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

Failures of comparability in global governance: Exploring the practical dimension of the redress of law

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Abstract

In *The Redress of Law*, Emilios Christodoulidis explores the philosophical foundations of market constitutionalism and shows how its embedded rationality shapes global governance. The author delves into critical phenomenology to lift the veil of ignorance on the fact that market constitutionalism has replaced political rationality with economic reasoning. By grounding its theory in the continental critical theory, ranging from Marxism to Weil's existentialism and Luhmann's systems theory, the book shows how the redress of law is also a practice that could radically transform the global political economy. However, the challenge is to displace the modern thinking of market constitutionalism that is rooted in functional differentiation and privileges constituted rather than constituent power. Such market thinking has allowed global governance experts to simplify and reduce to numbers complex polical, cultural and social phenomena embedded in constitutional legal regimes. The disembedding of law from society through functional differentiation, and the sole preoccupation of legal experts with constituted power, have contributed to the depoliticisation of constitutionalism as both theory and practice. A quintessential example of market constitutionalism in practice are global governance indicators. These indexes entail comparisons among legal regimes that empower private market rules as the final arbiter of local redistributive policies while bracketing historical, genealogical and reflexive connections to law's social realities. The book offers several strategies of 'redress of law' such as rupture, contradiction and open dialectic, aiming to foreground political rather than market constitutionalism and to revamp the dialectic between constituted power exemplified by constitutional texts and constituent power, exemplified by strikes. This Article praises Christodoulidis's sophisticated theoretical framework grounded in critical phenomenology, but at the same time pushes the author's argument beyond the book itself. By questioning the practical implications of the redress of law, the focus on legal assumptions in global governance shows how legal experts in a variety of legal fields beyond constitutionalism have reproduced existing inequalities defined in terms of market, social and colonial hierarchies.

Keywords: market constitutionalism; comparative law; Marxist dialectic; failures in global governance; indicators; comparative law; critical theory; constituent and constituted power; labour law; capitalism; critical phenomenology; racial capitalism; neoliberalism; colonial continuities; international organisations; multilateral investment banks

1. Introduction: Marxist dialectics and political constitutionalism

The Redress of Law by Emilios Christodoulidis is an intellectually ambitious tour de force in critical legal theory.[1] Even if the width and depth of the book may lead some readers to get occasionally lost, the monograph reads just like a novel that is hard to put down. This is due to the

[1]E Christodoulidis, *The Redress of Law* (Cambridge University Press 2021).

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author's elegant style and ability to narrate the strategies of redress of law through a multitude of linkages among continental philosophers. However, the author does not hide behind this intellectual exercise. Rather, he boldly expresses his political views, for instance in valuing Simone Weil's existential vulnerability more highly than Hannah Arendt's problematic philosophy of the public sphere.[2] In developing the elements of political constitutionalism, central to the book's utopian aspiration, Christodoulidis favours strategic over discourse theory.[3]

To reclaim political constitutionalism, Christodoulidis relies on the Marxist development of historical materialism, which 'is played out on the terrain of social labor.'[4] As an example, in the phenomenology of work, Christodoulidis shows the immanent deficit along a political, ethical, and philosophical categorisation of labour. This deficit characterises current constitutional regimes and results in a disconnect between labour law and the invisibility of care workers or the new working class of the digital economy.[5] Constitutional regimes heighten the paradox of processes of value production and social reproduction, thus creating 'the mismatch between the categories of thought and the modes of social being.'[6] This mismatch contributes to the lack of protection of the most vulnerable groups, such as children, women, racial minorities and the working poor, who fall outside the labour safeguards included in national constitutions or a supranational charter of fundamental rights. This is one of the paradoxes that Christodoulidis is tackling directly in his book through what he calls the redress of law, in which law is both part of the problem and its solution.

