Cambridge Law Journal, **82(1)**, March 2023, pp. 185–190 © The Authors, 2023. Published by Cambridge University Press on behalf of The Faculty of Law, University of Cambridge
doi:10.1017/S0008197323000041

The Redress of Law: Globalisation, Constitutionalism and Market Capture. By EMILIOS CHRISTODOULIDIS. [Cambridge University Press, 2021. xiv + 592 pp. Hardback £95.00. ISBN 978-1-108-48703-0.]

The Redress of Law is a major achievement. It is large, it interweaves disciplines, it overflows with ideas. It is elegantly written, at times almost poetic. Against the rather clichéd structure of legal theory books, it moves forward like a complex novel or an intellectual detective story. It unravels in formal symmetry. It has four parts of four chapters each with the two middle parts mirroring each other. The first presents its critical methodology founded on the phenomenology of work. The second is a reconstruction of what constitutionalism used to be when grounded on the separation and bridging of constituent and constituted power. The third presents the capture of domestic and global constitutionalism by the market. The last offers the fundaments, if not the hope, of a new political constitutionalism. The plot moves symmetrically. The first two parts set the scene presenting theories, methods, values. The third moves to the *peripeteia*, the travails and deformations that have beset the building blocks of the first two. The last offers the resolution or *catharsis*: the return to political constitutionalism, where the plot started, with radical politics correcting the legal deformation. Constitutionalism moves outward from the text to the world and from law to politics. This is an academic book with something out of Paul Auster's novels and George Perec's *Life: A User's Manual*.

The book forms a grid or chessboard. Yet its orthogonal structure is populated by a trinitarian logic. There are three major referents in the subtitle – globalisation, constitutionalism, market capture. Three schools of thought organising the narrative– phenomenology, systems theory, Marxism and radical philosophy. Three heroes move the plot along: Simone Weil and the ethics of work, Karl Marx and political economy, Niklas Luhmann, semiotics and structure. Putting them next to each other seems incongruous, a trinity with no spiritual connection. Yet this is not a holy but a dialectical trinity. The three systemic dimensions, the social, the material and the temporal, lead from the political constitutionalism of the beginning to the reconciliation of a radical constitutionalism at the end. It is not inevitable, predictable or even likely. As political constitutionalism retreats captured by the market, critical theory becomes a long reflection on the "distribution of contingency and the meaning of necessity" (p. 4). The wager of political constitutionalism calls for knowledge, belief and commitment.

The *Redress of Law* offers a thesaurus of concepts and an assemblage of authors, all treated generously, including those Christodoulidis disagrees with. Some are part of the constitutional vocabulary, others external to the discipline, others serendipitous encounters with superficially unrelated topics. Tragedy, the bible of phenomenology, is at the heart of the early peregrinations: it marks the disclosure of human possibility in the face of overwhelming necessity that does not thwart the human spirit. Take Euripides' *Helen*, his penultimate minor comedy of errors. The Helen who travelled to Troy was a ghost, the eponymous lady was in Egypt. When her husband Menelaos is shipwrecked, accompanied by Helen's ghostly double, the betrothed recognise each other and plan their escape. All this suffering in Troy for nothing? Gods and men have no answer to the conundrum, everything is doubled up, meaning escapes, reason fails, contingency triumphs.

It is this minor play that helps develop the link with Simone Weil, the philosopher and radical activist. Weil worked in factories, taught night classes to workers, fought in Spain and worked with the French resistance in England, all in 34 short years. For

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Weil, work and its dignity are the foundation of action; the solidarity of self-governing workers the promise of emancipation; moral categories central to political action. But capitalism imposes unnecessary suffering on workers. Against this avoidable tragedy, dignified work and communal resistance emerge to restore the relationship between thought and action. Subjected to the discipline of the factory and the injustice of exploitation, the collective action of working people preserves their self-respect. Weil insists that we act with courage in the face of worldly adversity. She finds it in the *Iliad*, the workers struggles and self-organisation, the courage and strength that "makes humanity appear in its vulnerability" (p. 69). The courage of hopelessness, the belief in the dignity of labour and the quest for a necessary but perhaps impossible redemption fires Christodoulidis' work.

