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

Introduction: Redressing EU law, Redress through EU law?

Agustín José Menéndez

Departamento de Filosofía y Sociedad, Universidad Complutense de Madrid, Madrid, Spain
Email: agustmen@ucm.es

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Abstract

This short introduction to the symposium on Christodoulidis's *The Redress of Law* highlights the reasons why the book will be relevant to readers interested in EU law. First, EU law is the main body of positive law by reference to which the author develops his argument. In the process, he offers a critical assessment of the state of EU law, which has played a key role as the main vehicle of the neoliberalisation of the legal systems of the Member States of the EU. Second, some of the key concepts elaborated and sharpened by the author can be used to build up a critical theory of EU law. This is illustrated by considering how a critical theory of the history of EU law could be written, and by showing that Christodoulidis offers us the elements with which to reconstruct how EU got transformed from the 1970s through the reverse engineering of some of the key institutions and substantive norms of democratic political constitutionalism.

Keywords: democratic and social constitutionalism; neoliberal constitutionalism; neo-ordo-liberalism; proportionality

The symposium that is published in this issue revolves around Emilios Christodoulidis's *The Redress of Law*. The book is part of a series on global law, made up of volumes which are generally of interest to legal theorists, political theorists and political philosophers (is there much of a difference?) and constitutional lawyers. The main purpose of this short introduction is to spell out the three main reasons why it seemed to the editors of the journal that anybody interested in EU law should read the book. It goes without saying that appetizers are no substitute for main courses, and thus, the reader is urged to engage with the contributions of Silvia Steininger, Aristel Skrbic, Fernanda Nicola, Angelo Golia and Alexander Somek (and not to miss the rejoinder of the author).

1. EU law as the archetype of market constitutionalism?

What at first sight may look like a bulky volume reveals itself to contain three distinct, albeit closely interrelated, monographs. The author presents to the reader not only (1) a critical political phenomenology, shaped in dialogue with Hannah Arendt and Simone Weil, but also (2) a constitutional theory, articulated around the (a) critique of neoliberal and ordoliberal visions of the role of law in politics and society (what the author labels as *market constitutionalism*), and (b) the defense of a different regulatory ideal, that of radically democratic constitutionalism, in the book referred as *political constitutionalism*, and (3) a constitutional politics, in which different strategies to overcome the dominance of market constitutionalism and reshape the law in the image of political constitutionalism are considered.

Decisively from the ELO standpoint, this is also a book about EU law. The latter is the main body of positive law by reference to which Christodoulidis has worked out the key lines of argument of the volume. In several chapters of the book we find a reconstruction of the law and the politics of European integration as they have evolved in the last decades (very especially on what concerns labour relations) as well as an assessment of such evolution from a critical perspective.

The main thesis that emerges is that the EU and EU law have been radically transformed from the late 1970s under the decisive influence of neoliberal and ordoliberal ideas. This transformation is perhaps the most paradigmatic example of the triumph of the societal vision that the author identifies with market capitalism. But EU law is not just another citadel conquered by market constitutionalism, but also the key stronghold of such a constitutional vision. In other words, if market capitalism has transformed the EU, such transformation has in its turn facilitated the overall triumph of market capitalism, if only because EU law, so reshaped, has become a battering ram, if not a Trojan horse, with the help of which the fortresses of what were once national democratic constitutions have been assailed. All that with the help of the doctrine of the primacy of EU law, which has slowly but steadily mutated into the doctrine of the supremacy of EU law. In the words of the author, which are worth quoting:

> The asymmetry that is generated between economic concepts that are successfully uploaded and normative concepts that are vacated at the national border, leaves constitutional thought at sea, oscillating between the alternatives outlined above, of its strict coupling to the semantics of the state, which leaves injustice unaddressed and unaddressable in the global context, or its loose coupling to those semantics, to the point where the constitutional is undercut as an institutional achievement in its own right, lost to 'plasticity' and to functional equivalence, and harnessed to market expansion.[1]

No surprise then that it is concluded that the EU is close to becoming the protype of what the author aptly labels 'constitutionalism without democracy'.[2]

