characterised by the action of counter-hegemonic, not necessarily majoritarian forces, collectively organised along more or less situated agendas. This was often the reality – I would say the materiality – of the 'corporatist achievement of industrial democracy' much magnified by Christodoulidis. Arguing that 'radical forms of syndicalism and class struggle were animated by and geared to the aspiration of democracy and equality' (476) might be, on the one hand, too broad of a claim in historical terms, when one looks at the varieties of political constitutionalism; and, on the other hand, might extend what happened during the 'constitutional moments' to the entire reality of political constitutionalism in its ordinary, everyday operation.

But this is not only about industrial democracy. Political constitutionalism did not owe its 'improbable' (196–7, 199) achievements only to the productive mobilisation of the constituent/constituted contradiction. Such achievements were also due to the fact that that contradiction emerged among social forces and – importantly – their respective normative systems. Even before globalisation reached its current stage, law – the legal system – was never only *the* law, but always the law of the state, the law of the church, the law of the party, the law of the corporation. Effective constitutionalisation processes and constitutional normativity emerged as the – indeed, 'improbable' – stabilisation of mutual constraint of distinct normativities ultimately based on political,

<sup>96</sup>See most famously *Plessy v Ferguson*, 163 U.S. 537 (1896).

economic, scientific, religious rationality.<sup>97</sup> Put otherwise, the effectiveness of political constitutionalism depended *also* on the structural coupling of politically legitimated law with other, non-politically legitimated forms of normativity. To be sure, Christodoulidis captures this dynamic, again in Luhmannian terms, when he distinguishes between differentiation and fragmentation (297–308). But even under conditions of ‘healthy’, so to say, differentiation, could non-political normativities and principles of legitimacy really be traced back to political rationality *tout court*?

Further, the fact that Christodoulidis qualifies these industrial struggles as manifestations – the ‘hallmarks’ (476) – of the political maybe sheds some light on how he can ‘uncontroversially’ include democracy in his concept of the political. *The Redress of Law* is characterised by some ambiguity when it comes to the notion of democracy. One could say that he envisages a non-consensual, conflict-based democracy. One can only get glimpses here and there, especially when he critically discusses Habermas’ theory of communicative reason. However, within this field, it never really takes a clear position between the revolutionary elitism or more contestatory traditions *à la* Negri. Again, contestatory traditions seem to mirror more faithfully the overall project but, if this is the case, then the same criticisms can be raised. The ‘multitude’ of Negri can play its constituent and irritant role but, as such, it does not really found/constitute legal rights, as long as their protection is entrusted *only* to the reaction of the multitude itself to the experience of suffering – so central in Christodoulidis’s work – and not *also* to the autonomous operational processes of law in a given system. For Negri at least, the constituent power of the multitude has an omnivorous character, as it absorbs every defence of the ‘common’ and ultimately dissolves within itself any constituted power, ultimately emerging as a sort of permanent revolution. But – and here is another question – can there really be a political constitutionalism based on rupture without legal formalism? In other words, it seems that Christodoulidis draws a too stark contrast between strategies of ‘legal formalism’ and strategies of ‘rupture’, while they might actually – however counterintuitively – reinforce each other.

In strategic terms, looking at constitutionalism through the lens of pluralism may help unveil – ‘force the appearance of’, as Christodoulidis would put it – creeping de-constitutionalisation processes and guide the ‘selective withdrawal of certain areas of social action from the logic of the price’ (477). In the same terms, and again, confining ‘runaway pluralisms, the varieties of constitutionalism’ from below *à la* de Sousa Santos to the mere role of institutional experimentation and excluding them from the role of ‘defence of institutional achievement’ (264) does not do justice to their potential. At the global/transnational level, constituent power and rupture may also emerge through strategies of legal formalism based on *distinct* normative systems. Unless one sees law – legal formalism – only as a form for political action, what is ‘formal’ for a legal system may be ‘informal’ for another. The application, overlap, and entanglement of distinct legal/illegal (or constitutional/unconstitutional) codes may open to different strategies of both rupture and defence of institutional achievements, depending on the case.<sup>98</sup> One may argue that global constitutionalism does neither necessarily hide nor legitimise the reality of global capitalism. Rather, it changes the conditions under which different strategies of (dis)empowerment and emancipation may be pursued and succeed through legal means. Pluralism, then, may even offer instruments to establish a connection between constituent and destituent power. The 2021 landmark case of the District Court of the Hague in the *Shell* case<sup>99</sup> is only one spectacular example of how the intertwining of different normativities and their distinct (in)formality – domestic tort law, binding human

<sup>97</sup>See Teubner, Constitutional Fragments (n 15).

<sup>98</sup>B de Sousa Santos, ‘Law: A Map of Misreading. Toward a Postmodern Conception of Law’ 14 (1987) *Journal of Law and Society* 279.

<sup>99</sup>*Rechtbank Den Haag, Milieudefensie et al. v. Royal Dutch Shell PLC*, judgment of 26 May 2021, C/09/571932/HA ZA 19–379, <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339>>. It ordered the fossil fuel giant to reduce the CO2 emissions resulting from its global operations by net 45 per cent by 2030 compared to 2019 levels, thereby establishing a reduction obligation similar to the one imposed upon the Dutch state in the *Urgenda* case.



rights law, international soft law – may have (global) constitutionalising effects, heralding a new era for climate change litigation.<sup>100</sup>

## 6. Conclusion: the beauty of un-marketability

I would like to end with a consideration related to the style. *The Redress of Law* is a demonstration of the beauty of un-marketability. *The Redress of Law* presents a certain style, I would say a certain aesthetics that is already in itself a critique, an act of *resistance* to market thinking. The arguments unfold patiently, slowly. The careful, detailed, overabundant deployment of finely interconnected and symmetrically disposed arguments, the navigation of an impressive number of lines of thought, approaches, and theories coming from law, philosophy, sociology, and literature is an act of resistance in itself. The internal connections and symmetries across chapters are absolutely necessary to capture the real content of the book, which, as such, cannot be broken down into stand-alone units and cannot be processed in single pills to be digested separately by the academic market. All this stands against everything we are told today – especially as early-career scholars – when it comes to the marketability of academic publications and, more generally, to academic research. I think it is particularly important to highlight this point, especially as Christodoulidis has built his career in the United Kingdom, currently at the forefront of a global struggle against the ever-increasing neoliberalisation and marketisation of academia.

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<sup>100</sup>On these profiles, see, if you want, A Jr Golia and A Hoff, ‘Reducing is Caring. The Dutch climate case against Shell’ <<https://voelkerrechtsblog.org/reducing-is-caring/>>; and, from the specific perspective of societal constitutionalism, I Kampourakis, ‘The Power of Open Norms. Milieudefensie et al. v Royal Dutch Shell’ Verfassungsblog, <<https://verfassungsblogde/the-power-of-open-norms/>>.

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