Among the several strategies of redress of law included in the book, rupture emerges as a practice of immanent critique and negation that aims at identifying contradictions and struggles beyond societal rules and constitutional settlements. The author uses rupture in constitutional theory to show how scholars have too comfortably relied on the notion of constituted, rather than constituent powers. In contrast, the book's theoretical framework re-centres the Marxist dialectic between constituent and constituted power as an ongoing and background tension of constitutional settlement. According to Christodoulidis, this dialectic tension is still at work in shaping political constitutionalism, creating instabilities and contradictions, but at the same time, opening new possibilities for redress. This changing and evolving dialectic between constituent and constituted power allows the author to revamp the tradition of the Paris Commune of 1871 as a moment of rupture and ongoing struggles in *autogestionnaire* politics of the French revolutionary government.[7] Moments of rupture throughout history, in European integration and around the world, are vividly depicted in the book to show contradictions, open dialectics between capital and labour, and missed opportunities towards a more democratic and egalitarian political constitutionalism. For instance, 1989 is a moment of rupture in Polish constitutionalism. However, this soon becomes a missed opportunity, not least through the 'co-option' of the Solidarity movement. The result is a compromise around the 'small [Polish] constitution'[8]. Finally adopted in 1997, the present Polish constitution is emblematic of the turn towards European market constitutionalism and the abandonment of social democracy. Throughout the book these moments of rupture explore built-in asymmetries and constant constitutional dialectics between constituent and constituted power, rights and politics; capitalism and democracy.

[2]Ibid., 193-228.
[3]Ibid.
[4]Ibid., 41.
[5]See A Kapczynski, Coronavirus and the Politics of Care, Law and political Economy Blog (03. 03.2020) and B Rogers, '*Data and Democracy at Work. Advanced Information Technologies, Labor Law, and the New Working Class*' (MIT Press 2023).
[6]Christodoulidis (n 1) 252.
[7]Ibid., 494.
[8]See W Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019), 39.

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This book review proceeds in five steps. First, I consider the key redress strategies put forward by the author, pointing to some issues which could be further developed (Section 2); then I zoom in the constitutionalisation of the basic principles of labour law in liberal constitutionalism, which appear to have implications beyond what Christodoulidis seems to assume (Section 3); I consider how the author problematises total market thinking and market constitutionalism when projected to the global scale, and provide further evidence of how legal integration comes hand in hand with renewed forms of market fragmentation (Section 4): I extend the authors' arguments to consider the transformation of law through its co-option to serve as a means of implementing governance through indicators (Section 5); and finally I revisit the ways and means through which market constitutionalism shapes and moulds the assumptions made by global governance experts, critically contributing to misreading the world, and as a result, to the critical failures of global governance (Section 6). The last section holds the conclusions.

2. Critical phenomenology and the problem of market constitutionalism

The author uses a critical phenomenology to lift the veil of ignorance and point us towards the problem of contemporary constitutionalism, namely the fact that market constitutionalism has displaced political constitutionalism and its democratic alternatives. The redress of law becomes a gesture of self-reflection in the attempt to provide new means and frames to re-center law as both tool and subject of redress. For instance, by 'constitutionalising contradiction' the author points to an open constitutional dialectic influenced by Machiavellian thinking.[9] At the junction of '*virtù*' and '*fortuna,*' that is the way the Prince governs effectively and strategically against the circumstances responsible for human misery, we find redress on the transformative potential of a material praxis with its real political effects.[10]

Another strategy of redress of law stems from constitutional contradictions existing in liberal democracies. By exploring these contradictions, their meaning, and how they are experienced, the author creates an open dialectic entailing the succession of stages such as temporality and reciprocity, or co-implication and recognition.[11] The book offers multiple theoretical insights on the material constitution, meaning the coupling of the legal order with the political regime, and a welcome reminder that 'the people' are the moving signifier, the subject of the constituent power, and the very core of political constitutionalism. However, the rich theoretical apparatus built by Christodoulidis does not enter into conversation with contemporary constitutional scholars on fiercely debated topic such as the turn towards juristrocracy,[12] the spreading of populist constitutional settlements,[13] the establishment of authoritarian constitutionalism in Venezuela and Hungary,[14] and the debacle of egalitarian constitutional reformism in Chile.[15] These recent examples, which challenge the liberal constitutional paradigm and reveal the shortcomings of market constitutionalism, would have been powerful illustrations of both 'rupture' and 'constitutional contradictions'. By not addressing such constitutional transformations, the author may have missed a timely opportunity to connect his analytics to present-day scenarios.

[9]Ibid., 524–55.

[10]Ibid., 526.

[11]Ibid., 534–5.

[12]R Hirschl, *Towards Juristocracy* (Harvard University Press 2004).

[13]See B Bugaric and M Tushnet, *Power to the People: Consitutionalism in the Age of Populism* (Oxford University Press 2021).

