



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

## The Redress of Law – A rejoinder

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### Abstract

The Rejoinder offers a first response to the reviews of *The Redress of Law*, published in this issue of ELO, and further pursues certain lines of theoretical inquiry in engagement with the reviewers' suggestions and objections.

**Keywords:** constitutionalism; total market thinking; systems theory; solidarity; market access; social dumping

### 1 Debts, concessions and caveats

There is much to be admired in, and to be learnt from, the set of reviews collected here. To their authors, for all their insights and attention, allow me to say how much in their debt I am! What follows is only the beginning of an answer, which falls short of doing justice to the wide range of observations and criticisms that are offered in the reviews.

As one would hope from a discussion of this kind, the contributions push the debate in directions that *The Redress of Law* had only begun to cover. I will begin with a short reference to such possible lines that push the argument further that I was prepared, or equipped, to do. In this respect let me mention Angelo Golia's succinct account of societal constitutionalism, on which he and Gunther Teubner have recently provided a comprehensive restatement;<sup>1</sup> Alexander Somek for the comprehensive analysis of the book and for contrasting my own suggestions to other lines of left-wing thought like Roberto Unger's.<sup>2</sup> Some of this I will return to in what follows. And let me thank at the outset Fernanda Nicola for her acute analysis of the uses of comparative law for the purposes of immanent critique.<sup>3</sup> I am intrigued by the suggestion that 'the labour principles enshrined in the Italian Constitution could be pushed a little further' as a strategy of redress. Nicola extends Rodolfo Sacco's 'dynamic approach to comparative law' to capture how comparative law is caught up in the forcefield between the shoring up neoliberal policies and the potential to harbour democratic and decolonial resistance. Most fascinating here is the suggestion for reclaiming its complex genealogy and disruptive potential against the way it has been instrumentalised by global governance experts in 'synchronic, a-historical' and functionalist terms. This suggestion holds significant promise for antagonistic strategies of redress of law.

<sup>1</sup>A Golia and G Teubner, 'Societal Constitutionalism: Background, Theory, Debates' 15 (2021) ICL – Vienna Journal of International Constitutional Law 357.

<sup>2</sup>A Somek, 'Scholasticism and Aesthetic Enchantment: Notes on a Perplexing Quest for the Pouvoir Constituant', this issue.

<sup>3</sup>F Nicola, 'Failures of Comparability in Global Governance', this issue.

As to the criticisms addressed directly to the book, I will begin this Rejoinder with two unqualified concessions. These will be followed by three qualified concessions that, I hope, bring out a certain nuance and complexity that makes a difference to our discussion. In the second part of the paper, I will open up the debate in three directions in which many of the contributions here converge: first the question of constitutional *strategy*; second the critique of ‘*social dumping*’ in Europe; and third, the selective use of *systems theory as critical method*.

So let me begin with the concessions. The reviews do indeed hit a number of legitimate targets, mainly in terms of paths not followed, or not followed adequately, and often for no good reason. There are two objections in particular that hit the mark, that while travelling in the same direction as *The Redress of Law* raise questions of justice against assumptions (in the book) that may have foreclosed alternatives to market thinking.

My insistent argument that principles of welfarism and social protection made western societies *humanly* functional in the post-war decades, is, it is objected, insufficiently attentive to the *inhumanity* of colonial and postcolonial extraction, as well as the exploitation of unpaid domestic labour, that sustained the wage structure and paid for the relatively high levels of social protection of post-war social democracies. A more attentive tracking is required of the ways in which, over time, different answers to the ‘social question’ addressed or failed to address unequal and discriminatory treatment based on gender and race in the meeting of social needs, or the manner in which social reproduction simultaneously relied upon but excluded from analysis the gendered and racial operation of the division of labour in society. The book indeed ‘lacks sufficient engagement with feminist and critical race scholarship’. Instead, as Silvia Steininger puts it, ‘the approach to labour remains rather traditional, focused on industrialised and unionised workers’ and ‘remains blind vis-à-vis the way labour regulations have been used to benefit both patriarchal as well as imperial orders by exploiting the work of women and people of color’. For Nicola, ‘the deep capitalist ties with the rationalisation of social reproduction, the logic of patriarchy, and the forms of racial capitalism deeply entrenched in every aspect of EU constitutional and labour law’ can no longer be ignored and ‘require new strategies of redress’. Yes, certainly.

The second objection asks: Why is there so little emphasis on ‘constitutionalism from below’ of the type typically associated with ‘epistemologies of the South’ as Boaventura de Sousa Santos and his co-authors develop them, asks Angelo Golia in his exceptional review.<sup>4</sup> There is indeed clearly a space for these antagonistic, even *constituent* manifestations of law-making power, and had they been given proper attention, the ‘open dialectic’ of the final chapter might have carried these generative moments into institutional form. Golia is surely right to stand by, and insist on, a dialectical approach that may have indeed harboured a more radical constitutional pluralism. My own critique of pluralism aimed not at these more rooted, more embedded, more clearly emancipatory constitutional understandings, but at the surface constitutional pluralisms and celebratory ‘experimentalisms’ that are harnessed to the epistemological gains of ‘total market thinking’, which by remaining perfectly accommodating of deeper workings of the capitalist economy, help to immunise capitalist operations from democratic challenge. But by targeting a pluralism supercoded to capitalist distributions, a surface pluralism curiously inattentive to the M-C-M’ cycle clocking away below its panegyric expressions, I missed the opportunity to address a deeper pluralism and to harness its constitutional ‘energies’.

If the above are concessions without caveats, I now move to three criticisms that require a more nuanced response, and I am thankful for the opportunity to attempt that response here, because these arguments are central tenets of the book.

