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DIALOGUE AND DEBATE: SYMPOSIUM ON EMILIOS CHRISTODOULIDIS'S THE REDRESS OF LAW

Scholasticism and aesthetic enchantment: notes on a perplexing quest for the *Pouvoir Constituant*

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Abstract
The Article offers a summary of some of the major themes of Emilios Christodoulidis's *The Redress of Law*. In addition, it engages critically with social systems theory by calling into question whether it provides us with an adequate perspective on constitutional law. The concluding observations address the deplorable state of the left-wing project at the beginning of the twenty-first century.

Keywords: globalisation; constitutionalism; constituent power; social question; labour; left-wing project

On its face, Christodoulidis' work[1] seeks to reassert the vocabulary and the outlook of 'political constitutionalism' (6–7) vis-à-vis its transformation and impending demise under the predominance of neoliberalism (8). The noun 'redress', the author explains, is supposed to capture the law's 'countervailing gesture' (1) against the absorption of the power that gives form to the constitution by this very form (9), or alternatively put, against severing the powers of government from their democratic origin (265). Deep down, unsurprisingly, the book in nothing short of a quest for the lost *constituent power* (433).

1. Political constitutionalism

Political constitutionalism, the author contends, is based on the 'guiding distinction' (152; *Leitunterscheidung*) between the constituent power, on the one hand, and constituted powers, on the other (152, 179, 434). While the latter are supposed to constrain unbridled political clout, they also provide a durable outlet for the 'elan' of the former (157, 519). The author, hence, does not confront us with a crude and, in a sense, 'deistic' reading of the relation, according to which the constituent power serves as the watchmaker that sets the clock of the constitutional order in motion. Rather, the force of democratic politics remains irreducible to juridical thinking (156) and makes the constitutional process amenable to reimagination (18, 33–4, 189). It is unsurprising, therefore, that constituted powers grow from within and occasionally spill over their own boundaries (179, 434). The dynamism of the forming force is formless. This explains why it must translate itself into form in order to lend itself, and to sustain, its existence. It remains formless, though, not least because neither the limits of the people nor their authority are susceptible to any conclusive account. Constituent power is *semper, ubique et usque-quaque* self-authorising (163). Hence, 'revolution', 'politics', 'will' and 'democracy' are taken to be manifestations of the

[1]E Christodoulidis, *The Redress of Law* (Cambridge University Press 2021). References in brackets in the text are to this work.

constituent whereas 'order', 'law', 'reason' and 'rights' represent the constituted (154–5, 189, 434). As the historical realisation of this tension, the political constitution sustains the connection between democracy and the rule of law.

After this bold and somewhat Dionysian opening, the work changes into a more temperate mood, for the almost volcanic set up of the political constitution soon becomes locked up in a Luhmannian conceptual cage. A constitution sustains the 'structural coupling' of law and politics (153, 197, 199, 220, 230, 271). Both are, in principle, separate, functionally differentiated subsystems of society. It is through coupling that the systems can work in tandem.

'Constitutionality', the author posits, is the 'modality' of law's self-reflection (193–4, 200). This is a very uncommon way of putting the matter. Indeed, the first that comes to mind when one considers (or 'observes', in a 'second-order' manner, to be sure) how the law reflects on itself, are rules of procedure (200). In principle, such rules would be a far cry from a constitution if it were not for the fact that they assist us in identifying valid law. That a constitution provides us with sources of law is apparently decisive for the author, too.

Adopting Luhmann's three dimensions of meaning (*Sinn*),[2] Christodoulidis distinguishes three matching dimensions of 'constitutionality'[3] (210): Socially, the constitution is relevant to the group of people whose political choices lead to intermittent eruptions of constituent energies (215–6, 223–4); temporally, a constitution sustains commitments normatively, that is, by obdurately refusing to change expectations in the face of disappointments (225); materially, the type of constitution that Christodoulidis is interested in is manifest in social rights that are buttressed by an allegiance to values such as human dignity (233) and solidarity (228, 234). Normative commitments are self-reflectively secured through entrenchment, a hierarchy of norms and the juridical attempt to rationalise – to lend unity to – the constitution (214, 205, 229, 243) in light of overarching values that are treated as taboos (231, 215, 435). Juridical thinking in the form of 'dogmatics' is the quotidian manifestation of this attitude that abstains from casting ultimate normative premises into doubt (238). Apparently, in the eyes of the author dogmatics is the proper style of expounding the normative.[4]

There remains, however, always tension between the surplus meaning of these values and their particular realisation within systems of rights (144, 242, 251). The author seems to attribute to this surplus the 'antinomic' character of the substantive constitution: its foundational values resist being exhausted in historically contingent arrangements (254, 459). Rather, the surplus can be tapped for the purpose of renewal.

[2]For a first account, see N Luhmann, 'Sinn als Grundbegriff der Soziologie' in N Luhmann and J Habermas, *Theorie der Gesellschaft oder Sozialtechnologie – Was leistet die Systemforschung?* (Suhrkamp 1971) 25–100.

[3]Christodoulidis introduces this term as though it can be used as an equivalent to 'governmentality' or to what Anglo-American legal theory calls 'legality'. The latter concepts are supposed to designate either extralegal sets of techniques of governing or the quality of being law. See M Foucault, 'Governmentality' in JD Faubion (ed), *His Power* (New Press 2000) 201–22, at 211, 221. LL Fuller, *The Morality of Law* (2 ed., Yale University Press 1969) at 197–8. For a recent and most perceptive work on LL Fuller, see K Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L. Fuller* (Hart Publishing 2012). By contrast, American diehard Hartians, such as Coleman and Shapiro, have whittled down 'legality' to a property that can be possessed by abstract entities. It is the property of being law. See JL Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford University Press 2001) at 84; SJ Shapiro, *Legality* (Harvard University Press 2011) at 7. Legality means the quality of whatever belongs to the set of entities called 'law'. The major difference to Fuller's understanding is that the property 'legality' would also extend to norms that fall short of the standards of the rule of law. One may harbour doubts whether 'legality' does not in fact mislead, given that the concept has a different meaning outside of this discourse (in the context of Kant's legal philosophy, but also in continental European constitutional systems). – As a term, 'constitutionality' is well established in constitutional law. It designates the quality of being in accordance with the constitution, for example, when one asserts the 'constitutionality' of a statute. Christodoulidis, however, seems to use 'constitutionality' in order to refer to the basic elements of political constitutionalism. For people trading in constitutional doctrine this is somewhat confusing.

[4]I may be wearing the blindfold of the German legal tradition as this point, whereas, in fact, Christodoulidis appears to borrow the concept from Alain Supiot (230–235).

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2. Market constitutionalism

The 'political' constitutionalism, thus understood – and it is a remarkably idiosyncratic understanding of this concept – ,[5] is then contrasted with 'market' constitutionalism. In fact, the work suggests that we are confronted with a historical shift (259) that is particularly manifest in the context of European integration ('the European misadventure': 366).

First, in the temporal dimension the asymmetry in the relation of constituent and constituted power becomes strangely reversed. All of a sudden, we are confronted with processes of 'constitutionalisation', that is, incremental steps by which ordinary fields of law reveal their potential to transform themselves into some form of higher law (225, 260–1; 291):

> With constitutionalisation as an *emergent* quality of the constitutional, the constitutional function – still tentatively oriented toward the common good, whatever that means under conditions of radical pluralism – is tied to adequate responsiveness to contingencies as they arise, and the constitutional achievement is a process of incremental sedimentation.