[14]J Corrales, 'The Authoritarian Resurgence: Autocratic Legalism in Venezuela' (2015) 25 Journal of Democracy 37; K Lane Scheppele, 'Autocratic Legalism' (2018) 85 Chicago Law Review 545.

[15]C Vergara, 'The Battle for Chile's Constitution' <https://newleftreview.org/issues/ii135/articles/camila-vergara-the-battle-for-chile-s-constitution>.

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3. Labour principles in the constitution

Borrowing from Ranciere's *metapolitics* and Foucault's *dispositif*, Christodoulidis explores a continental version of critical thinking to address the constitutionalisation of contradiction. This links the constitutional *dispositif,* which embodies the distinction of constituent/constituted power, with Foucault's notion of strategy as an intervention attentive to the historical context and the double bind present in the project of subjectification.[16] As an example of such constitutional contradiction, Christodoulidis recalls Toni Negri's insight on the labour proclamation in the preamble of the Italian Constitution of 1948, namely 'Italy is a democratic republic, founded on labour'. [17] Per Christodoulidis's analysis:

> Negri asks what is the meaning of such proclamation at the foundation of 'the fortified citadel of bourgeois and economic power?'[18]

According to the author, Negri's dialectic demonstrates the constitutional contradiction between unity and antagonism that reflects the dialectic within political constitutionalism between formal and material constitutionalism.[19] Negri first engages with the towering constitutional law scholar Constantino Mortati regarding the ideological role that the Marxist notion of 'labour value' has in the Italian constitutional arrangement. Negri then engages with Hans Kelsen regarding the need for strategic formalism as a moment of closure and self-reference in the constitutional text.[20] As Negri points out, labour is a polemical concept in the Italian constitutional case, because its semantics point to the relationship between the working class and the organised movement. However, the rational and coherent reading of the constitution by its legal elites led to the suppression of its core contradiction between socialism and capitalism. Through a critical phenomenology, Christodoulidis aims to show how 'opportunities are not displaced or substituted for' in the process of constitutional foundation; rather, such opportunities are coopted by market constitutionalism.[21]

While fascinating, Christodoulidis's use of Toni Negri's insight is not quite persuasive. It is questionable if unity, contradiction, and antagonism in Negri's analysis of the Italian labour principles could be used as a strategy of redress *vis à vis* a constitutional dialectic that acquired different meanings among judges, lawyers, and unionised workers after 1948.[22] Rodolfo Sacco, who had direct experience of the Italian constitutional debates of the late 1940s, would surely remind Christodoulidis of the gap between formal and informal rules in the Italian Constitution. Sacco's work on *legal formants,* the deconstructed sources of a legal system,[23] famously showed that the very same legal rule or concept could hold three different meanings in the judiciary, in the legislature, and in legal academia respectively. Legal formants can explain

[16]Christodoulidis (n 1) 542.

[17]See The Costitution of the Italian Republic 1948 <https://www.quirinale.it/allegati_statici/costituzione/costituzione_inglese.pdf> accessed 18 Oct. 2022. The Italian Constitution of 1948 includes several fundamental principles referring to labour. Art 1 establishes that 'Italy is a Democratic Republic founded on labour.' Art 4 establishes a labour right, 'The Republic acknowledges the right of all citizens to work and shall promote conditions which will make this right effective.' Art 35 explains that 'The Republic shall protect labour in all its forms and practices available.'.

[18]Christodoulidis (n 1) 544.

[19]Ibid., 544–8.

[20]Ibid., 545.

[21]Ibid., 548.

[22]See The Costitution of the Italian Republic 1948 <https://www.quirinale.it/allegati_statici/costituzione/costituzione_inglese.pdf> accessed 18 Oct. 2022. The Italian Constitution of 1948 includes several fundamental principles referring to labour. Art 1 establishes that 'Italy is a Democratic Republic founded on labour.' Art 4 establishes a labour right, 'The Republic acknowledges the right of all citizens to work and shall promote conditions which will make this right effective.' Art 35 explains that 'The Republic shall protect labour in all its forms and practices available.'.

[23]See M Graziadei and A Gambaro, 'Legal Formants', in J Smits et al. (eds.), *Elgar Encyclopedia of Comparative Law* (Edward Elgar 2023, 2nd ed.).