The idea of the ‘dogmatic’ that I borrowed from Alain Supiot and Pierre Legendre attracted widespread criticism. Critics are right to point out that it is too quick to link the ‘dogmatic’ to either Lon Fuller’s notion of ‘aspiration’, or more arbitrarily to the thomist notion of *determinatio* (my own emphasis in the book was on Aristotle) to explain the logic of how *value* (it would have

<sup>4</sup>A Golia, ‘A Few Practical Things’: *The Redress of Law* and the Irritation of (Critical) Constitutional Theory’, this issue.

been *virtue* in Aristotle) is specified and applied in concrete contexts of decision and action. Both connections, I concede, were too fast, the terms too closely tied to a tradition that is not that of Legendre or Supiot. But that in itself does not discredit the hugely important function that the ‘dogmatic’ plays in Supiot’s work, and by extension, in *Redress*, and the impatient dismissal of the concept of the dogmatic is unwarranted. Here is why.

Supiot’s argument is that if the crisis of the social state is indeed a crisis of the *organisational* form through which solidarity is sustained, and the obligations that stem from it administered, that does not, emphatically not, also mark the decline of solidarity as dogmatic resource. After all, he reminds us, ‘the social state is simply one moment in the long history of human solidarities which have taken multiple forms, none of them neither definitive nor guaranteed.’<sup>5</sup> This is because solidarity underpins and sustains juridical reason in a way that is never exhausted by any one of its (organisational) instantiations. This is what the concept of *dogma* captures. Supiot’s *Homo Juridicus* is a restatement of law as social hermeneutic; the *hermeneia* referred to is unique to juridical reason and sustains the dignity and autonomy of the *ratio juris*. Its achievement is to provide the shared symbolic medium that *binds* by ‘interposing shared meaning between people.’<sup>6</sup> In its hermeneutic function, dogma furnishes nothing short of the very conditions of intelligibility of the institution of law, and at the same time marks the limit beyond which *hermeneia* is undone. This notion of limit point, captured in the term *interdiction*, is important. One might think of legal dogma as that which prevents passage to a different register to measure the adequacy of law’s solutions. That is why it became pivotal to the argument in *Redress*. In this gesture of self-reference, law turns its reflexivity back on itself as dogma, and in the notion of *interdiction* resists the ‘truths’ of market veridiction.

The second line of criticism that the book received targeted my impatient dismissal of the legal/political constitutionalism distinction. Legal constitutionalism, I suggested, is a meaningless tautology, whose main function is to sustain, in constitutional theory, an unhelpful stand-off between courts and legislatures. Overstated, perhaps. And it is fair to concede that this tired debate has in recent times seen a re-vitalisation of sorts, as the earlier clear lines of the stand-off began to blur: the rise of right-wing populisms sent legislature-focused ‘political constitutionalists’ to seek some degree of rights-protection to temper populist-democratic excess, while the rise and rise of free-wheeling proportionality forced even hard-line exponents of ‘juristocracy’<sup>7</sup> to express some qualms about being ruled by judges. In any case it was never my intention to deny that some important work has indeed been produced by constitutional scholars who invested in that distinction. My criticism is that the distinction itself has too long been treated as the *portal* into constitutional theory, in the British context in particular, and that the schematic stand-off that it forces between judiciaries and parliaments, with typically both sides attempting to locate the guarantees of discursive rationality in the two institutions, leads constitutional theory into a stifling introversion. For the argument in *Redress*, the dismissal of the distinction as ‘entry point’ into the debate on constitutionalism was a necessary ground-clearing exercise, for a different distinction - between political constitutionalism and market constitutionalism - to be given a point of purchase.

The third line of criticism relates to my attack on ‘proportionality’, and here, as above, I would again like to introduce a qualification. My suggestion in the book is that constitutional reflexivity operates along an *unbroken* line of normativity, where constitutional values (as dogmatic resources) provide the standards on which is measured the adequacy of any constitutional solution; constitutional values are markers of what cannot be sacrificed. Some objects. ‘These statements suggest an absoluteness of right that is not plausible to assume’, because ‘no right is

<sup>5</sup>A Supiot, ‘Grandeur and Misery of the Social State’ 82 (2013) *New Left Review* 99.

<sup>6</sup>A Supiot, *Homo Juridicus* (Verso 2007) xxiv.

<sup>7</sup>The reference is to R Hirschl, *Towards Juristocracy* (Cambridge University Press 2007).

absolute', he says. While 'rights make demands on us owing to the existence of exclusionary reasons', where there are collisions the 'question needs to be answered how far the exclusionary reason extends', which is what the 'balancing' that proportionality imports 'is meant to determine.' In such cases 'one suspends the exclusionary reason by asking whether there are not good reasons to have other values prevail in a certain case.' To suggest otherwise 'would be to behave like a moral fanatic.'

Every element of this objection is problematic. To suspend the exclusionary reason in order to ask whether there are not other reasons worth pursuing is precisely what the exclusionary reason is there to prevent. Exclusionary reasons are second-order negative reasons and their function is to block recourse to those 'good reasons' excluded at the first-order level. But more interestingly, what would these 'good reasons' be? Presumably in *Laval/Viking* in connection to which this discussion arises, they would be to allow Viking to reflag its ship, allow capitalists to move their capital around, workers to work uninsured, and only ever engage 'proportionately' in strike action. It is this free-wheeling balancing, under the banner of optimisation, that the unbroken lines of normativity back to *values* – remember neither *rights*, nor *goods*, but *values* – gave us normative reasons to prevent. In a nutshell, there are no 'good reasons' *ever* to compromise, or temper, the constitutional values of dignity and solidarity.

My argument is not an argument against proportionality *as such*. An older constitutional *problématique* defined the test of proportionality exercised by constitutional courts as a corrective *within* the democratic framework and not *of it*, as its more recent, expansive, restatement does. In that older, more modest understanding, the court would make sure that legislative and executive action complied with the requirements of appropriateness (is the action compatible with democratic law-making?), rationality (do means correlate to ends?) and necessity (is the action, amongst functional equivalents, the least intrusive available?) There is nothing incompatible with democratic decision-making about proportionality in this classical form; in Johan van der Walt's insightful formulation, it stipulates 'the scope of judicial scrutiny [as] limited to the way parliamentary majorities have *decided* – through a simple procedure of voting that testifies to its own groundlessness – *exactly that which cannot be balanced*.'<sup>8</sup>

But it has been difficult for this self-restriction to sustain itself in the force field of the contradiction between democratic organisation and capitalist accumulation. Already with the German Federal Court's 1957 decision in *Lüth* and its reference to the balancing of competing values, the test of proportionality becomes unhinged from its classical, limited, conception<sup>9</sup> to be released in a self-propelling move as substitute for democratic decision-making. By the time we reach the European Court of Justice decisions in *Laval* and *Viking*, and the flurry of the subsequent jurisprudence entrenching the economic freedoms of capital against labour protection, the test of proportionality has been magnified to a travesty of its former self, as involving a comprehensive pooling of stakes, values and interests, to be calibrated on the vague metric of 'optimisation'. Proportionality in this form mobilises a measure of 'proportion' to counter the fear of democratic 'excess' (of Swedish collective bargaining, of Finnish worker protection legislation), in order to rein in the 'disproportion' of industrial action and protect the economic freedom of employers. It is what plays to the barbarous disproportion that market integration has orchestrated at the European level at the expense of labour. Fanaticism indeed.