Second, the original constituent power also becomes dispersed. The euphemism for this is 'constitutional pluralism' (283, 436) which comes, in turn, in a variety of forms (259, 263).[6]

Third, the normative commitments of law (and of constitutional law) become washed out owing to the rise of two forms of governance. Apparently, Christodoulidis attributes to this process a constitutional significance, if only for the reason that the model of constitutional authority that relies on statutes adopted by elected parliaments becomes gradually replaced with more flexible forms of governance (329).

In his view, the 'shift from government to governance' (329) has taken place in two 'waves'. The first wave is marked by the attempt to overcome the inertia of top-down bureaucratic regulation by infusing administrative processes with a new spirit that originates from rational choice theory. The second wave puts a premium on information-sharing in horizontal networks (331) and on fluid, revisable, 'learning' processes of policy-making that are carried out in an experimental spirit. Since they require, in order to be successful on their own terms, the participation of self-nominating 'stake-holders' they promise to involve a strong element of direct democracy (331, 339, 341). The emerging picture is summed up and lampooned nicely by Christodoulidis as follows (338):

> The grand project [.. .] gains its leverage and justification from the fact that it is effected on a fluid terrain, on which governance professes to optimize the flow of streams, to counter bureaucratic inertia, to fragment rigid structures of decision-making and re-align processes to move more flexible models of horizontal relationships within and between networks. [.. .] An emancipatory idiom mediates the rise and rise of governance: new governance, alternately, though often also cumulatively, is celebrated as *participative, collaborative, deliberative, responsive, experimentalist, recursive, reflexive, revisable, multi-level, etc.* The exuberance is unabated [.. .].

While in the context of political constitutionalism 'implementing the mandated word' used to be the 'truth of representation', now regulatory processes are expected to 'self-adjust' instead of

[5]For a well-established understanding of 'political constitutionalism' that perceives normative constraints anchored in shifting arrangements of social forces and emphasises the merits of democratic participation vis-à-vis judicial review, see R Bellamy, *Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy* (Cambridge University Press). See also, more recently, M Loughlin, *Political Jurisprudence* (Oxford University Press 2017) at 19.

[6]The most notorious of these forms is not even mentioned, namely, the pluralism in the relation of national constitutional orders, on the one hand, and the constitution of the EU on the other. It is a classical feature of a mere 'federation'. See S Larsen, *The Constitutional Theory of the Federation and the European Union* (Oxford University Press 2020). See also M Avbelj & J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012).

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'keeping their word' (340). We are witnesses to '[.. .] the gradual displacement of normative expectations by cognitive expectations in the process of social learning we associate with globalization' (279; see also 282, 340, 356). This is epitomised by the rise of cognitive orientations in policy making, such as mutual learning, correct measurement, benchmarking, best practice, experimentation, flexible adaptation (351, 387). The Open Method of Coordination serves as a key example here (384–90). The turn to the cognitive goes so far as to rely on indicators as a method of governance (344–7; see excellent remarks on their hidden normativity at 353, 389).

Substantively, the law becomes invaded by the neoclassical market mentality that affects the temporal dimension of normativity, too (358):

> [.. .] [T]he risk that the demands placed on law by globalization is that they threaten a *pathological* asymmetry between 'over-complexity' with regard to the system's cognitive expectations, and 'under-complexity' with regard to its normative expectations, an undermining of its own stabilising mechanism that presupposes adequate levels of 'indifference'. [.. .] Normative criteria guide selection of relevant information, and learning processes are those that keep both sets at play and manage the relation between them. This balancing exercise can lean decisively to the side of environmental complexity, but a limit point will be reached to law's ability to deploy normativity as a condition and filter of learning [.. .]. In the face of the rapid expansion of markets, at stake is law's ability to reproduce its own repertoire of reasons vis-à-vis the market's. [.. .] [The] [.. .] abandonment to unqualified market adjustment [.. .] is precisely what is celebrated in the varieties of 'constitutional' governance as total market thinking [.. .]

Thus, what Christodoulidis refers to as the 'framing function of law' begins to erode. In his view, the term 'constitutional' connotes (why not denotes?) a 'framing function'. It is manifest in the selection of certain facts, and not others, as relevant, the allocation of powers and the demarcation of the limits set to them (261, 268). Under the auspices of the market, however, the framing function becomes overwritten with a functional orientation. From this seems to follow, even though Christodoulidis does not spell this out very clearly, that the meaning of constitutional values and norms ('programs') is increasingly calibrated with an eye to the function that the constitution is supposed to serve. This function is 'the pursuit of the common interest' (268 with reference to Neil Walker). Taking one's cue – in the course of quotidian operations – from the 'function' invites exploring the availability of functional equivalents that are identified with an eye to a 'common good' that is tacitly or straightforwardly articulated in terms of market efficiency (269).

Additional light can be cast on Christodoulidis's observation with an eye to Luhmann's distinction between conditional and final programs.[7] Conditional programs establish a quasi-mechanical relation between a legal consequence and its triggering facts. Final programs, by contrast, require law application to take its cue from various goals to be attained or from values to be optimally realised. If the constitution is construed in latter terms it is transmuted into one gigantic engine of flexible goal attainment (something that has arguably happened in the EU, but Christodoulidis does not spell it out in that manner). As a result, the constitutional is '[.. .] undercut as an institutional achievement in its own right, lost to "plasticity" and to functional equivalence, and harnessed to market expansion' (276).

The logic of functional equivalence, he contends, has been key to the rise of 'total market thinking' (328). The latter stands for upending the functional differentiation of the subsystems of society (327). One system is always by default in place to perform and to take over the functions of others. This system is the economic subsystem of society, which can basically step into the shoes

[7]See N Luhmann, *Zweckbegriff und Systemrationalität: Über die Funktion von Zwecken in sozialen Systemen* (2 ed., Suhrkamp 1968) at 260.

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of the legal system (328) by adopting as its core principal efficiency and the decentralised dissemination of information.

The generalisation of economic reason is manifest in three steps of 'market capture' (310, 318–9), which Christodoulidis characterises as economic, democratic and epistemological: First, the political economy is reconceived in market terms (more precisely, in the terms offered by neoclassical marginalist economic thinking or by defending the market as a structure for generating reliable knowledge; Christodoulidis focuses only on the latter, 315–7, 319). Second, unplanned market allocations crowd out political choices to allocate goods according to need, hence the market supplants principles of justice (319). Third, economic reason supports the substitutions of other 'rationalities' with economic rationality and presents the market as a principle of veridiction (321, 390).

As a result of market capture, governance displaces the political with regard to democracy and epistemology. It supplants democracy with stake-holding and replaces the language in which labour, value and the moral economy may have found expression (354–5) with the language of prices.

Placing this diagnosis in the context of social systems theory, it suggests that functional differentiation becomes skewed in favor of the economic system (297). For a devout Luhmannian such a loss of the empty space in the leading functional system in society is the equivalent of a cardinal sin, for it reverses the course of functional differentiation and pushes us back to some form of stratification (297, 305). Interestingly, Christodoulidis gives the tilted version of functional differentiation the name of 'fragmentation' (306–7). This 'collapse of differentiation into fragmentation' (307–8, 376; see also 327, 468) results in law and the political being overwritten by the economic (308, 327, 376, 383). Here is how he describes the matter (306–7):

> Differentiation names *a principle of connection* that holds the parts together meaningfully – as differentiated and therefore as maintaining a relationship both to the whole and among themselves. Fragmentation on the other hand simply means scattering; it marks the move away from the whole and toward brokenness. Differentiation breaks under the weight of an asymmetry between an economic system and the legal and political systems, where the former's organisation of the global flows of capital depends on the exploitation of the latter, still largely stuck at state-level. The deficit is no temporary, and transient, anomaly; it is instead *structurally* built in to *the architecture of global capitalism*. In the case of Europe the asymmetry shows in the unevenness of the integration of national markets (through the fast-tracking of economic integration) as against the fragmentation of states' systems of social protection.