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how the disconnect between the social reorganisation of labour and the written text of the law was mediated as an ongoing struggle not only by legislation but also by courts.[24]

Sacco's lack of harmony among legal formants reflects in the legal profession what Negri called the antagonist struggle, represented by the continuous dialectic between constituent and constituted power that led to many strikes and violence, including the killing of law professors attempting to reform the Workers' Statute, which was considered the Bill of Rights of Italian workers.[25] The constitutional settlement – albeit imperfect – brought peace to a postwar Italian society that experienced the boom of the 1960s and Italy's rise to the status of G7 economy. Yet this became another example of cooptation, whereby market constitutionalism slowly eroded the social constitutional protection that would have created a more egalitarian society.

4. Market constitutionalism and legal fragmentation

As pointed in Section 2, central to the book is the notion of market constitutionalism. This acquires a fundamental form when it becomes global market constitutionalism. In that specific sense, the concept is deeply connected with legal and government failures recently exposed by UN Secretary General Antonio Guterres.[26] Christodoulidis shows in particular that 'total market thinking' has become dominant in the legal reasoning of lawyers, jurists and civil servants in the international organisations shaping global governance.[27]

The author explains that phenomenon of 'functional differentiation' through which law is reduced to its social or economic fuctions leading to the 'displacement of normative by cognitive expectations'.[28] Functional differentiation not only allows for hiding the normativity beyond legal indicators, but it can only represent modern organised societies through a fragmentation of social forms that allow lawyers to bracket democray or equity considerations when they are comparing corporate, financial or investement laws affecting market efficiency.[29] Such fragmentation is connected to two ideologies: the generalisation of economic reason and the substitution of political with market constitutionalism. The intellectual history in which the book situates the rise of global governance is the development of the ideas of the New Right of the 1980s, the globalisation wave of the 1990s, and, subsequently, the emergence of the network society as a decentralised power structure reframing market capitalism. This intellectual trajectory clearly maps the turn towards privatisation, the rise of markets above the states, and the overall move from government to governance.

However, here the book leaves us with a gap. It is as if theory and the historical context played out without any identifiable human agency. We are given some legal tools and an abundance of

[24]See R Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' (1991) 39 The American Journal of Comparative Law 1. 'It is misleading to speak of the legal rule in force in a given country as though there were only one such rule. To illustrate, consider the reglation of collective bargaining agreements in Italy. Article 39 of the Consitution provides that 'duly registered trade unions … may … enter into collective labor agreements which are binding upon all …' The constitutional rule, then, is that the unions can enter into binding agreements once they register. Italian legislation, however, has never provided a way in which the unions can register. The statutory or legislative rule, then, is that registration is not possible and collective bargaining agreements therefore are not binding. Nevertheless, Italian judges have consistently enforced the agreements that unions enter into. Thus, the judicial rule or case law provides that such agreements are binding. There is a lack of harmony, then, between the constitutional rule, the statutory rule, and the judicial rule. A common lawyer, accustomed to considering the judicial precedent as a main source of law, will therefore find it curious that in Italy judicial decisions are not supposed to be a source of law at all.'

[25]See B Quigley, *Italian Labor Law and the Political Struggle over Article 18* (Lehigh University 2003).

[26]See AA Lyon Dahl 'Global Governance Failures: Warnings by the Secretary General' (2023) https://globalgovernanceforum.org/global-governance-failures-warnings-by-the-secretary-general/.

[27]Christodoulidis (n 1) 327–64.

[28]Ibid., 356.

[29]See FG Nicola, 'Another View of the Cathedral: What does the rule of law crisis tell us about democratizing the EU?' (2018) Maastricht Journal of European and Comparative Law 133.

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legal theories to work with, but there are no legal actors, networks or institutions directly connected to the entrenchment of market constitutionalism in global governance. By contrast, it is now becoming evident that global governance tools, promoting economic thinking in national and international institutions, emerged because specific actors conceived and realised such tools through law and legal ideas. For over a century states and, after World War I, international organisations (IOs) have used legal tools to shape power relations and re-constitute imperial, colonial, and global capitalist orders.[30] Under colonialism, the dominant approach involved States imposing their legal systems, with some local variations, from the core to the periphery through extraterritorial regimes.[31] Later, it involved international organisations (IO) adopting uniform or harmonised legislation through inter-state negotiations which were then transposed into domestic legal orders to achieve economic integration and encase global financial markets.[32]