In the next section I will have the opportunity to revisit *Laval* and *Viking* in the context of objections of other reviewers as well, to ask the question that critical theory invites: with the help

<sup>8</sup>In J Van der Walt, 'Deligitimation by Constitution? Liberal Democratic Experimentalism and the Question of Socio-Economic Rights' 97 (2014b) *KritV* 303–33, at 329; and for a more extensive treatment his *Horizontal Effect Revolution* (de Gruyter 2014) 361–99.

<sup>9</sup>Van der Walt, *Horizontal Effect Revolution* (2014, above). See also Dieter Grimm for the deployment of proportionality in German constitutional history. See D Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' 57 (2007) *University of Toronto Law Journal* 383.

of what distinctions are we able to resist the surrender of democracy, and the subsumption of solidarity, to market thinking? Against the market's move to flood the field with functional equivalents, I argued in *Redress* that we must fasten onto the non-negotiability of solidarity as constitutional *value* and as *achievement* of political constitutionalism. It is non-negotiable as a matter of the self-determination of political society. This does not of course mean that the interpretative questions over what solidarity requires in any one practical context will go away, or that the question over relative thresholds will become uncontroversial. It simply means that the constitutional value will remain the standard against which its instantiations will be measured, and that, and nothing else, elevates it to a 'dogmatic resource'.

## 2 The question of strategy

Although the book is long its structure is straightforward. The first of four parts tests the meaning and opportunities of critical phenomenology. It argues that the 'political phenomenology' that Hannah Arendt sustains through particular binary distinctions (political/social, action/labour) is paradigmatic of the attempt to *foreclose* critique. Against these thwarted disclosures, the effort in *Redress* is to retrieve a *critical* phenomenology by turning to Simone Weil's writing on necessity (in chapter 2) and Marx's on labour (in chapter 3) and to re-state it clearly (in chapter 4) in terms of a demand to *force appearance* against the foreclosures, blockages and elisions through which the constitutional imaginary of the Age is harnessed to 'total market thinking'. It is the trajectory of this 'great deformation', to paraphrase Polanyi, from political constitutionalism to market constitutionalism that parts 2 and 3 of the book track. The last part of the book, on strategy, hopes to suggest opportunities of redress, by fastening on to what was disclosed by the critical phenomenological exercise of part 1.

Running obliquely through the book *across* the stringent structure, are two strands of argument. The first concerns labour, the processes of its devaluation and the opportunity of redress. The second, *semantic* strand — delivered in four instalments under the heading 'semantics and structures' — concerns the loss of constitutional language and its possible recovery.

It is the fourth part of the book, on *strategy*, that attracts most of the criticisms. Recovery and redress, I suggest, demand strategic thinking. This part of the book lays out three strategies of resistance to the market capture of constitutionalism; I identify them as 'militant formalism', 'rupture and autogestion', and the 'immanent critique' of the constitution. The commitment to deploying strategy in the direction of redress, is the book's indispensable premise, on which it stands and falls.

For Somek it falls. Where Part IV of the book, he says, 'promises to excavate the emancipatory potential of political constitutionalism', 'paradoxically it does not seek to identify left-wing alternatives.' As it happens, 'the three strategies (formalism, rupture and contradiction) conjure up an ethos of resistance. That is basically it.' This is disappointing, he says, for those 'who may have expected to encounter the outlines, let alone the blueprint' of a more concrete suggestion. 'As the work, even more than before, revels in abstraction in this final section, it professes, inadvertently, its complicity with the aesthetically enchanted left.' Hence also the title of Somek's review. 'Any plan of action is indefinitely postponed' in this 'flight from action to the arts.' He finds it hard to know 'what to make of such inconclusiveness.' The book's 'remarkable exercise in sublimation demonstrates that the left no longer has a political outlook.' Let me pause to remark that it is not wholly clear to me what this apraxia, as well as the melancholic eulogy to the Left, has to do with the book. Somek's most ardent criticism, however, is yet to come and it attaches to 'the motley assembly of ideas' that the book marshals 'ranging from formalism', Rosa Luxemburg, autogestion, the Polish 'Solidarity' movement, the mass strike, Benjamin's recourse to that myth, Rancière's dissensus, [etc]. 'Motley assembly'? 'If the aim of the final part,' he continues, 'is to

unsettle market constitutionalism’, the ‘work does not hint at what might be the author’s preference’.<sup>10</sup>

On the final comment, let me just say that from the point of view of strategic thinking, it would not, could not, make sense to rank strategic ‘preferences’ in advance. Strategy is responsive to the situation, alert to the wager of its undertaking, a matter of opportune time, deployed in the ‘conjuncture’, as Althusser used to say. Of course, one does not need to have read Althusser to appreciate the point that the success or failure of strategic initiatives depends on the contingencies of the situation one finds oneself in. It is not a matter of foregrounding a list of preferences, or a blueprint. In a phrase that I have heard attributed to Rudolf Wiethölter, *one does not play the game by showing one’s hand*.