Christodoulidis then spends quite a bit of time and pages on telling the European story, focusing, eventually, on *Viking* and *Laval*, taking issue, quite rightly so, with the application of the proportionality principle to the exercise of the right to strike (408) and with the perverse prospects of realising a social market economy through social dumping (424–5).

3. Emancipatory potential

The fourth and final part of the *Redress of Law* seems to seek to uncover trajectories of transformation, more precisely '[.. .] to excavate [.. .] the emancipatory potential of political constitutionalism' (455), and this involves countering the generalisation of economic reason and breaking the cycle of functional equivalence (479). Paradoxically, however, this part does not seek to identify left-wing alternatives, but rests content with recounting various attempts to imagine the new and to trace its emergence. At one point, and for reasons that do not emerge clearly, societal constitutionalism – Teubner's final bid in the camp of the Luhmannians – makes its appearance (467).

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Overall, however, this part offers a motley assembly of ideas, ranging from formalism (461), Luxemburg's perspective on spontaneity and autogestion (499), the initial success of Solidarność (480, 485), the sudden appearance of the poor in antiquity (489), the myth of the mass strike (501, 503), Benjamin's further aesthetic transformation of this myth (506–7), a practice that installs its own legibility (505), and, of course, Rancière's ideas concerning disagreement (490–1, 515, 548) and the 'event', in which those appear on the scene who have had so far no part in the spectacle of the social (493; 127 on 'acts of resistance as aesthetic acts'). The strange adoption of societal constitutionalism aside, it seems as though the final part of the book that presents itself, at the outset (12), as a project of decommodification, engages in the search of a force that would be able to unsettle market constitutionalism either through action or radical withdrawal. The work does not hint at what might be the author's preference for a particular institutional alternative.

This sets this book remarkably apart from the oeuvre of another legal scholar who has pursued a 'left-wing' project over many decades, however, by going to great pains, indeed, to sketch institutional alternatives, ranging from systems of finance to organising democracy and designing a system of rights.[8] No two left-wing thinkers could be further apart than Christodoulidis and Roberto Unger. While Unger's work appears to betray some of the spirit that Christodoulidis would dismiss out of hand as being complicit with the epistemic mindset of the market mentality inasmuch as Unger stresses matters such as social experimentation and 'reinventing ourselves',[9] it is nonetheless clearly focused in the twin agenda of a left-wing program, which is, on the one hand, the emancipation from dependence and social hierarchy, and, on the other, the desire to produce greater material advantage for all.[10] Both of these themes do not, surprisingly, play a role in this work that claims to defend a decidedly left-wing orientation against becoming submerged in neoliberal ideology.

4. The style

The book is enormous in its scope, which is not least owing to the author's style. For the most part, it presents itself as a collage or a pasticcio of themes that the author reassembles for the purpose of his own project. Through relatively close readings of works stemming from antiquity to postmodernism Christodoulidis presents and further elaborates the themes that he extracts from these sources. This explains why the emerging picture often becomes fuzzy as the focus shifts away from the main themes of the book to the writings of the referenced authors. This often proves to be somewhat exacting on the reader's indulgence, for it is not clear, for example, why the section that introduces the ascendancy of market constitutionalism needs to be introduced with long-winded considerations of the sociology of Durkheim and Simmel, to which is then added, ostensibly to spice things up a bit, a quick aside on Luhmann's early book on fundamental rights (297–301). Such a style of exposition resists easy condensation into a set of quickly presentable arguments. Indeed, I, for one, was not infrequently reminded of how Hans Blumenberg went through a series of authors, apparently aided by his sizeable archive of notes (*Zettelkasten)* for the purpose of writing extensive volumes on various topics; works that also struggled with staying focused, to say the least. Reading Blumenberg is the intellectual equivalent, in the field of philosophy, of listening to serial music. The ear progresses intrigued from one moment in which sonorities are spilled out to the next, but the listener struggles heavily with putting isolated experiences together into a whole.

[8]For a latest instalment, see RM Unger, *The Knowledge Economy* (Verso 2019) and, for a first comprehensive statement, his *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (Cambridge University Press 1987).

[9]See Unger, *Knowledge Economy*, Ibid., at 137–58.

[10]See RM Unger, *What Should the Left Propose?* (Verso 2005) 38.

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While the book is undoubtedly – again, in this respect redolent of Blumenberg's solitary tomes – quite impressive as to the learnedness that the author puts on display, the question remains whether it is successful in both respects that matter to it, namely, as a constitutional theory and as the attempt to reinvigorate the project of political constitutionalism.

In what follows, I would first like to examine mostly the question of constitutional theory before I'll turn, in my final remarks, to the left-wing project.

5. The aerial image

Possibly owing to its style, the book remains strangely detached from the constitutional theory prevalent in the discipline. It also demonstrates casual indifference to the evolution of constitutional systems.

The detached demeanor is already manifest in how Christodoulidis uses the term 'political constitutionalism'.[11] Usually, particularly in British circles, political constitutionalism is contrasted with its legal counterpart.[12] Christodoulidis is, of course, aware of this, but also quick to reject the contrast due to what he ostensibly believes to be a lowly degree of sophistication (194–195):

> [L]et us dispense quickly with the unhelpful circularity of theorising 'legal constitutionalism' as pitted against 'political constitutionalism'. [.. .] In the theories where the contrast is deployed, it is intended to connote [why not denote? A.S.] an opposition between political constitutionalism in its 'democratic' overtones and the 'juristocracy' of rights adjudication by constitutional courts. The contrast has spawned a thousand variations. Suffice it to say that it is a category mistake to collapse constitutionalism into the function of adjudication as a matter of *theory construction*.

Even though the last sentence is somewhat difficult to parse, it raises the question, indeed, whether it is sufficient to suggest, somewhat superciliously, that what ordinarily passes as 'legal' constitutionalism reduces the project to a function of adjudication. This is even misleading to suppose, considering what theories of judicial review have tried to accomplish, namely, to determine the legitimate scope of the latter vis-à-vis other branches of government.[13] Taking on this task, one needs to draw on fundamental ideas of constitutionalism and cannot, by virtue of doing so, 'collapse it into a function of adjudication'. The condescension with which the system theorists look down upon established constitutional theory blinds him also to the fact that there is something important to the legal and political divide, namely, the belief shared among political constitutionalists that the normative force of constitutional laws is an emergent quality (in Luhmannian parlance: *eine emergente Eigenschaft*)[14] of relations of power.[15] Christodoulidis, with the faith that he rests on the intellectually blind-folded dogmatics (235), does not seem to share this view (heaven forbid, he could not share it, for this would explode the 'normative closure 'of the legal system). Rather, he endorses a legal constitutionalism that regards all commitments as rooted in something that is not amenable to rational insight. Here is the relevant enigmatic statement (235–6):

[11]See already above n 3.

[12]See G Gee and GCN Webber, 'What Is a Political Constitution?' 30 (2010) Oxford Journal of Legal Studies 273–99 and the original Article by JAG Griffith, 'The Political Constitution' 42 (1979) Modern Law Review 1–21.

[13]See, for example, JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1981).

[14]On the notion, see PM Hejl, 'Selbstorganisation und Emergenz in sozialen Systemen' in W Krohn and G Küppers (ed), *Emergenz: Die Entstehung von Ordnung, Organisation und Bedeutung* (Suhrkamp 1992) 269–92, at 288–9.

[15]See my 'Real Constitutional Law: A Revised Madisonian Perspective' in *Vienna Lectures in Legal Philosophy*, vol. 2 (ed. C Bezemek, M Potacs and A Somek, Hart Publishing 2020) 161–83.