This line of criticism may seem at first sight similar to that put forward in some recent pieces of critical scholarship, such as Mike Wilkinson's *Authoritarian Liberalism and the Transformation of Modern Europe*, already discussed in these pages.[3] However, there are major differences, if only because there is no ambiguity in Christodoulidis's defence of the role of democratic constitutional law in the integration of European societies. In particular, his political constitutionalism does not dissolve constitutional law into constitutional politics (as Wilkinson at times seems to argue for), but rather assumes that the rigidity of constitutional norms plays an essential role, not only in stabilizing expectations, but also, and decisively, in articulating the general democratic will.[4] Such a position is far from being improvised. Rather, it results from the (admittedly far from easy) combination of a Marxist engine (in the form of a Marxist social and political philosophy) with a systems-theory chassis (in the form of a Luhmannian legal theory). The resulting theoretical vehicle paves the way to a critical perspective which neither cancels the radical democratic potential of constitutional politics (rather aims at keeping alive the radical potential of the *pouvoir constituent*), nor renounces the legal mediation of democratic power. Instead, constitutional law is expected to become the *form* of democratic politics (also, quite obviously, in the EU).

[1] E Christodoulidis, *The Redress of Law* (Cambridge University Press 2021), 276.
[2] Ibid., 261.
[3] See the first issue of the first volume of *European Law Open*.
[4] Christodoulidis (n 1), 194.

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2. How to do things with Christodoulidis

The Redress of Law is definitely not a book in which the author aims at doing all the thinking for the reader. Or what is the same, this is not a volume that offers ready-made theoretical answers and off the shelf legal interpretations, as has become customary in the era of templated research projects and twitterised scholarship. On the contrary, *The Redress of Law* is above all an invitation to make use of a number of conceptual tools and theoretical resources to find new ways of redressing *the law* and achieving redress *through* law. Thus, the book is intended as the *beginning*, not as the *end*, of a critical engagement with EU law. From such a perspective, the relevant question that we should pose ourselves is not only to what extent Christodoulidis studies EU law, but rather what we can do with the conceptual tools and theoretical instruments sharpened in the book. In other terms, what the book can contribute to redressing *EU* law and, eventually, to redressing European societal orders through *EU law*.

Quite obviously, it would be silly to offer an exhaustive list of the possibilities opened up by the book. Still, it might be useful to illustrate the potential of *The Redress of Law* by focusing on two ways in which it can change how we study EU law. The first is the articulation of a history of European law, relevant not only to legal historians, but also to legal practitioners. The second is an analysis of the (legal) techniques through which market constitutionalism replaced political constitutionalism as the underpinning 'public philosophy' of European law.

A Towards a critical legal history of European law

We are still lacking a full-fledged history of European law. This may be attributed to the facts that (1) only recently have legal historians started to pay attention to EU law and (2) so far they have tended to concentrate, to a large extent, on the 'forging moment' of EU law, ie on the time period in which the key structural doctrines of direct effect and primacy emerged and consolidated, and as a result, Community law became a distinct academic field or discipline. Less attention has been paid to the development of substantive norms[5] and to more recent periods. Like Minerva's owl, history seems to spread its wings only after the coming of dusk. But the ahistorical character of EU law as a discipline is also the result of the fact that the very making of Community law as a scholarly field was premised on the denial of its *actual historical character*. In the very precise sense that the evolution of Community law would be said to have consisted in the seamlessly unfolding of the economic cum political project which is reputed to have been enshrined in the founding Treaties. An unfolding which may have occasionally accelerated or slowed down, but which would have not been marked by breaks and discontinuities. In that sense, EU law is assumed to be *beyond* history. This is particularly the case of the case law of the ECJ, including its most openly transformative rulings. The affirmation of the direct effect and primacy of European legal norms in 1963/1964 (*Van Gend/Costa*), the acknowledgment of the direct effect of directives in 1974 (*Van Duyn*) or the new understanding of economic freedoms in *Cassis de Dijon* in 1979, are generally appraised as acts which were at the same time (and rather paradoxically) brave and fully due (and not as decisive turning points caused by a specific set of social and economic circumstances and forces, and which may have the potential of reconfiguring the project). Such rulings were fully due because they were required by the founding Treaties (something which preempts any discussion about the legitimacy of the ECJ taking such decisions). Still, they were brave because the Court of Justice (with the Commission on the wings) dared stick to what was already decided by the Member States when the latter were prone not to respect their own foundational commitments.

[5]That notwithstanding, see K K Patel and H Schweitzer (eds.), *The Historical Foundations of EU Competition Law* (Oxford University Press 2013) and P Teixeira, *The Legal History of the European Banking Union* (Bloomsbury 2021).