Without wishing to second-guess Somek, I wonder whether what invites the bellicose tones is that strategic thinking often jars with the smooth expanses of communicative reason, in which, under Habermas’ staggering influence, constitutional theory has found its home, portraying the public sphere as a field of *rational* exchange rather than strategy, involving citizens in attempts to *persuade* others rather than gain advantage over them, all in good faith and under the benevolent conditions of the universal pragmatics of language use. I spend the opening chapter of the ‘strategy’ part of the book (chapter 4.1) in a clearing exercise against these assumptions and the way they purport to subtend the field of politics. In extreme cases the space for engagement is already foreclosed, as in the case of the *Solidarity* movement in Poland that I analyse as a *constituent* achievement. It was constituent to the measure that it imported a logic of collective self-determination against what was *already* available as register of collective action in a state-socialist republic, and its endeavour was to institutionalise a novel political form *against* the structures that denied it visibility (remember its demands were always read as economic demands for the adjustment of wages, never political demands for the democratic control of work). Here strategy had to involve a comprehensive gesture in the context where the conditions of action were denied it, and it took the form of pure *autogestion*. Rancière’s fascinating work on *dissensus* is not a flight from politics to aesthetics but an invitation to think of aesthetic *acts* as political *acts* claiming their stage. But clearly this more radical form cannot be generalised; the use of formalism, in the narrower frame of strategic litigation, follows different dictates and draws on different resources, as does the constitutional strategy of committing to a social-rights constitutionalism in the context of a capitalist system to which it is contradictory, the latter forever pushing social rights ‘entitlements’ to the margins of its operations. Strategic and collective actions articulate at these junctures where options and registers are selectively availed and withdrawn. Where options are not available in advance, the very undertaking of action itself can sometimes throw them into relief – hence the motto ‘*on s’engage et puis on voit*’ (closer to Lenin and Lukács, than ‘Napoleonic’ as per Golia). Strategy is forged in the forcefield of practice, it is not a realm where preferences can be foregrounded, ranked or programmed by constitutional theory in advance.

‘Yet the time of mass strikes is long past’ announces Steininger, in her review. While her earlier point against a rather monochromatic picture of male striking workers is well taken, this less readily convinces. As I write, news is pouring in of strikes in the UK across the health, transport and education sectors. In Ontario earlier this month, just four days after its right-winger Premier, Doug Ford, had rammed through large-scale anti-worker legislation, it was hastily repealed in the face of a threat of what was explicitly labelled a general strike.<sup>11</sup> In a striking expression of cross-union solidarity, the Canadian union of Public Employees was joined by labour movements (‘Justice for Workers’) and backed by the giant Ontario Public Service Employees union, with further calls to industrial action coming from municipal sectors and the auto industry.

<sup>10</sup>Though at another point, Somek argues that the book treats ‘formalism as a panacea’, ‘a bit out of whack with a hundred years of legal theory.’

<sup>11</sup><<https://www.ier.org.uk/news/general-strike-threat-beats-ontarios-anti-worker-law/>> accessed 15 December 2022.

Of course, constitutional strategy involves difficult questions of prioritisation and opportunity. But a proper reckoning involves attention to the sites of resistance, and imagination regarding dynamics of linkage, contingency and opportunity. This in turn invites both attention to the manifold spaces and modalities of collective mobilisation and resistance and, equally significantly here, it requires *humility*: humility to ensure that people are not spoken *for*, that ‘Third World Approaches to International Law’ (TWAIL) are not loudly proclaimed by *first-world* scholars, or, closer to *Redress*, that it is to those whose labour is devalued or denied that is given a register to articulate the injury and to contest it. Simone Weil, as in so much else, exemplified this humility. And if her philosophy of work, as Alain Supiot put it, ‘s’enracine dans l’expérience de l’univers industriel.’<sup>12</sup> it is because she went so far as to seek factory work in her insistence that the workers would *not be spoken for*, that only her own partaking in the practice would authorise her speaking position, one that this eternal outsider never properly managed to claim for herself in any of the sites of her impassioned engagement. Weil’s shadow looms large over the book, and I am not aiming to recount any of it here. My aim is only to re-direct the critical gaze back to the sites where labour is expended, be these in formal or informal contexts, sites of valuation, devaluation, expenditure, deformation, and where it might be summoned,<sup>13</sup> also of resistance.

### 3 Europe’s ‘race to the bottom’

One of the more brutal, and unambiguous, expressions of ‘market constitutionalism’ discussed in *Redress* was the *Laval/Viking* quartet of cases decided by the European Court of Justice in 2007. It is a sign of how prevalent market thinking has become that the ‘race to the bottom’ instigated by the *Laval/Viking* jurisprudence was met with vehement criticism (at least initially) by labour lawyers, that EU lawyers took it in their stride, and that Human Rights lawyers, finding their loyalties divided, mostly sat on the fence. It was arguments raised by scholars in Central and Eastern Europe that caused some concern,<sup>14</sup> that Aristel Skrbic describes well in his review:<sup>15</sup>

What is perceived from the centre as social dumping and needs to be remedied by having a more social Europe, looks different from the perspective of the periphery. The ability to offer cheaper labour is a comparative advantage with which companies and workers of the periphery can better compete against those of the centre. This in turn provides workers of the periphery higher wages than they would receive at home. Cases like *Laval* embody, from this perspective, a victory for the workers of the periphery.

It was unsurprisingly those who were to gain ‘market access’ as a result of the ECJ decisions that were the first to attack the contra-distinction between social and economic rights. We were, instead, invited to realise that it is the (social) right to work of the Estonian or Latvian workers that defeats the (social) right of the privileged Nordic workers to increased protection. The clash is no longer between rights and freedoms, the social and the economic, but between the social rights of workers of two different constituencies.

Skrbic borrows the argument about ‘structural bias’ from Damjan Kukovec who for some years now has argued that the Euro crisis brought to the fore a larger and hitherto invisible structural problem regarding the relationship between the European Union’s centre and periphery.<sup>16</sup> Kukovec argues that a certain asymmetry has installed itself between the wealthy countries of the

<sup>12</sup>A Supiot, ‘Simone Weil, juriste du travail’ 33 (1) (2010) Cahiers Simone Weil 3.

<sup>13</sup>The book’s critical-phenomenological method, and main substantive argument, addresses all that is staked on this ‘might be summoned’.