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> Reciprocity, solidarity and obligation, as dogmatic resources, are elevated to the level where they furnish normative orientation. There is no stepping outside (the system, the horizon, the dogmatic) because there is nowhere to go normatively.

Aside of the fact that a potential infinite regress and the invariable use of stopgaps are far too readily conceded at this point (haven't we since Antiphon[16] good reasons to believe in the equality of human beings?), it harms the project to stay away from, or to deride as being beneath the ken of sociology, core issues of constitutional theory. While Christodoulidis's idiosyncratic use of the predicate 'political' for a constitutionalism that does not deny the link between the constituted and the constituent, is not without merit, its detachment from the ordinary language of constitutional law, however, comes at the cost of indifference towards supposedly insignificant topics such as judicial review and the separation of powers.

It would be premature, however, to celebrate this chaste attitude as a virtue attending to the superior insight of the sociological perspective. On the contrary, it detracts considerably from its appeal, for it is even more puzzling given that much of the shift to market constitutionalism reconstructed in this book has been either brought about or condoned by judicial bodies, such as the ECJ and, if Danny Nicol is right, also the ECtHR.[17] Not by accident, *Laval*[18] and *Viking*[19] occupy a prominent place in the book. Should not a constitutional theory attempt to explain the fact that a 'constitutional moment' (395) originates from an institution presenting itself as an adjudicating body? Naïve constitutional theorists may even ask themselves at this point whether 'political constitutionalism' in Christodoulidis's sense would not be better served if judicial tribunals were disempowered in the manner advocated by ordinary, low-brow political constitutionalists.

The outright disregard for the judicial branch is merely one of the downsides of a high-flying social theory. Another one concerns the puzzling fact that the shift of gravity from legislation to governance and the ascendancy of market constitutionalism are even perceived as part of a transformation of constitutionalism.[20] The processes – the spirit of which Christodoulidis reconstructs quite perceptively – occur primarily in the relation between the legislative and the executive branches of government. The turn to informal, self-revising, experimental processes of governance is backed up by self-denying ordinances on the part of the legislature, adopted in the face of unmanageable 'complexity'. Constitutional authority does not prevent a development that is located, even from a transnational perspective, in the context of the 'administrative state'.[21] It is not by accident that an American public law scholar perceives the European Union as nothing short of a transnational administrative agency or, possibly more adequately put, as a whole compound of those.[22]

It stands to reason that the altered relation of authority between branches eludes the sociological project due to grafting pitilessly a peculiar vocabulary upon social phenomena. Social systems theory spurns the richness of the historical sociology that we encounter in the works of Max Weber or even Montesquieu. It addresses itself to society as a system of communications and

[16]See *Antiphon the Sophist: The Fragments* (ed. with introduction, translation, and commentary by GJ Pendrick, Cambridge University Press 2002).

[17]See D Nicol, *The Constitutional Protection of Capitalism* (Hart Publishing 2011).

[18]See Case C-341/05, *Laval un Partneri Ltd*, ECLI:EU:C:2007:809.

[19]Case C-438/05, *International Transport Workers Federation, Finnish Seaman's Union v Viking Line ABP, OÜ Viking Line Eesti*, ECLI:EU:C:2007:772.

[20]I, for one, would, indeed perceive it as such, however, based on an entirely different constitutional theory. I would attribute it to the 'dark side' of the cosmopolitan constitution and attribute to civic interpassivity the force of the constituent power. See A Somek, 'Constituent Power in National and Transnational Contexts' 3 (2012) Transnational Legal Theory 31–60.

[21]For an introduction to the legacy, see BA Ackerman, *Reconstructing American Law* (Harvard University Press 1984); CR Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Harvard University Press 1993).

[22]See P Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation State* (Oxford University Press 2010).

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to how communications are coded and programmed. It is a theory that views human actions as 'events' that are either attributed to a system or located in a system's environment.[23] Institutions play, if at all, a peripheral role. That this general orientation of the theory is brought to bear on the field of constitutional law may explain why Christodoulidis does not care whether the relevant shift has been precipitated by the legislative, the administrative or the judicial branch.

The reliance on social systems theory may also be responsible for the lack of attention to historical transformations. The world of 'constitutionality' is presented as though it had always been the same or an idea in the Platonic sense. This is puzzling, in particular, with regard to its alleged commitment to human dignity. The world of modern constitutional law begins with freedom understood as freedom from unlawful interference by government.[24] Constitutional law is historically fundamentally intertwined with liberalism. While it makes sense to view the allegiance to solidarity as something that originates already in the course of the French revolution,[25] modern constitutionalism has thrived, primarily, as a project of liberty, whereas social rights have lagged behind, much derided and sneered, at not least by Marx and Marxists.[26] Christodoulidis posits that political constitutionalism is based on solidarity and dignity (see, already, out of nothing on 125). Historically, however, dignity enters the picture rather late, first in the course of the Christian appropriation of human rights[27] and later, in the German case, as a strange token for the compromise between liberty and solidarity.[28] There it has served as a shibboleth for the fresh start taken in the wake of the universal declaration of human rights.[29] The story is complicated on the level of details, but one cannot simply dispense of it by claiming the value of solidarity is fundamental and that various social rights remain incapable of ever exhausting its meaning (and mustering Thomist *determinatio* in one's support, 236, 239, 242, 251 337, 412).

6. A distorted reconstruction

Christodoulidis' allegiance to social systems theory is also responsible for his attempt to reconstruct the transition from political to economic constitutionalism as a process involving a switch from cognitive to normative expectations. His analysis demonstrates, unwittingly, how social systems theory can in fact be distortive of social facts.

I do not mean to deny that Christodoulidis' account of the move to flexible and adaptive policy-making processes comprises some of the very best parts of the book (327–54, 384–91). They are brilliantly written and particularly instructive when it comes to the hidden normativity of indicators and how institutions are able to wield power by virtue of their publication (345–7, 376, 388–90). Nevertheless, some of these highly perceptive observations are not fine-grained enough to reveal a subtle shift in the relation of administrative and judicial authority. Generally and ideally, the relation between these two branches is to be calibrated with an eye to how each promises to contribute to rational problem-solving. Since it is rationality that matters, there is always and in any case something *normative* at stake. This explains why Christodoulidis' account is somewhat misleading. He believes that the rise of market constitutionalism hinges,

[23]See N Luhmann, 'Handlungstheorie und Systemtheorie' in his *Soziologische Aufklärung*, vol. 3 (Westdeutscher Verlag 1981) 67–80.

[24]See CH McIlwain, *Constitutionalism Ancient and Modern* (2d ed, Cornell University Press 1947).

[25]See, of course, H Arendt, *On Revolution* (Penguin Books 1990) 59, 61.

[26]See K Marx and F Engels, Werke (MEW), Band 36 (Dietz Verlag, 1979), 150–2. I would like to thank Vadim Arco for having dug this out for me.

[27]See S Moyn, *Christian Human Rights* (University of Pennsylvania Press 2005).

[28]See A Somek, *The Cosmopolitan Constitution* (Oxford University Press 2014) 9, 134–54.

[29]See T Rensmann, 'The Constitution as a Normative Order of Values: The Influence of International Human Rights Law on the Evolution of Modern Constitutionalism' in P-M Dupuy, B Fassbender, MN Shaw and K-P Sommermann (eds), *In Festschrift für Christian Tomuschat* (N. P. Engel Verlag 2006) 259–78.