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The groundwork of a wider critical history of European law could be developed with the help of the two concepts at the core of *The Redress of Law*, namely, political constitutionalism and market constitutionalism.[6] Instead of the usual narrative in which the forging of the EU would be a process of constitutionalisation of Community law, we could distinguish different *types* of constitutionalisation, reflecting the wider social, economic, political and cultural transformations. These two conflicting visions of the role of law and politics in society are, admittedly, contrasting ideal types, the outcome of an effort of theorization. But a good case can be made that the ideas that are captured by these two concepts have actually *influenced* the development of EU law and EU politics. If we go down that road, we could test three possible working hypotheses.

First, the Treaties through which the European Communities were established reveal themselves to be deeply ambivalent, influenced by *both* political constitutionalism and market constitutionalism. Second, the development of the Communities from the fifties to the seventies seems to have been largely influenced by political constitutionalism. Third, from the late seventies, however, it would have been market constitutionalism that shaped and molded the development of the projects of the single currency and the single market.

Let us elaborate such hypotheses in some more detail.

First, we could start by highlighting the ambivalence of the founding Treaties of the European Communities. The negotiation of the Treaties was an arduous process not only because there were different national interests at stake, as is usually highlighted, but also because there were different socio-economic visions in contrast. There was wide agreement on the need of creating common institutional structures, decision-making processes and substantive norms to complete the process of reconstructing and 'modernizing' the (Western) European economies and societies. But there were deep divergences regarding what this should entail, how public power should be wielded, and for what purposes. Simplifying only a bit, the result was that the Treaties had, at the very least, two different souls, which we could label as those of democratic interventionism and of ordoliberalism, which would largely correspond to the visions of political constitutionalism and market constitutionalism. Different actors managed to plant in the founding Treaties seeds of the two visions, here and there. The result was a compromise, under which the European Communities, and with them European law, were open to be developed in different directions.[7] The Communities were, so to say, suspended between political constitutionalism and market constitutionalism.[8]

Next, we could notice that for the three first decades of their existence, the development of the European Communities was largely shaped by political constitutionalism. The dominant

[6]It is open to be discussed whether the use of 'market' as an adjective with which to characterise the specific form of constitutionalism Christodoulidis refers as market constitutionalism is the best possible one. It is usual to consider that capitalism and market economies are rough equivalents. But as John Kenneth Galbraith pointed out 20 years ago, this does not only confuse capitalism with markets, but moreover, serves to mask capitalism as the socioeconomic order characteristic wherever production and distribution of goods and services proceeds through markets. Not only is it conceivable that the institution of the market could be part of socioeconomic orders other than capitalism (there were markets well before capitalism emerged and consolidated, and there might be markets even when capitalism will have become part of the past economic history of our societies), but, as Adam Smith observed long ago, capitalists tend to conspire to rig or put an end to markets. Competition law, the master discipline of the ordoliberals, is based on the latter premise. For such reasons, perhaps it may be better to speak of neoliberal (or, to be more precise, of neo-ordo-liberal) constitutionalism.

[7]It has become frequent to claim that if European law has become a vehicle of the neoliberalisation or the ordoliberalisation of national legal orders, this is so because European law is *structurally* neoliberal or ordoliberal. Reconstructing EU law with the help of the concepts of political constitutionalism and market constitutionalism should help avoiding such projection of the present into the past. We could certainly discuss how broad was the breadth and the depth of the policies that were *possible* within the Treaties, in particular, whether the *openness* in terms of socio-economic models was as wide as that of national constitutions. Having said that, what seems a too simplistic conclusion is to affirm that, from the very founding of the Communities, the Treaties were a vehicle of the neoliberal or ordoliberal transformation of Europe. See contra Alessandro Somma, *Contro Ventotene* (Rogas 2021).

[8]B Shaev, 'Left Internationalisms, Past and Present' 27 (2019) Renewal, 31-40.