Constitutionalism and sovereignty descend from the legacy of "political theology". As Carl Schmitt puts it, "all the important concepts of modern state theory are secularized theological concepts. And this not only because of their historical development: they were transferred from theology to the theory of the state, where, for example, the almighty God became the almighty legislator" (*Political Theology* (trans. G. Schwab) (Chicago 2005), 36). The omnipotence of God was transferred to king, the people (US) or the nation (France). The sovereign legislates and governs. In the nineteenth century, the great fear of the rising bourgeoisie and liberal ideology was that universal franchise and unrestrained political power could lead to the abolition of property and class privilege. The law emanating from politics was asked to limit political and protect social power. As Dieter Grimm puts it, "the very essence of constitutionalism is the submission of politics to law" (*Constitutionalism: Past, Present and Future* (Oxford 2016), 200). Logically a self-limiting law must come from a source higher than the transient legislating majority. This almost magical feat happens through a relentless doubling process: constituent and constituted power, the people before and after the Constitution, the constitutional text and ordinary legislation, presence and representation. The constitutional paradox is an answer to liberalism's generative fear. The opposite tradition of decisionism condemns representative politics because it destroys the unity of the people. Carl Schmitt, the strongest exponent, assumes that the existential unity of the people precedes its constitutional incarnation and is undermined by democratic representation.

The paradox raises constituent power into the nominal source of all power. However, it "must present itself as conditioned but this means that it is sovereign on condition that it is not" (p. 152). The people are sovereign, but their sovereignty is limited. If the nation is an "imaginary" community created through memory, tradition and narration, the people is a constitutional construction. At the constituent moment, popular power is transferred from presence to institutional representation. Representatives gather and transmit popular interests and demands to the institutions. The constituent, like the sun in a rainy day in Glasgow, has been "eclipsed" in Christodoulidis' felicitous phrase and the people have not done much better (p. 180). This is the logical outcome of a philosophy which places the unity of the sovereign– Hobbes' *Leviathan* as "mortal God" – at the centre.

The absence haunts parliamentary democracy. We can bookend this effacement with Jean-Jacques Rousseau and Pierre Rosanvallon. Rousseau mocked the Englishman who considers himself free because he can vote for his representatives: "But he is wrong. He is free only when he elects members of Parliament. Once elected, slavery returns." Three centuries later Rosanvallon

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concludes that democratic regimes are "marked by deception, as they incarnate a betrayed and disfigured ideal" (quoted at p. 220). Chris Thornhill summarised the history:

> the notion of constituent power, the normative basis of the political system, was founded not in the external factual will of the people but in a complex of norms by means of which the political system excluded the people .... Once declared by its representatives, the will of constituent power fell fully silent, and the people were conclusively expelled from further exercise of power (*A Sociology of Constitutions* (Cambridge 2011), p. 219).

Parliamentary democracy allows the representation of the population as a single person with common will and nominal sovereignty. But this "people" is a purely formal figure without social characteristics, a legal fiction. It occludes divisions and dominations and delegitimises popular initiatives and direct democracy. The constitutional sovereignty of the "people" marginalises the "many-headed hydra" of the people.

Constituent power is not just a logical way out of the paradox of self-limiting political power. Most important constitutions and political systems (the constituted power) were the result of revolution, liberation, overthrow of dictatorships and totalitarianisms, an exercise of what Abbé Sieyès first called *pouvoir constituent*. "It is the source of everything. Its will is always legal; indeed, it is the law itself" (A. Sieyès, *What Is the Third Estate?* (trans. M. Blondel) (London 1963), 124). Its exercise in Philadelphia, Paris or Gdansk is a collective political act that changes the world. It is ontological and performative: when the American revolutionaries declare at the beginning of the Declaration of Independence "We, the People", they make a double claim: "who" we are (the constituent part) and "what" we will become (the constituted).

A variation on the theme is found in the *Critique of Hegel's Philosophy of Law* by the young Marx. Against Hegel's advocacy of state sovereignty, Marx finds in the democratic Constitution of the French Revolution a "completely opposed notion of sovereignty". Democracy is "the resolved riddle of all constitutions", the "essence of every political constitution" (quoted in K. Möller, "From Constituent to Destituent Power Beyond the State" (2018) 9 Transnational Legal Theory 32). The democratic Constitution paves the way for collective self-rule. Marx develops this constitutional theme in his political writings. The future will arrive with the assumption of power by the working people. In the *Eighteenth Brumaire of Louis Bonaparte* (1852), he writes that the social revolution "cannot draw its poetry from the past by only from the future" (quoted at p. 173). After the Paris Commune, Marx finds in the "self-government of workers" the revolutionary poetry and institutions of the future.