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among other things, on a turn from a normative to a cognitive way of dealing with disappointments. While cognitive expectations are adjusted to fit new experiences, normative expectations are sustained in the face of frustration. Even where I encounter widespread trickery, I want people to be honest.[30] This is my normative expectation, and it makes a great deal of sense to distinguish this attitude, as a type, from the cognitive adjustment to a situation. But the distinction does not help to elucidate the transformation in question. What is involved, instead, is a shift from one source of normativity to another. The rationality of law is simply increasingly crowded out by the rationality of administrative policy making. Admittedly, this rationality is 'cognitively open'. This openness, however, is part of the law that exists unto itself and, hence, it is a normative form of openness.

Social systems theory also occasionally entertains a 'pluralistic' perspective on rationality. The idea is that various social systems operate with different, potentially 'incommensurable' rationalities. One encounters this view as a darling dogma of the approach that attempts to diagnose global 'regime' collisions.[31] What purportedly underlies their clash is a contest among rationalities. While such a diagnosis may have an exciting ring to it, not least for those susceptible to the lure of all kinds of relativism (or Davidson's 'third dogma' of empiricism),[32] the facts are simpler. Different social systems, if they exist at all (a point that is not conceded), serve different functions and are therefore adjusted to the attainment of different objectives. Administrative processes pursue various policy aims,[33] while the legal system is supposed to watch over legality. The control of legality is in one way or another the preserve of the judiciary using more or less stringent standards for reviewing the rationality of administrative action. The normativity of law is thus funneled into the judicial assessment of administrative actions. The contest that arises here, necessarily, pits the normative standards of effective administrative action (such as cost-effectiveness, satisficing, expediency, bargaining with stake-holders) against the rationality standards underlying judicial review. And, to repeat, even if the standard of administrative action embraces 'learning' and 'cognitive openness' then these precepts are nevertheless normative standards. We are confronted thus, with a contest of normativity from which, at the end of the day, administrative rationality ends up victorious over law, which recedes into the background and rests content with filtering out instances of clear irrationality.[34] This is the development that Vermeule describes as 'law's abnegation'.[35] The bite of judicial review is scaled back to a rudimentary level, not least because it is not supported by sufficiently precise legal standards.

Now, one might object that a lack of support by law – intelligible principles – demonstrates that the constitution is already in demise. This seems to add grist to Christodoulidis' mill. But one must be guarded against this conclusion too. The retreat or abnegation of law concerns law *in general* and not merely constitutional law. From this follows that the problem explored by Christodoulidis is actually broader and more profound than he seems to notice. It is not only deconstitutionalisation, but delegalisation what we counter here.

Possibly, this is not a bad development at all. Perhaps the idea that legal rules and 'values' can constrain the Leviathan finally turns out to be delusional. The critics of law, such as American legal realists and proponents of critical legal studies may have had it right that when they claimed that formalist mumbo-jumbo is just a coverup within the political agenda of those mesmerising and to bamboozling an ignorant public. Considering these important currents of legal thought, the

[30]See N Luhmann, *Rechtssoziologie* (Rowohlt 1972) 40–53.

[31]See A Fischer-Lescano and G Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' 25 (2004) Michigan Journal of International Law 999–1046.

[32]See D Davidson, 'On the Very Idea of a Conceptual Scheme' in his *Inquiries into Truth and Interpretation* (Oxford University Press 1984) 183–98.

[33]They do so in a notoriously 'opportunistic' manner. See Luhmann *Zweckbegriff und Systemrationalität* (n 7) at 52.

[34]See A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press 2016) 129.

[35]Ibid., at 13, 210.

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formalist panacea presented by Christodoulidis (461–6) seems to be a bit out of whack with a hundred years of legal theory.[36]

It is against this background that the celebration of the 'dogmatic' must appear as relatively eccentric, to say the least.

7. Sociology without society

Social systems theory can be properly described as 'scholastic' owing to its strong propensity to explore questions that originate from and concern its own theoretical design. These questions are largely unrelated to the world we live in.

The scholasticism is most visible in the penchant of professing theorists to replace external reference with self-reference. There is a reason why there is so little to learn about society from Luhmann's books. Since *Social Systems*,[37] each sequel volume that claimed to study a particular subsystem of society ended up discussing questions of theory construction, for example, founding paradoxes and their concealment ('invisibilisation'). The *Science of Society* is a perfect example for that.[38] The introverted nature of the theory explains also why *The Law of Society*, which appeared in 1993,[39] ended up being such a disappointing book by contrast to the 1972 *Sociology of Law*, which is rich in content.[40] In retrospect, one is even inclined to call it a masterpiece. Luhmann's later works, though, are, indeed, reminiscent of Fichte's serial introductions to the *Science of Knowledge*.[41] They represent repeated attempts to impart to the reader the core ideas, even if always in slightly modified form. While in the case of Fichte this made for an impressive, albeit rather aloof, philosophical oeuvre, in the case of Luhmann and his acolytes it resulted in the loss of external reference to the phenomenon under consideration, which is, lest we forget, society. Overstating the point a bit, it has been the distinguishing mark of Luhmann's theory to be very much akin to a nervous illness. The ostensible inability to shed light on society gave rise to an obsessive preoccupation with the theory itself, which thereby grew – undeniably in an interesting manner – into the symptom of its own failure.

8. Social experience to elucidate social theory (and not the other way round)

At several important points of Christodoulidis's work, the questions of constitutionalism are overwritten with the conceptual grid and internal pressures of the master's theory. The resulting palimpsests are a bit strained. An instructive example of what I have in mind here is the discussion of 'societal constitutionalism'.[42] The idea is presented as a coupling of the reflexive operations of separate social systems (473).[43]

But what is that supposed to mean?

Any system's ordinary operations use the code to refer to and to classify something in their environment: 'This is legal, that is illegal' (with 'legal/illegal' representing the code of the legal system). The reflective use of the code applies the code to the coded operation. The language used changes to the meta-level: 'The statement that this is legal is illegal'. The ascent to the meta-level gives rise to a paradox ('It is illegal that this is legal') that can be resolved by distinguishing

[36]For a brief introduction, see A Somek, *Knowing What the Law Is: Legal Theory in a New Key* (Hart Publishing 2021).

[37]See N Luhmann, *Soziale Systeme: Grundriss einer allgemeinen Theorie* (Suhrkamp 1984).

[38]See N Luhmann, *Die Wissenschaft der Gesellschaft* (Suhrkamp 1990).

[39]See N Luhmann, *Das Recht der Gesellschaft* (Suhrkamp 1993).

[40]See n 30.

[41]For an overview, see the contributions in D James and G Zöller (eds), *The Cambridge Companion to Fichte* (Cambridge University Press 2016).

[42]See G Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press 2012).

[43]See Teubner, Ibid., at 105.

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between primary and secondary rules. The reflexive uses become then governed by rules of rule application, for they are supposed to determine the conditions under which the attribution of 'values of the code' (*Kodewerte*) is itself 'legal'. Owing to extant procedures it is possible to say that the speech acts attributing 'legality' or 'illegality' to certain acts are themselves either lawful or unlawful.

Now, the selfsame scheme can be grafted upon politics. The code, in the case of this system, is 'government/opposition'.[44] Regardless of whether this is an illuminating way of approaching the field of politics, it ostensibly casts the political world squarely into the scheme of 'friend' and 'enemy'.[45] Any reflexive operation of the code again applies the code to its own operation. As a result, seeming friends are unmasked as enemies, former enemies are turned into friends. Indeed, much of politics is indeed about forming and reshuffling coalitions. This is, at any rate, how I would make sense of the reflexive use in this context.[46]

Social systems theory tells us that law and politics become structurally coupled in the context of 'constitutionality'. Translating this statement back into the root code on which the theory is based this means that the push and shove of coalition building and discrediting your opponent becomes combined with paying heed to what is proscribed with procedural rules.