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constitutional grammar at the national level was also the constitutional grammar which governed the development of Community law. True, the conflicts between political and market constitutionalism were largely postponed due to the conditions prevailing in the early postwar period. In particular, the making of the common market and the launching of the key common policies (not least agricultural policy) provided the occasion for 'overlapping consensuses' between the democratic interventionists and the ordoliberals. Still, if one vision prevailed, it was the one of political constitutionalism. The common market (and the very embryonic but still relevant attempts at creating a common currency) ostensibly aimed at increasing the growth potential of national economies. But this was to be achieved in a very concrete and specific way, namely retaining (even reinforcing) the capacity of member states to articulate autonomous social and economic policies. Such policies would in their turn guarantee the adequate distribution and redistribution of the resulting increased wealth. In other words, the European Communities were expected to serve as *enablers* of the national Democratic and Social States. European integration was about the managed opening of national economies, as Alan Milward stressed.[9] A process in which national economic borders were rendered selectively porous but remained solidly in place. This allowed Member States to tailor their socio-economic policies to the historical trajectories of the political community and to the political preferences of the democratic general will.

There were many dark sides in the postwar (Western, and only selectively Western) European constellation. From its first issue, ELO has showed a commitment to explore and confront that dark past, including imperialism and post-imperialism, the persistence of patriarchal domination and homophobia, or the spreading of unsustainable consumeristic lifestyles. But the direction in which the societies of the Member States moved in the fifties and the sixties, and with them the Communities, was one which could be regarded as realizing, to a relevant extent, the ideals of political constitutionalism. The optimism which European societies exuded in those decades was not just a matter of false consciousness.

But the history of European integration is not the history of political constitutionalism *triumphans*. This moves us to the third hypothesis that emerges when we apply Christodoulidis's concepts of political constitutionalism and market constitutionalism to the history of European integration, namely the rise of market constitutionalism, which by the late 1970s started to replace political constitutionalism as the public philosophy underpinning the legal systems of the Member States of the European Communities, and of the European Community itself. Indeed, a major discontinuity started to take shape in the late sixties and imposed itself with full force in the following decade. These were years marked by crises, first monetary (the collapse of Bretton Woods) then economic (with the two downturns of 1973 and 1979). With the benefit of hindsight, it may be pertinent to characterize such overlapping and mutually self-reinforcing crises as the first 'policrisis', which opened an era of economic turbulence which has lasted till this day. From Christodoulidis's perspective, what matters is that the said policrisis was the midwife of the success of market constitutionalism at the European level of government. The project of the common market was replaced by that of the single market (and of the single currency). The implications can be appraised by considering what was now expected to happen to economic borders. Contrary to what was the case in the era of the common market, they are not to be redefined, but simply eliminated. The Communities were transformed into the enforcers of a series of prohibitions (most famously, those stemming from the four economic freedoms, the ideal of free competition as articulated in competition law and sound money, which was part of the fabric of the Exchange Rate

[9] A Milward and V Sorensen, 'Interdependence or Integration? A National Choice' in A S Milward, F M B Lynch, F Romero, R Ranieri and V Sorensen, *The Frontier of National Sovereignty*, *History and Theory 1945-1992* (Routledge 1993), 1-32, 9: 'The outcome was a search for a new form of neo-mercantilist policy which could combine a more rapid trade expansion with more selective and more easily adjustable forms of protection.'

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Mechanism of late 1978, and a foundational commitment in EMU), which precluded Member States from any form of active economic intervention. The powers lost by the states were however not 'moved upwards'; ie they were not acquired by the Union. The economic power till then wielded by democratic institutions was transferred to 'markets' and to public institutions which were by design freed from democratic control (such as the ECB). As a result, public power was first fragmented and then pulverized. This process is usually captured by characterizing integration as 'negative integration'. Perhaps an even better conceptualization is achieved if we state that the European Communities, and later the European Union, became an *external constraint* on national governments and parliaments. This translates into English the concept of *vincolo esterno*, paradoxically coined by the advocates of such limitations in the Italy of the 1980s (a place and a period still to be researched in full depth).

True, many of those who favored the Single European Act and the Maastricht Treaty did so on the expectation that in the fullness of time, a fully-fledged supranational level of government would be created, and that a federal Europe could play even better than the Member States the role of shaper and regulator of economic activity in the whole European area.[10] But while the intentions of the authors are essential to understand how events unfolded, and also for the purpose of writing biographies, the fact of the matter is that it seems hard to contest that the last forty years of the history of the EU have been marked by the coming of age of market constitutionalism.[11]

B The Legal Technology of the European Shift from Political Constitutionalism to Market Constitutionalism

In the previous section, we concluded that there are very good reasons to consider that during the seventies, a major discontinuity emerged in the history of Community law, corresponding to the substitution of political constitutionalism by market constitutionalism as the vision and regulatory ideal underpinning Community law. This is, however, not registered by mainstream theories of European law. Rather the contrary is the case. The eighties and the nineties are identified with the 'completion' of the internal market and the consequent 'relaunch' of European integration. Not a break but a joyous continuation.