<sup>14</sup>For a very useful collection see M Freedland and J Prassl (eds), *Viking, Laval and Beyond* (Hart 2014).

<sup>15</sup>A Skrbic, ‘Pushing the Debate on Posted Workers beyond the EU’s Status Quo’, this issue.

<sup>16</sup>D Kukovec, ‘Law and the Periphery’ 21 (3) (2015) European Law Journal 406.

European core at the expense, typically but not solely, of the countries that joined the EU in the post-1989 expansion. He argues that the concern with ‘social dumping’ following the Laval/Viking quartet of cases is typically a concern of the core privileged economies and welfare states, like Sweden and Germany. These ‘core’ countries have taken against the movement of workers under ‘market access’ as an example of the ‘race to the bottom’, but have shown scant concern when it comes to the free movement of goods and the ‘dumping’ effects there. For Kukovec, the argument against social dumping is both hypocritical (why only workers and not goods?) and conceptually flawed. For Skrbic the approach

goes beyond merely highlighting differential distributional consequences. . . . [Kukovec’s] boldest argument is that what is a social claim and what is an economic claim is a matter of perspective. . . . What counts as social and what counts as market [now] attaches to proper names, such as Latvian workers and Swedish companies, which means that by changing one’s perspective the nature of the conflict changes.

The change of perspective is a simple switch, as captured by Kukovec in terms of the ‘duck/rabbit’ metaphor.

Like Wittgenstein’s duck-rabbit picture, what appears as economic is social and what social is economic, depending on the angle from which we see the dilemma. The debate could just as well be framed in terms of social rights of [Estonian] workers against the [Finnish] interpretation of the freedom of movement provisions which ignores their realisation.<sup>17</sup>

‘In other words,’ concludes Kukovec, ‘what appears as an economic freedom in the dominant EU legal discourse could just as well be a social right of Latvian workers struggling to improve their livelihood, *dignity* as well as fair and just working conditions.’

As unproblematic as the switch of perspective may seem, there remains something profoundly disturbing about ‘the merit’ of a ‘duck-rabbit’ understanding of the interface of the social and the economic that *pivots* on market access understood in its functionality of sustaining a downward spiral of lowering wages (social dumping); and to assume market access in this modality as *sole* guarantor of *both* social rights (for Baltic workers) *and* economic freedoms. The perverse conclusion, for this line of argument, is that since a social dimension exists within the very framework of the internal market freedoms, Europe’s *social market* appears *realised*, not undercut, by ‘social dumping’.

Note, incidentally, in the context of this comprehensive change an interesting variation on a formal jurisdictional matter. It used to be a fundamental condition that in order to *activate* EU Law, and to claim a right under it, one had to show a link with a *cross-border element*. With ‘market access’ the criterion is reversed; the triggering effect is not the connection (with a cross-border element) but the *potentiality* of it. It is now the *denial* of (market) access across borders – that is, the very *lack* of a cross-border element – that activates the ‘right’ and provides standing.

These are tectonic and highly problematic developments. And the difficulties that the social-democratic Left have had with the ‘duck-rabbit’ thesis, that folds social into economic rights, I argued in *The Redress of Law*, is the outcome of the comprehensive internalisation that is effected as *total-market-thinking*. We witness in these cases how social rights became a signifier for *inclusion* in the labour market, an inclusion effected at the expense of other workers, in the case of *Viking* of the sacked Finns of the reflagged vessel, whose own social right to work was sacrificed at the altar of comparative advantage. In the process ‘social Europe’ became coincident with the integration of its internal market, and in the unfolding of this relentless process, the language of

<sup>17</sup>D Kukovec, ‘Whose Social Europe?’ Talk delivered to Harvard Law School (April 16, 2010), SSRN, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1800922](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1800922)> 15 December 2022.



redress was lost to market thinking and the ‘frictionless’ flows of capital. From the point of view of constitutional theory, what we witness is a *loss of the language* which would carry the critique of social dumping. Against the comprehensive uptake of market thinking as horizon of every determination *and* every alternative to it, the play of mirrors and the duck/rabbit conundra, the answer is, I suggested following Christian Joerges and Wolfgang Streeck, in the most modest demand: *uphold democratically enacted law*.

The objection of course here is that democratic enacted law is *national* law, and upholding it is inimical to European law. ‘The constitutional commitment to workers’ rights will, in the end, always remain protectionist,’ says Steininger, the ‘democratic objection’ inevitably a ‘further retreat in the national sphere’. And for Skrbic, the answer must be sought at the European level, through a robust fiscal harmonisation policy, though he finds ‘too optimistic’ ‘the grand political project of establishing a social union in any real sense, . . . through broader fiscal competence at the transnational level.’ He insists that the fact that so far as at the transnational levels there is little opportunity for democratic enactment, at the moment, does not mean that we should give up the fight. I agree. But does that mean, as his objection suggests, that in the *interim* solidarity with the workers of the periphery must take the guise of market access, even if that means social dumping?

Let me counter-suggest before we raise the blanket ‘protectionist objection’, that we think strategically about what current institutional solutions offer, and about how far, currently, we might stretch the ‘institutional imagination’ (as Roberto Unger, would have it.) We need to explore carefully why the grand schemes to constitutionalise solidarity in Europe failed thus far, notwithstanding the efforts by European unions in the 1950s to constitute the EEC as a social democratic organisation and later to make it a kind of neo-corporatist organisation,<sup>18</sup> or the ‘social dialogue’ constitutional initiative introduced with such fanfare in Maastricht. We must look carefully at whether those failures were contingent, or whether they were the result of deliberate deadlock. I refer to ‘deadlock’ to draw attention to the key *fractures* through which the European project ensures its asymmetrical development: market completion at EU level, fiscal policy at national level, monetary policy at European level. These are disarticulations that serve to organise the competitive alignment of the national systems of labour protection, as clear as one might get an instantiation of Schumpeter’s definition of capitalism as a system of ‘creative destruction’; and they serve also to extinguish any resistance to the project of market integration, as so painfully experienced by the Greeks amongst others, with the emphasis on ‘sound money’ and the selective deployment of quantitative easing. I am not arguing that the potential for seeking solutions at European level is impossible, however unlikely the current entrenchment of these fractures and priorities make it seem. The argument rather is that, in the present conjuncture, and *until* supra-state solutions are found, what we can and should do now is to protect the democratic will where it finds expression and protect the constitutional value of the dignity of work.