Have we not known this before? The theory does not elucidate social phenomena. Rather, it is the other way round. The theory is interested in expressing matters that we are already acquainted with in its own idioms. We do not arrive at a better and deeper understanding of social reality. Rather, we can only make sense of a remarkably twisted theoretical edifice by holding fast to our socially determined preunderstandings.

9. Scholasticism undermines the project

I am afraid, however, that social system theory not only fails to improve our understanding of society, it is eventually also detrimental to Christodoulidis' project.

Adopting the perspective of a self-appointed, albeit imaginary, Luhmannian, the first thing to notice is that Christodoulidis does not describe the political field in terms of its code. Rather, he just talks about power acting upon power. He designates the system by referring to its particular medium of communication. Against this background, the point of societal constitutionalism is introduced as follows. It is said to consist of a coupling of 'reflexive structures' of the relevant systems, that is, politics and law.[47] In the case of law, the reflexive structures are rules of procedure – for example, of parliamentary procedure. In the case of politics, the equivalent thereto are the principles of prudent political conduct in the face of constantly lurking opposition. I am, hence, inclined to take from this suggestion that the structural coupling consists of behaving politically under the auspices of legal constraints and manipulating or exploiting legal rules in the pursuit of political objectives. This matches exactly what a prominent social systems theorist has to say on this (473)[48]:

[44]See N Luhmann, *Ökologische Kommunikation: Kann die moderne Gesellschaft sich auf ökologische Gefährdungen einstellen?* (Westdeutscher Verlag 1986) 170.

[45]Of course, my way of putting this is a bit reminiscent of C Schmitt, *The Concept of the Political* (trans G Schwab, University of Chicago Press 1996).

[46]I am construing examples with the awareness that the theoretical grid or scheme may well be, and has been, applied differently by avowed social system's theorists. This is unavoidably so because it needs to be determined in the course of its application. In some instances, however, I doubt that the theorists apply it properly. For example, Teubner, n 42 at 104, improperly assimilates the reflexive use of the code of politics to the application of the code of law: 'Politics becomes the autonomous power-sphere of society when it directs power processes via power processes, and produces the double closure of politics through electoral procedures, modes of organization, delineation of competence separation of powers, and fundamental rights.' He should have spoken about power-equilibria and, hence, about coalitions instead. Not infrequently, social systems theory appears to be internally inconsistent.

[47]See Teubner (n 42) at 105.

[48]This is a quotation from Teubner (n 42) at 104.

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> Constitutions emerge when a structural coupling of the reflexive mechanism of law (ie secondary rules) with the reflexive mechanism of the relevant other social sector occurs.

This statement summarises the trivial point made before. The exposition of law is subject to political maneuver, politics has to present itself as being entirely consistent with law. But this way of thinking sets Christodoulidis's project on a trajectory that is contrary to its objectives. This can be seen by taking an alternative social system into account.

The communications of the economic system use 'payment/non-payment' as their code.[49] The code is used reflexively if one engages in paying or saving with an eye to future returns or sustaining liquidity ('This is a payment that pays, that is a payment that does not'). The reflexive use is guided by the standards of sound investments or finance. These rules can be spelled out or, at any rate, supported by rules of banking and finance. But what on earth would it justify calling a banking regulation a constitution? This would be a quite outlandish terminological move.[50]

Yet, exactly this type of move has fascinated Teubner ever since the publication of his seminal *Reflexives Recht*.[51] It appears that he has merely rebranded the original approach by calling the fact that a social sector regulates itself a 'self-constitutionalization' (304). Depending on the system, apparently, this process requires more or less structural coupling with law.[52] This move matches, however, exactly the trivialisation of the concept of the constitution that *The Redress of Law* is up against. Christodoulidis seems to endorse, therefore, on p. 473, what has taken him at least 200 pages to refute before. As a social system theorist, however, he may feel obliged to follow Teubner's lead and, hence, states explicitly that a system becomes *constitutional* only if the coupling of reflexive processes occurs within both systems (474). This means that the constitutionalised economic system reasons legally and the legal system economically.[53] One is inclined to shout out: 'Welcome back to the wonderful world of market constitutionalism!' After Christodoulidis has thus surrendered to what he has been fighting an arduous up-hill battle against he can finally make illuminating statements like the following (474):

> The threshold of constitutionalisation is only reached once the 'hybrid binary meta-code' guides internal processes in both systems. How this is achieved is through the second-order coupling, with the help of 'hybrid meta-codes', that is 'codes' where the code-values constitutional/unconstitutional function to enable the coupling of systems at the reflexive level (hence 'meta'), and hybrid' because in 'straddling' the two systems there is no direct transferral of meaning between the two orders of reflection, but in each system the coding releases opportunities for system-specific thematisation. Of what? Of what is constitutional or not, in relation to the pursuit of the public interest. In the idea of the public interest and 'public

[49]See N Luhmann, *Die Wirtschaft der Gesellschaft* (Suhrkamp 1988) 14.

[50]But see Teubner (n 42) at 103. He even suggests that the coupling with law with regard to the self-founding or self-constitution of social systems varies among these systems. Whereas science can regulate itself without law, the constitution of politics requires the rule of law (108).

[51]See G Teubner, ‚Reflexives Recht: Entwicklungsmodelle des Rechts in vergleichender Perspektive' (1982) 68 Archiv für Rechts- und Sozialphilosophie 13–59.

[52]See Teubner (n 42) at 108–9.

[53]See Teubner (n 42) at 108. He presents this relation wrongly, in my view, as one that sustains a strict separation. Rather, it must be the case that one can be represented from within the other and taken into account. If that were not the case, the talk of 'hybrid meta-coding' (110) would be entirely out of place. The hybrid binary meta-code 'constitutional/unconstitutional' is supposed to guide the processes of both systems. The point of the 'hybrid binary metacode' is to make the relevant systems take account of the function of the other (Ibid.): 'The constitutional code (constitutional/unconstitutional) is given precedence over the legal code (legal/illegal). What is special about this meta-coding, though, its *hybridity*, as it takes precedence not only over the legal code but also over the binary code of the function system concerned. Thus it exposes the binary-coded operations of the function system to an additional reflection regarding whether or not they take account of the subsystems public responsibility.' Of course, such mutual taking into account can only be accounted for as 'mutual irriation' (111) and is supposed to work somehow.

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responsibility' as underlying the 'additional reflection' imported at the constitutional level, we find the normative pulse of the theory.

Christodoulidis seems to embrace, thus, the functionalism that undermines political constitutionalism. But, apparently, since it is this time around coming from Teubner, it does not seem to harm. Now it becomes even associated with an organic vision of society, for the idea is that the functionally separated pursuit of the public good will give rise to the self-limitation of social spheres. Only a small step is needed to expand this view into some variety of 'common good constitutionalism'.[54]

At the same time, it does not even take the conceptual mumbo jumbo and compulsive rigidities of social systems theory to wrap one's head around the basic idea. It is rather simple. Once political constitutionalism becomes weaker since a functionally differentiated society does not avail of a center, not even a political one,[55] the social spheres cannot but regulate themselves in order to avoid chaos. Do we have to spice this realisation up by calling it 'societal constitutionalism'?

10. Structural coupling

At an even more fundamental level, social systems theory does not offer a particularly helpful vocabulary in the context of constitutional law.[56] Rather, it overdetermines constitutional analysis and replaces the problems of constitutional law with trials and tribulations of its own making.