This can be said to be another manifestation of the ahistorical proclivity of European legal scholarship. However, the theoretical tools sharpened by Christodoulidis could provide us with a different explanation. If the break from political constitutionalism to market constitutionalism is not usually registered it is because it resulted from the reverse engineering of political constitutionalism. This was a break *en douceur* because forms were preserved, at the very same time that they were voided first, and then refilled with a radically different substance.

Think for example of constitutional review. In the postwar period, it can be said that constitutional review played an important role in the consolidation of the Democratic and Social

[10]See J Delors, *Mémoires* (Plon 2004). With the benefit of hindsight, it may seem naïve at best to expect that economic integration would unleash a politically articulated request for federal political government. But such a belief was widespread. A fully considered judgement on the actors of that period will only be possible once we have a full and comprehensive history of the period, which we still don't have.

[11]It should be added that this does not entail that the ambivalence of the European Union only manifests itself over time, and that in the two periods (50–70s, 70s–2020s) we find a Union fully and coherent moulded in the template of political constitutionalism or market constitutionalism. Things are more complicated, because the ambivalence has been at play at all points of time in the evolution of the European Communities and later of the European Union. To illustrate the point: as already indicated, the neoliberal turn has resulted in the EU gaining multiple powers through which it can prohibit Member States from implementing a set of given policies. But it is also true that the legacy of the European Union as an enabler of the Democratic and Social State endures, as codified in Treaty provisions and in regulations and directives, and also reproduced through political impulses coming from supranational and national institutions (such as the Charter of Fundamental Rights). The conflict between political constitutionalism and market constitutionalism is not over (yet), and indeed the conceptual tools that Christodoulidis offers us can be used to show that European policy making is, as much as national policy making, a terrain where the conflict between different socio-economic policies is constantly played out.

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state as a constitutional state in Italy and Germany. It was essential in that regard that review proceeded on the basis of a wide definition of the yardstick of constitutionality, one premised on the indivisibility of political, civil and social rights (not by chance, still reflected in the preamble of the Charter of Fundamental Rights on the initiative of Stefano Rodotà). This created the conditions under which the respective constitutional courts did not play the mere role of enforcers of a capitalist socio-economic order, as was the case with courts in general in the prewar period, but of guardians of the new constitutions of the Democratic and Social states, which were explicitly open to different socio-economic visions.

While the founding Treaties did not assign to the Court of Justice the mandate of reviewing the validity of national norms by reference to the basic normative contents of Community law, that function emerged in an evolutionary fashion as the European Court of Justice vindicated the primacy of Community law and national courts addressed the Court of Justice preliminary questions in which they basically posed such validity questions. There is thus a form of 'functional' constitutional review, a constitutional review of sorts, in EU law, which becomes extremely powerful once primacy of EU law is actually constructed as supremacy of EU law. At first the European Court of Justice seemed to replicate not only the form of judicial review developed at the national level, but also the substantive content of national yardsticks of constitutionality. Thus, the *Costa* judgement endorsed the nationalization of electricity in Italy, while the judgement in *Internationale Handelsgesellschaft* declared that the collective good of a common agricultural policy justified introducing considerable limits on the right to private property of farmers. Things changed, though, from the moment in which the ECJ opted for an innovative interpretation of what economic freedoms entailed (indeed a key step in the coming of age of market constitutionalism in European integration). First the free movement of goods, and then the other three economic freedoms, ceased being regarded as operationalisations of the principle of non-discrimination and became the concretization of a neoliberal or ordoliberal understanding of private property and entrepreneurial freedom. This resulted in major inroads in the powers of Member States to shape their socio-economic orders, as the ECJ started, step by step, and most intensively after the entry into force of the Maastricht Treaty, to set limits to key national economic powers, from the design of national direct taxes to the definition of the ownership regime of public utilities, ending with the grand finale of *Viking* and *Laval*.

As a matter of form, the ECJ has been merely replicating the way in which national constitutional courts undertook constitutionality reviews, not least making of proportionality judgements the core of its rulings. As a matter of substance, however, the yardstick of European validity has been defined largely at odds with the parameters of national constitutionality, putting an end to the open character, in socio-economic terms, of national constitutions.

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