Marx understands the "constitutional paradox" as historical and political. Constituent power is the force that changes history. It reproduces social existence and remains hidden but alive in the constitutional text. It emerges in a double movement in which it appears and is hidden at the same time. It establishes a new society but is marginalised by its institutional creations. The constituent is the world making power of popular initiative and democracy. But only the constituted form – Constitution, institutions, personnel – becomes legitimate, even sacred. The constituent, which gave rise to it, recedes, but remains active. Similarly, the constituent subject, the demos, the people or the multitude, is an ever-present potentiality: it lies behind every constituted form. Conflict, struggle, antagonism is not pacified by the unifying symbolic logic of the Constitution.

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This is the path of political constitutionalism: the original distinction between constituent and constituted power persists. Following Niklas Luhmann, Christodoulidis posits the constituent/constituted as the "guiding distinction" of constitutionalism (p. 154). As a critical reader of Habermas, he finds the two poles equally implicated, co-original. The constituent is a necessary reference for the constituted but cannot be reduced to its logic. Similarly, the constituent finds its limit and measure in law (p. 153). The characteristics of the two sides cover every area of social life. The constituent carries democracy, potentiality, political acceleration, community and openness. The constituted, institutionalisation, self-reflection, repetition, the fixing of time. It organises the legalisation of power and the internal coherence of the law (the Kelsenian moment); it sets its outside limits (the Schmittian moment) and defensively protects the balance of social power (the Marxist moment). Conflict in its various permutations moves political constitutionalism.

Constituent power is both logically necessary and politically marginalised. For legal positivism, it is a "political myth that grounds the necessity of the basic norm", superfluous, unproductive (M. Loughlin, "On Constituent Power" in M. Dowdle and M. Wilkinson (eds.), *Constitutionalism Beyond Liberalism* (Cambridge 2017), 157). Yet, it is not exhausted in its transfer to representative bodies, nor is it fully integrated into the Constitution. It remains a permanent presence because political power and legal form rise on the foundation of the "material" or "productive" power of working people that reproduces society. This "material" part condenses and expresses too class domination. But the Constitution remains relatively independent. Its social ordering takes place within the parameters set by social power.

The *Redress of Law* combines left political economy with a humanistic interpretation of work as species generative and non-alienated labour as "constitutively cooperative" (p. 74). Simone Weil's dignified labour and her belief in *auto-gestion* completes the anthropological perspective. These are the values of the social Constitution. It aims to meet human needs and realises the value of solidarity. During the post-WWII marriage of convenience between capitalism and democracy, social rights were the result of victories by trade unions and the left as well as a concession of capitalists worried about domestic militancy and Soviet expansion. However social rights remained antithetical to capitalist structures of risk, opportunity and reward. When the market allocates resource, distributions aiming to meet need are deemed irrational. After the exit of communism, the social state was side-lined. The "post-political" condition placed knowledge above normativity, technocrats and experts above politicians, fake consensus above the disagreement of politics. As Wolfgang Streeck put it, the financial markets replaced the "sovereign" people and democracy was fully subjected to capitalism (*How Will Capitalism End?* (London 2016), ch. 5).

The political Constitution was undone by this market capture. The road was paved by the turn to a facile constitutional "pluralism" domestically and cosmopolitan constitutionalism globally. Pluralism limits the state's legal competency and subordinates it to civil society with its huge concentrations of economic power. Legal doctrines and theories developed to justify the side-lining: the "golden" rule and balanced budgets, the (non) justiciability of social rights or, the ubiquitous "proportionality". "Reflexive" argumentation, the spill-over and legalisation of social areas by stealth, normativism and the rhetoric of the rule of law replaced democracy. Human rights have marginalised social justice and become the site of conduct and the reward of politics. Class and most other forms struggle have been declared finished and political conflict has been

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transferred to the lawcourts. Market constitutionalism's contribution to the common good is to facilitate capital's access to all aspects of life. Postmodern "liquid" work practices imitate fluid financial products: flexibilisation of work, zero-hours contracts, uninsured and underpaid work, the undermining of unionism and collective action. The *Laval* and *Viking* line of European jurisprudence confirmed the trend. The political right to free association and the social right of worker solidarity were trumped by the right of movement and establishment of the enterprise and the individual right to disassociate from union protection. Social justice has been abandoned at the European level and was sent back to largely impotent domestic politics leading to popular resentment and xenophobia. The alienation of citizens from politics proceeds apace. Is there a way out?