The intellectual surplus of conceiving of constitutional law as a 'second order coupling' of reflexivity must elude the reader (473), simply because one is always eventually left in the dark as to what a 'structural coupling' really is.[57] Does it mean that an event triggers operations within the structures of both systems? But then all multi-system events (*Mehrsystemereignisse*)[58] would amount to a structural coupling. Or does it mean that the operation of one system is conditioned by the other? If that were the case, the boundary between the systems would not be sustained, for there existed a program tying one system to the other.[59] In the absence of programs, one could say that certain features of the environment have to be reliably given in order to secure the continuous reproduction of the system.[60] Without food no life. Life is not determined by food, but is sustained by it. From that angle, it would have to be the case that without law there could be no politics. But that's just as manifestly untrue as would be the reverse idea that without politics there could be no law.

Evidently, the structural coupling of law and politics is historically contingent. It appears at a certain point of human history, possibly with the idea of checks and balances. One must wonder, therefore, whether Madison's memorable discussion of how, owing to political jockeying, the constitution can be binding as law,[61] has not given us a clearer perspective on how law and politics work in tandem in a constitutional system than talk of 'structural coupling'.

[54]For a recent statement, see A Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity 2022).

[55]For a decidedly different perspective, see Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (Basic Books 1983) 30 (claiming that politics necessarily needs to dominate in order to keep separate spheres of justice intact).

[56]For a very thorough critique, see J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (trans W Rehg, MIT Press 1996) 52–6.

[57]Not even transcripts of Luhmann's lectures are of much avail. It cannot explain more than that the operations of the system are *somehow* permanently linked and dependent on certain features of the environment without thereby losing their 'operational closure'. See N Luhmann, *Einführung in die Systemtheorie* (ed D Baecker, 2nd. ed., Carl Auer Verlag 2004) 120–6.

[58]See D Krause, *Luhmann-Lexikon: Eine Einführung in das Gesamtwerk von Niklas Luhmann* (2nd ed, Enke 1999) at 159.

[59]In order to avoid the conclusion that one system is actually 'conditioned' by another Luhmann speaks of 'resonance' (or *Resonanzfähigkeit* in German). See Luhmann n 37 at 441.

[60]See Krause (n 58) at 142.

[61]See A Hamilton, J Madison and J Jay, *The Federalist* (ed C Sunstein, Harvard University Press 2009) 339–45.

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I am afraid that the intellectual harvest remains small when it comes to this concept. Unfortunately, Cristodoulidis compounds the already existing scholastic difficulty for himself by adding constitution/constituted as a *Leitunterscheidung* to an already quite intoxicating brew that is composed of the 'hybrid meta code' of constitutional/unconstitutional and the two subordinate adjunct codes of government/opposition and legal/illegal. Things are bound to remain rather messy. What eludes the reader, however, is how his tangle of binaries could ever elucidate the phenomena of constitutional law? I suspect that it holds allure only for those harboring a penchant for substituting the study of society with the construction of social systems theory.

Lest we forget, the incessant and tiring recourse to 'structural couplings' is a consequence of the theory's design. After social phenomena have been torn apart and apportioned to functionally differentiated social systems, they have to be artificially reassembled again. Otherwise, social systems theory could not even claim to speak about social phenomena. But the conceptual universe remains locked into scholastic self-reference even in the attempt to break free from it. The concept 'structural coupling' merely signifies the need to overcome differentiations, but it is far from fulfilling this need. In our case, it helps merely to shroud the word of constitutional law in a nebulous mystery.

11. The neglect of constitutional reasoning

One price to be paid for prioritising social theory over society is that the analysis never touches base with the conceptual world of constitutional law. Christodoulidis presents the constitution as though it had always been conceived of as an 'order of values' (230–1). Nothing could be further from the truth. Modern constitutions emerge as 'charters of powers created by liberty'.[62] The first modern constitutions did not, originally, put solidarity at the center. They endorsed popular sovereignty and were based on a very lively sense of the constituent power.[63] To attribute to constitutionalism a core commitment to solidarity may be correct for the beginning of the French revolution and several European and Asian constitutions thereafter (India, for example); it is not, however, true for the Anglo-American tradition. It is regrettable that this tradition does not feature in this work, for this is the tradition that has provided us with our modern constitutional vocabulary to begin with.

When it comes to this vocabulary, the trias of 'constitutionality' – entrenchment, hierarchy and rationalisation – gives us only a very impoverished view of the subject. It does not explain the central role that is played by the proportionality principle (*Übermaßverbot*) and its reversal, namely, the obligation to protect fundamental rights to a sufficient degree (*Untermaßverbot*) or the 'radiating effect' of constitutional values into the field of private law. It fails to capture their significance not least because the analysis does not take into account the transition from a constitutionalism that puts the limits of powers at the center to another one that focuses on principles of rational government action.[64]

The disconnect of the work from the world of legal analysis is not by accident manifest in how Christodoulidis discusses proportionality. He touches the idea with the latex gloves worn by a political theorist who believes that rights are absolute (413, 417):

> Rationalisation, we argued, involves holding up a constitutional principle to constitutional *value*. Constitutional reflexivity operates and is delivered along the *unbroken line of*

[62]J Madison, 'Charters' (*National Gazette*, 19 January 1792): 'In Europe, charters of liberty have been granted by power. America has set the example and France has followed it, of charters of power granted by liberty.' (<http://www.constitution.org/jm/17920119_charters.htm>).

[63]See T Paine, *Rights of Man* (ed E Foner, Penguin Books 1969) 186–9.

[64]See Somek (n 28) at 109–14.

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> *normativity*. The adequacy of any constitutional solution is measured on that line. It is against this measure that proportionality falls short.
>
> [.. .]
>
> Values are markers of what should not be sacrificed, names of what should not be put into circulation.

These statements suggest an absoluteness of right that is not plausible to assume. The closer look adopted by analytic philosophy indicates that no right is absolute. All rights can be interfered with.[65] The conditions of such interference are, traditionally, spelled out in the context of a rational basis test, to which constitutional law at least since the 1970s has added a balancing component.[66] This development is summarised in the observation that rights are turned into requirements of mere optimisation, which means that they are to be realised to the greatest extent possible subject to legal and factual possibilities (418, quoting Alexy).

Critique has often been voiced, in particular in Germany,[67] that proportionality effectively 'softens' constitutional normativity. That this is not the case can be seen by taking a closer look at its composition. Contrary to what Christodoulidis suggests, 'values' or public interests do not in the process of balancing enter into an equation of exchange value and are not thereby put into 'circulation'.[68] Rights make demands on us owing to the existence of exclusionary reasons.[69] Such reasons claim that no competing value must be taken into account. In instances of collisions between or among values, however, the question needs to be answered how far the exclusionary reason extends. The scope of the exclusion is what is to be determined in the final instance of 'balancing'.

While I completely agree with Christodoulidis' critique that holding trade unions to the same standards as the state is utterly wrong (395–403), his discussion of *Laval* does nothing to demonstrate that 'balancing' is complicit with viewing values 'as goods in circulation' (417). It means only that one suspends the exclusionary reason by asking whether there are not good reasons to have other values prevail in a certain case. If one were to exclude, categorically and stubbornly, under all circumstances the relevance of other factors one would behave like a moral fanatic. It stands to reason that it would be imprudent to assimilate the normativity of political constitutionalism to the mindset of fanaticism.[70]

12. Aesthetic enchantment

The fourth and final part of the work seeks to develop answers '[.. .] that are strategically deployed into the direction of redress' (434). It moves forward to recover constitutionalism as a project of emancipation and to '[.. .] resituate the constitutional point of view on the distinction between the constituent and the constituted' (455):

> It is keyed to a specific intelligence and intelligibility of the constitution, that doesn't mutate to conform but holds the field, in order to reclaim the possibility of self-determination, and of

[65]Seen JJ Thomson, *The Realm of Rights* (Harvard University Press 1990) 82–7.

[66]See TA Aleinikoff, 'Constitutional Law in an Age of Balancing' (1987) 96 Yale Law Journal 943–1005.