This means that *against* the ‘inclusionary’ suggestion of market access as social dumping we hold to the following:

- *First*, we reclaim for critical theory the language in which to state its objection to the diminishment of labour. It is a clear sign of the extent to which the critical nerve of the academy has been dulled, that market-access-as-social-dumping has substituted for any expression of ‘solidarity’ to European workers from the ‘periphery’ and as the lever to redress core-periphery asymmetries. To state that social dumping is the only option for inclusion marks a failure of institutional imagination.
- *Second*, let us be clear that while the argument that it is hypocritical to condemn the cross-border worker movement but allow cross border dumping of goods may be correct, it does not as such justify social dumping. It may be worth noting in this respect, that the proffered aspiration to ‘inclusion’ and ‘solidarity’ comes with its own hypocrisy, expressed in the EU’s

<sup>18</sup>See R Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford University Press 2014) Chapter 6.

‘periphery’s’ insistent guarding against its own periphery of non-European workers, in the blatant anti-immigration policies of Hungary, Poland, etc, and the extent that they have driven the ‘vision’ of ‘fortress Europe’.

- *Thirdly* and most significantly for the argument of Kukovec et al: *there is no duck-rabbit thesis* here, as a *conceptual matter*. The social right to work of the Estonian or Latvian workers is *not* compromised, because their social right to work does not mean, and could not mean, the right to a job.<sup>19</sup> The ‘social right’ of ‘work’ refers to the protection of working conditions, of unionising, striking, securing health and safety at work, etc. It does not mean an actionable right out of unemployment. There is therefore no clash between social rights of over-privileged Scandinavian workers and social rights of under-privileged Baltic workers,<sup>20</sup> because the former are actual social rights, but the latter are potential work opportunities.<sup>21</sup>

#### 4 Systems theory as critical theory? Selective deployments and their limits

There is no question that the debt of *The Redress of Law* to Luhmann’s theory of social systems is immense, while its use of it is highly selective. This ‘eclectic’ take attracts critique from within the theory, even before it confronts the general antipathy towards systems theory that characterises most current critical approaches. The latter for the most part rehearse the critiques of technocracy<sup>22</sup> and functionalism<sup>23</sup> that have been levelled against Luhmann, alongside critiques against its displacement of agency and ‘dehumanising’ effects,<sup>24</sup> or its ‘sociology without society’ (amongst others Somek, above). I will say less about the latter, not because they do not matter, but because they are largely familiar, and inform broader debates in the sociology of law not all of which relate to my own interpretation of the theory. It is the former, *internal* critique of selective deployment, that poses the more acute problems for my own position.

In his attentive and profound review, Golia discusses the book’s ‘relationship with systems theory’ at some length. From Luhmann, he says, I borrow an account of constitutional normativity, while deploying a ‘non-Luhmannian understanding of the political system’.<sup>25</sup> And while he agrees that there are clear dividends to the phenomenological use of systems theory, when it comes to *strategy* I limit the usefulness of systems theory to its ‘formalism’, which in turn informs ‘backstop’ tactics: chiefly to use formalist arguments in order to resist the economic logic of price from variably intruding, colonising or co-opting the field of constitutional thought. For Golia, from *within* systems theory, and with special reference to the theory of societal constitutionalism,<sup>26</sup> a number of objections arise.

- (i) My recourse to ‘militant formalism’ unnecessarily short-circuits the range of strategic options to the state, and ‘gives in to state constitutional theorists. . . . who ignore initiatives for the constitutionalisation and democratisation of non-state institutions. . . . or

<sup>19</sup>Skrbic, too, alludes to this when he writes: ‘what [Latvian workers] have won cannot reasonably be described as a social right’.

<sup>20</sup>See Kukovec, (n 16) 415: ‘The Laval debate could just as well have been framed as a conflict between Latvian workers’ social rights and the Swedish interpretation of the freedom of movement provisions, which impedes the realisation of these rights.’

<sup>21</sup>In other words, what appears as an economic freedom in the dominant EU legal discourse could just as well be a social right of Latvian workers struggling to improve their livelihood, dignity as well as just and fair working conditions.’ (*Ibid.* 415).

<sup>22</sup>Since the famous Luhmann-Habermas debate in 1971. See J Habermas and N Luhmann, *Theorie der Gesellschaft oder Sozialtechnologie: Was leistet die Systemforschung?* (Suhrkamp 1971).

<sup>23</sup>See in particular J Habermas, *The Theory of Communicative Action* (Polity Press 1987).

<sup>24</sup>See H Rottleitner, ‘Biological Metaphors in Legal Thought’ in G Teubner (ed), *Autopoietic Law: A New Approach to Law and Society* (de Gruyter 1987) 97–127; and H Rottleitner, ‘A Purified Sociology of Law’ 27 (1989) *Law and Society Review* 779.

<sup>25</sup>Golia (n 1). The objection is also raised by Somek §9.

<sup>26</sup>For a comprehensive statement see his co-authored paper with Teubner, n 2 above.

transformative legal theories like associative democracy; such fixity on the state is unnecessary since *the Redress of Law* travels in the same direction as societal constitutionalism in ‘de-centring states as the sole *loci* of the political’. In effect societal constitutionalism is significantly broader than a theory of ‘militant formalism’ as it is described in the book.

- (ii) The book’s analysis of the economic system denies the economy its own flexibility and relative complexity, and ignores the inner transformative capacities of the economic system by ignoring, for example, historical experiences of democratising the economy.

It is, however, with reference to ‘framing’ the *political system*, that my selective take on systems theory becomes most problematic. Golia argues that I deploy a ‘sanitised’ concept of the political, as constitutively engaging democratic categories. The concept of the political in *Redress*, in other words, appears as *already* democratic.