The market and the fake rationality of *homo oeconomicus* have defanged constitutionalism. Government and democracy have been replaced by governance, the rule of experts and the market. Social rights are retreating and are replaced by market distributions; workers rights and the protections of labour are under attack by European law. It is this evisceration of democracy and retreat of social rights that political constitutionalism tries to redress. When the constituent is removed from constitutional thought, its democratic and social constituents are gradually vacated. Political constitutionalism returns constituent power to its rightful place. It counters the hidden theoretical moves that aim to distribute what is "rational" and to exclude what is not. Constitutional meaning emerges again against the horizon and inspiration of the constituent power (p. 195). Political constitutionalism answers the great constitutional dilemmas by resolving them in favour of democracy. The emancipatory project combines traditional Marxist class-based activism, workers councils and Italian *operaismo* as well as legal strategies. It is a heady, somewhat uneasy, but powerful combination that moves the project along.

The strength of the constituent can return through the revival of lost radical traditions. Three strategies reinsert politics into constitutionalism: militant formalism, rupture and immanent critique. Radical formalism – abiding to the constitutional text and valorising law's resistance – may undermine the normative aspirations of liberal capitalism. It includes social action litigation and different functional "couplings" between legal, political and economic systems following systems theory. But often no legally admissible alternative exists. How can a wrong be corrected if the ability of language and action to redress has been removed? The second strategy therefore involves the negation of the existent and radical rupture. Examples include the emergence of the *demos* in classical Athens, the insurrection of the Solidarity union that changed Poland and its Constitution and, mass political strike. Rosa Luxemburg, George Sorel and Walter Benjamin are the theorists of pure withdrawal. The mass strike subverts capital's demand to produce things and valorise commodities. It is a negation of the capitalist material Constitution. Worker self-government, on the other hand, becomes the link between constituent power and the social dimension of work.

Finally, immanent critique. It draws on resources the legal system makes available (equality, solidarity, dignity) and mobilises them when the practice falls short of the promise. The contradiction between the universality of the categories of law and rights and the partiality of distributions is the moving force. Such is the right to work in a system that creates unemployment or universal social rights that appear in the Constitution but not in life. The moral injunction against suffering and the principle producers of value should determine its disposal are mobilised in the conflict between constitutional inscription and practical non-performance.

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The ontology of the people as One is not the only camp in political philosophy. Another tradition promotes the "multiple", the "multitude", the Many. It hails from Machiavelli, Spinoza and Marx. The many are not united and do not mimic God. As Antonio Negri has cogently argued the constituent power of the multitude lies behind modernity and its politics. Nicolo Machiavelli, Baruch Spinoza and Karl Marx are the progenitors of the idea. For Machiavelli, the historical process develops through the strength and passion of the multitude augmented by struggle. Spinoza moves from history to metaphysics. Politics and sovereignty are determined by the infinitely expanding *cupiditas* (desire) of the multitude. the many, a "democratic living god" (A. Negri, *Insurgencies: Constituent Power and the Modern State* (Minneapolis 1999), 304). Its force produces the material world; its Constitution projects its power into the future. This intersection of production and Constitution creates the material, political and cognitive progress of modernity. For Marx, finally, the multitude becomes living labour; its constituent power is the productive force that creates every social form.

For Antonio Negri, the contemporary heir of this tradition, the constituent cannot be reduced to juridical reason (p. 156). What is the alternative? Every exercise of constituent power acquires its identity through its retrospective naming by the constituted. There is a kind of mediation that does not end up in the effacement of popular power: popular resistance, uprisings, revolutions. For Kant and Hegel, no right to resistance or revolution exists. Philosophy and the Constitution declare revolution both impossible and prohibited. Time and again, however, the repressed returns and challenges ossified constitutions and laws. Since 2011, the people have challenged the constituted order in the Arab Spring, in occupations in Madrid, Athens, the world Occupy and Black Lives Matter movements. The insurgent component of parliamentary democracy, as Etienne Balibar called it, returned as a collective political act (*Masses, Classes, Ideas* (New York 1994), xiii, 347). It led to citizen participation in constitutional revision processes in Iceland, Ireland, Bulgaria. Referendums of constitutional importance were held in Greece, the Netherlands, Britain, Italy. The Chilean student protests led to the constitutional referendum and the new constitutional assembly. The "genie" of popular power came out of the bottle in which constitutional fetishists had imprisoned it. Power is exercised inside and outside its institutionalised forms by those who seek to reform them in a democratic direction.

There is a *fin de siècle* melancholy in the *Redress of Law*. The world has been unmoored from the great constitutional discourses and practices of the past. It has become normatively unhinged but minutely regulated. The constitutional sense of certainty and safety, of a space of protection as well as of opportunities for experimentation, no longer holds. *The Redress of Law* offers valuable advice for the return to political constitutionalism. It is question of politics redressing sclerotic law through legal means. Constitutional lawyers, critical theorists and progressive politicians should be grateful to Emilios Christodoulidis for his wise counsel.

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