[67]See F Ossenbühl in 39 (1981) Veröffentlichung der Vereinigung deutscher Staatsrechtslehrer at 189 (statement during the discussion).

[68]They would do so only if we applied a utilitarian calculus and expressed their weight in terms of 'utility'.

[69]On the concept, see J Raz, *Practical Reason and Norms* (2nd ed, Princeton University Press 1990) 35–48.

[70]See RM Hare, *Moral Thinking: Its Levels, Method and Point* (Oxford University Press 1981) 170–8. But see Christodoulidis at 418: 'Theorising solidarity or dignity as *dogmatic* resources of constitutional thought meant precisely that they could not be cashed out as constitutional goods.'

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the iteration of what is just, in a context where that possibility has not been wasted as market adjustment.

The three (458) strategies discussed by Christodoulidis (formalism, rupture, and contradiction) conjure up an ethos of resistance. This is basically it. Whoever may have expected to encounter the outlines, let alone a blueprint, of a politically more bounded economy and the identification of the agent capable to introduce it must close the fourth part with at least a modicum of disappointment. With the exception of the story concerning the amazing early success of Solidarność (481–7) it engages in a recollection of how various authors have *imagined* defiance and the beginnings of transformations as they are manifest, for example, in the scandal of the sudden appearance of the people (487–93 on Rancière), *virtù* as the ability to seize the opportunity for a new beginning (533), rupture (518), the general strike *qua* power of withdrawal (521), the grounding that reconfigures the ground (530), the 'eventhood' of disruption (127, 549, what else?), the material constitution (544), the constituent power that is itself the constitution (547).

As the work, even more than before, revels in abstraction in its final section, it professes, inadvertently, its complicity with the aesthetically enchanted left. What I have in mind is the conspicuous outlook of the Western European left that has lost its faith in the proletariat as the last class that can bring about the final transformation. The reasons for that loss must not concern us here. Lest I be misunderstood, I hasten to add that I do not mean to join the chorus of those disparaging the left for its obvious substitute obsession with art. What matters, rather, is that instead of exploring practical alternatives, the left not infrequently has reconceived agency and the power of action through the lens of creativity.[71] When dreams of an alternative future appear to be either futile or embarrassing, the transformation of production and distribution is no longer spelled out in the form of a practical agenda. Not only is a plan of action believed to be indefinitely postponed, in its postponed form it is believed to *amount to* a resetting of our imagination brought about by someone or something appearing on the scene like a *deus ex machina*. Since the vision of fundamental change is not cashed out concretely and no longer anticipated as a real utopia, the focus shifts to an imagined force that may – through some sudden upsurge – vault humanity into what Robert Musil mused about as 'the other state' (*der andere Zustand*).[72] I surmise that the various guises of the force, ranging from 'divine violence' to the event, are nothing but projections of the power of imagination (*Einbildungskraft*): The whole world must be romanticised.[73]

[71]I am using this term in a manner that does not seek to evoke directly the vocabulary of Lacanian psychoanalysis. What I have in mind, instead, is creative force of collective imagination that Cornelius Castoriadis sees involved in the constitution of society. See C Castoriadis, *The Imaginary Institution of Society* (trans K Blamey, Polity Press 1978) at 127–32. For a perceptive critique, see J Habermas, *Der philosophische Diskurs der Moderne: Zwölf Vorlesungen* (Suhrkamp 1985) 383, 386.

[72]'Man hat ihn den Zustand der Liebe genannt, der Güte, der Weltabgekehrtheit, der Kontemplation, des Schauens, der Annäherung an Gott, der Entrückung, der Willenlosigkeit, der Einkehr und vieler andrer Seiten eines Grunderlebnisses, das in Religion, Mystik und Ethik aller historischen Völker ebenso übereinstimmend wiederkehrt, wie es merkwürdig entwicklungslos geblieben ist. Dieser andere Geisteszustand wird immer mit ebenso großer Leidenschaft wie Ungenauigkeit beschrieben, und man könnte versucht sein, in diesem schattenhaften Doppelgänger unsrer Welt nur einen Tagtraum zu sehn, wenn er nicht seine Spuren in unzähligen Einzelheiten unseres gewöhnlichen Lebens hinterlassen hätte und das Mark unsrer Moral und Idealität bilden würde, das zwischen den harten Fasern des Bösen liegt': R Musil, 'Ansätze zu neuer Ästhetik: Bemerkungen zu einer Dramaturgie des Films' in A Frisé (ed), *Gesammelte Werke* (Rowohlt 1925, 1978) vol. 8, 1137–54, at 1144. This reads in English translation: 'It has been called the state of love, of goodness, of turning away from the world, of contemplation, of seeing, of approaching God, of rapture, of will-lessness, of contemplation and many other sides of a basic experience which recurs in religion, mysticism and ethics of all historical peoples just as consistently as it has remained strangely undeveloped. This other state of mind is always described with as much passion as inaccuracy, and one might be tempted to see in this shadowy double of our world only a daydream, if it had not left its traces in innumerable details of our ordinary life and formed the marrow of our moral and ideality, which lies between the hard fibers of evil.'

[73]See FC Beiser, *The Romantic Imperative: The Concept of Early German Romanticism* (Harvard University Press 2003).

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Indeed, in my view the beginning of the aesthetically enchanted left, thus understood, can be traced back to the unfortunate Walter Benjamin and his even more unfortunate 'critique of violence'.[74] The intervention of divine violence – Benjamin's symbolic rendition of Sorel's general strike (506) – would mark the appearance of the power that can make a new beginning.

This is not the same, however entirely consistent with, the left's remarkable interest in vanguard art. It indicates the lure of the path leading from practical to imaginary transformations and from there to the transformation of the imagination itself.[75] The transformation of the imagination takes the place of political action. Unsuprisingly, the flight from practice to the arts has never given rise to the release of any utopian energies, in particular not in the field of labour and work.[76] The left simply ceased to dream of a better future. Rather, some authors became obsessed with conceiving of the transformative force that might be able to reset our imagination. In a sense, it embarked on a quest for the *genius* that would reimagine the political world. At the same time, it has always been understood that anyone claiming to be that genius must be suspected of being a false messiah.

Christodoulidis's work ends with sharing with readers the experience of reading the work that has engaged in the quest to imagine, in abstract terms, how the awe-inspiring force may appear. This is a remarkable exercise in sublimation. But it also demonstrates that the left no longer really has a political outlook. It has become a form of unhappy consciousness that pledges allegiance to inherited ideas in the awareness that they no longer persuade. The adherents of the left cling to them, nevertheless, for want of alternatives (I do not claim that I, for one, am not guilty of sharing this outlook).

It is unsurprising, therefore, that the book concludes with leaving the question of the people or of the revolutionary agent open (554, see already 146–7). This move is, concededly, entirely consistent with the overall approach. The constituent power cannot be but self-authorising. At the same time, readers are left in a quandary as to what to make of such inconclusiveness in a book that is also about globalisation. Would it have been too much to ask of the author to state that the only institutional setting that remains amenable to plausible forms of democratisation is the nation-state?[77]

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[74]See W Benjamin, *Toward a Critique of Violence* (ed P Fences & Julia Ng, Stanford University Press 2021).

[75]See recently, R Misik, *Das große Beginnergefühl: Moderne, Zeitgeist, Revolution* (Suhrkamp 2022).

[76]See J Habermas, *Die Neue Unübersichtlichkeit: Kleine politische Schriften V* (Suhrkamp 1985) 145.

[77]See W Streeck, *Zwischen Globalismus und Demokratie: Politische Ökonomie im ausgehenden Neoliberalismus* (Suhrkamp 2021) 410–3.

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