- (iii) This is unwarranted, as a matter of theory construction.
- (iv) This in-built assumption misses the critical-heuristic opportunity to address concentration and accumulation of power in the political system *as* political problems, or the deformation of constitutional thought that is populism as a deformation. ‘The selective use of systems theory results in the absence of any problematisation, of any *critique* of politics as *such*,’ says Golia, and he asks: ‘Can there be a critical theory of constitutionality that does not focus on the power/politics complex as such?’
- (v) Finally, and in relation to a more radical constitutional pluralism that Golia is out to defend, he points to the limits of the rationality of the political system itself: ‘The effectiveness of political constitutionalism depended *also* on the structural coupling of politically legitimated law with other, non-politically legitimated forms of normativity. . . . Even under conditions of ‘healthy’, so to say, differentiation, could non-political normativities and principles of legitimacy really be traced back to political rationality *tout court*?’

These are significant objections, and for the remainder of the rejoinder I will attempt to formulate (at least the beginning of) a response by answering the five objections, in turn, in the direction of a systems-theoretical defence of the political, one that while clearly at odds with Luhmann’s position, does not give up what is most valuable about systems theory as critical phenomenology.

To appreciate the force of objection (i) one needs to recall that for its advocates, the thing that sets ‘societal constitutionalism’ on its course is the severing of constitutional thinking from the state. This severing is sometimes explicit, but it is in all cases *pivotal*. And it is what, above all, furnishes the theory’s critical perspective, sending it in the direction of associative democracy as *not* bound to state procedures, living law as *non*-state law, ‘contestatory constitutionalisms’ as resisting state-hegemonic understandings, etc. In each case the critical perspective is fashioned in opposition to the perspective of the state. Much of this is fascinating of course, and politically speaking offers an invaluable genealogy. But there is no reason to assume that formalism needs to be state-bound; formalism is a theory about the reflexivity of the law, not its coupling with the state form. Which means, significantly, that the dogmatic resources of the law may indeed furnish understandings of associative democracy, transnational solidarities, etc, outside state formation. And to the extent that they import constitutionally backed political understandings into the economy, they offer significant opportunities to re-think *democracy*, I would suggest even *virtue*, as *economically relevant*, and such opportunities can also travel to supra-state levels. Like Golia, I too have found the selective, thwarted, complex crossings (and ‘irritation capacity’) between operatively closed systems to be one of the most valuable contributions of systems theory. And, against objection (ii) above, I did indeed attempt to track *the collapse of the political economy into its market form* as a pathology, not a definition. Not, therefore, as the correct reading of the

economy as an autopoietic system ('more Luhmannian than Luhmann') but as the combined effect of neoliberal governance. Because there is nothing about the autopoiesis of the economic system that, at the level of programming, bars its 'cognitive openness' to political/democratic values. In all this, neither is militant formalism state-bound, nor is it solely a 'backstop strategy'. Yes, I did argue that in the form of the constitutional values of dignity and solidarity, formalism sets the limit beyond which legal reason cannot travel, because at that limit the *ratio juris* reaches its ultimate ground. But this limit, and the 'backstop strategy' it offers, is only half the story. In the opposite direction of travel, from abstract to concrete, from value to norm, are furnished the criteria of intelligibility of what might count as adequate determination. I argued this point both in terms of the formal features of constitutional reason ('rationalisation' in chapter 2.2) and social rights constitutionalism (in chapter 2.3). And I argued it also by engaging (in chapter 4.2) with Teubner's fascinating account of societal constitutionalism in *Constitutional Fragments*, at the point where he moves the analysis to the meta-level, to deploy constitutional-level structural coupling to navigate globalisation at the reflexive level of the coupling of the economic, political and legal systemic logics. But this meta-level analysis is clearly a field of complexity with entry costs (Somek is right to object) that are nearly prohibitive; and I would also concede that it is somewhat hard to argue that the fine distinctions, meta-level alignments and crossings, offer significant or tangible strategic opportunity to counter the careering juggernaut of globalisation.

How does this all combine with the 'sanitised' concept of the political I deploy (objections iii–v) and the suggestion that I have stacked the cards, and 'uncontroversially included democracy in the concept of the political'?

Golia suggests that I have picked up the discussion downstream, and that this gesture has involved a 'subtle, surgical replication' of what 'Luhmann described as a certain functional synthesis between the political and constitutional law', where the political *already* finds (imperfect) expression in constitutional law. To the measure that 'political constitutionalism' operationalises the distinction between constituent and constituted power, it does indeed depart from the 'functional synthesis'. But why *is* it illegitimate to do so, which *the Redress of Law* undoubtedly does, with a view to inclining it in the direction of the economy rather than politics? It does so, not because concentration of power is of secondary importance to critical constitutional thinking, but simply because total market thinking isn't either. And it does not *have* to address the deformation of 'totalitarian politics' first, because 'untamed capitalism' neither presupposes nor requires the populist deformation for it to secure its reproduction. So, if it is that '[t]he selective use of systems theory results in the absence of any problematisation, of any *critique* of politics as *such*,' as Golia rightly points out ((iv) above), it is because the emphasis of the book is on the 'great deformation' of democratic capitalism, rather than the deformation of democratic constitutionalism. But then, 'politics as such' in my 'sanitised' view of it, isn't the problem. For the 'sanitised' view the question of what are 'the limits of the rationality of the political system' ((v) above) is very different to the ones indicated by 'societal constitutionalism'. And the injunction not to ignore 'non-political normativities and principles of legitimacy [that cannot] be traced back to political rationality *tout court*' begs the question of why they are characterised as 'non-political' in the first place, or what 'political rationality *tout court*' means in the context of these definitional questions.

All this may be well, I hear Angelo objecting, but it still depends on the credibility of a 'sanitised' view of politics, and how am I proposing to defend that? If I can interject here a brief personal recollection: I had the rare fortune of undertaking some of my doctoral work at the EUI in Florence in the early 1990s. It was a wonderful, if somewhat daunting, environment, and amongst the most extraordinary facets of life at the Institute in those days was the weekly reading group on Luhmann that Gunther Teubner organised, daunting not least for being conducted in four languages (of which I could, at best, understand only two). Even in the midst of all this erudition, what struck me then was how out of sync with the depth of the rest of his oeuvre, was Luhmann's thinking about politics. At the time what was available for discussion specifically on the political system was the relatively unremarkable long article translated as 'Political Theory in

the Welfare State', and Luhmann's shrill criticism levelled against Petra Kelly's Green party in Germany for their radical political approach to ecology in *Ecological Communication*. I channelled some of my unease with this paucity in my doctoral thesis *Law and Reflexive Politics*, which attempted, as the title suggests, to rescue from Luhmann's account of the political system the possibility to think of politics as reflexive. Years later, his treatise on politics was published (posthumously),<sup>27</sup> and while it introduces a high degree of sophistication to the discussion, it also repeats some of the foundational blind spots. All these years later, then, Luhmann's theory of the political system leaves us in not dissimilar a position, stranded with the limitations of the 'political *tout court*'.

One way, perhaps, to offer a systems-theoretical counter to Luhmann's own thwarted definition of the political is through the discussion of *reflexivity* in chapter eleven of his book *Social Systems*, on 'Self-reference and Rationality'. Here Luhmann's emphasis is on how reflexivity combines with self-reference when it comes to meaning-generating social systems. At lower levels, basic forms of reflexivity secure the connectedness of a system's operations, and thus secure a basic level of self-reference. As we ascend, reflexivity comes to secure the centripetal reproduction of a system that must balance 'variation' against 'redundancy' in order to remain responsive enough to the environment (while not losing itself to it), and, finally in this ascent, we come to reflexion, which is the point at which the system turns its reflexivity back on itself. In law, this reflexivity receives the name 'constitutionality'. All this can also be cast in the language of 're-entry': with the 're-entry of the system/environment distinction back into the system, the latter secures its autopoietic closure. Or we might say that 're-entry' marks the operation that enables systemic reflexion: where the system thinks itself in an environment and thinks the adequacy of that thought. This is all fertile ground for systems theorists, but we do not need to indulge in it; all we need is to take from it this important argument: the key question that reflexivity answers is the question of how (legal or political) social-systemic thinking turns back on itself, reflexively, to ask the questions 'what is law?', 'what is politics?' in the context of a societal environment vis-à-vis which it is functionally emplaced.

When it comes to the legal system the key concepts that subtend and organise its operations (coding, programming, function) are relatively well known, and they are largely covered in the reviews in this volume. How Luhmann understands the political system is perhaps less commented on. Very briefly, for Luhmann the medium of the political system is power, and the coding under which this resource is managed for the production of collectively binding decisions, is that between holding/not-holding power, which is in turn super-coded (under democratic conditions) to the difference between government and opposition. The various thematisations that reproduce the political system as a system of communication, occurs 'at the seams and junctures' (Thornhill, 105)<sup>28</sup> of politics and administration, administration and (political) public, and public and politics, around questions of what the common good requires, and what collective decisions (or abstentions) will deliver it. The contingency formula for the political system is *legitimacy*, against which the taking of such decisions is tested. As contingency formula, legitimacy organises the self-reference of the political system. In Luhmann's words 'legitimation is the form in which the political system accepts its own contingency.'<sup>29</sup> In other words, legitimacy concerns the range of what properly invites collective decision-making; or of how, crucially for our discussion, the realm of contingency is cast in terms of the distinction between what is necessary and contingent, what (might become) a political matter and what not.

Here is the crux for the 'sanitised' conception of reflexive politics: *the very same reflexive question that in the case of law circuits it back and locks it into formalism ('what is law is a legal question')* in the case of politics turns it constituent ('what is politics is a political question'). If one

<sup>27</sup>N Luhmann, *Die Politik der Gesellschaft* (Suhrkamp 2000).

<sup>28</sup>M King and C Thornhill, *Niklas Luhmann's Theory of Politics and Law* (Springer 2003), 105.

<sup>29</sup>I borrow the formulation from M King and C Thornhill (n 28) 74.

places the emphasis on a phenomenological, rather than a sociological–functionalist reading, one might even suggest that political autopoiesis runs alongside constituent power in turning all definitional questions reflexive, regarding subject (‘who decides who decides?’) and object (‘what is ‘common’ in the ‘common good?’). Once released from its confinement to the binaries of coding (and super-coding) to the exercise of governmental power, the question of political legitimacy too is unsettled at the root. If it is still to operate as ‘formula of contingency’, as Luhmann describes it, this is now a second-order contingency, one that turns on the contingency of the (first-order) distribution of necessity and contingency. And most importantly for our discussion: if, with Luhmann, we hold on to the communicative *medium* of power as that which undergirds the political system, then given that power is about relation, it imports *ab initio* the question of what constitutes connectivity and collectivity as pivotal. It is a short step from that to see how democracy comes into the picture as constitutive and irreducibly plural. ‘How does one think democracy democratically?’ asks Negri in order to open his discussion of constituent power. And it becomes difficult to stop short of that question if one takes seriously the reflexivity of the political system.

Of course, the suggestion to align the reflexivity of the political with the constituent in this way that also incorporates democracy definitionally, typically sends constitutional scholars into a paroxysm, exorcising the spectre of totalitarianism and the ‘brotherhood of terror’, invoking Robespierre, Lenin or Castro, in the forever renewed rite to ward off evil.<sup>30</sup> We can certainly lower the bar, and have done so, by departing from a ‘functional synthesis’ of constitutionalism that deploys the constituted/constituent distinction as the *guiding difference*<sup>31</sup> of political constitutionalism. This imports the *democratic*, irreducibly, at the constituent pole of the distinction, ‘sanitising’ to the measure that it operates as corrective to undemocratic deployments of constitutional thought, but, more significantly, turning it frontally against economic reason unleashed as ‘total market thinking’.

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<sup>30</sup>See Regis Debray: ‘Totalitarianism serves much the same function in the arsenal of our political science as fanaticism did in that of the Enlightenment or totemism in primitive anthropology: it is both an excuse for mis-recognition and a rite to ward off evil.’ R Debray, *Critique of Political Reason* (Verso 1983) 11.

<sup>31</sup>On the concept of ‘guiding difference’, see, indicatively, Luhmann, *Social Systems*, (Stanford University Press 1996), 32.