In the wake of post-Cold War decolonisation and with nationalism on the rise in the 21st century, IOs have turned away from multilateral treaties and are instead pursuing economic and social integration through global governance indicators, standards setting, best practices, and other soft law tools. During the unfolding decolonisation process and with the spreading of multilateral development banks (MDBs), the World Bank,[33] the most prominent institutional model reproduced in other regions,[34] has increasingly deployed these informal governance tools. The MDBs are also now called knowledge banks because of their ability to collect data and produce soft governance tools to address the vague idea of poverty reduction.[35] However, global governance experts, predominantly lawyers and economists, use and misuse comparative law to shape the epistemological space of international development. In doing so, they, too, re-assert the hegemony of the rule of law moulded by the Global North while reproducing existing hierarchies of power between donors and recipients in development finance. An exemplary tool of this colonial continuity in law is the Doing Business Index, now suspended by the World Bank due to manipulation scandals.[36]

Global governance experts have increasingly sought to quantify successful or failed legal regimes based on their capacity to ensure market efficiency and the entrenchment of neoliberal regimes through their comparative legal expertise.[37] International development experts working for MDBs include lawyers, economists and engineers who have developed global governance indicators and best practices linking development finance to fiscal restructuring of national legal regimes in the recipient states.[38] Over the past decade, legal experts have gathered enormous amounts of data comparing corporate, financial, trade, taxation, and investment regimes and data

[30]See A Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005).

[31]See T Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (Cambridge University Press 2010).

[32]See Q Slobodian, *Globalists. The end of Empire and the birth of Neoliberalism* (Harvard University Press 2018).

[33]See J Käkönen, 'The World Bank: A Bridgehead of Imperialism' (1975) Instant Research on Peace and Violence 150; J Xu, *Beyond US Hegemony in International Development: The Contest for Influence at the World Bank* (Cambridge University Press 2017).

[34]See N Lichtenstein, *A Comparative Guide to the Asian Infrastructure Bank* (Oxford University Press 2018).

[35]See W Easterly, *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (Penguin 2006).

[36]See See FG Nicola 'Scandal Involving World Bank's 'Doing Business' Index Exposes Problems in Using Sportslike Rankings to Guide Development Goals' (The Conversation, 15 October 2021) <https://theconversation.com/scandal-involving-world-banks-doing-business-index-exposes-problems-in-using-sportslike-rankings-to-guide-development-goals-169691>.

[37]See JD Ostry and others, 'Neoliberlaism: Oversold?' (Internaitonal Monetary Fund 2016) <https://www.imf.org/external/pubs/ft/fandd/2016/06/ostry.htm> accessed 5 October 2022.

[38]See J Esquirol, 'The Failed Law of Latin America' (2008) American Journal of Comparative Law 75.

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on labour relations, environmental regulation, and women's economic achievement.[39] This massive data collection has legitimised the creation of indicators and standard setting, resulting in an effective and highly manipulable regulatory framework in the Doing Business Index.[40] In this way, what Sally Engle Merry has called the 'seduction of quantification' has generated an effort to reduce complex social phenomena to legal comparisons and privatized solutions for international development. [41] A few African or East Asian countries have climbed the rankings by implicitly favoring corporate and private laws from the Global North, adopting them as universal at the expense of alternative and informal regimes from the Global South.[42]

5. Global governance by indicators

As Christodoulidis puts it, 'governance becomes constitutively coupled with forms of knowledge-production that, by centring the focus on outcomes and effects, seek solutions in terms of synchronic models of *fuctional* analysis, while bracketing historical and causal forms of explanation.'[43] This switch from causes to effects in investigating legal phenomena is key to understanding the turn to fuctionalism. Functional comparisons make laws mutually replaceable because they have been transformed into abstract doctrines disembedded from their political and cultural context and then transplanted in different legal contexts. In this logic of epistemological equivalence towards best practices as universal legal models achieving market efficiency or gender equality, democratic governance is a 'myth.' The author engages with Alain Desrosières and his notion of space of equivalences in which the processing and using of statistical social data ignores 'conventions of equivalence' that carry interpretative choices.[44] Turning to Alain Supiot's warning of governance by numbers, Christodoulidis defends juridical thinking against economic thinking in France and against the collapse of economic thinking into market reductionism.[45] In moving away from the French debate on governance by numbers, Christodoulidis focuses on the New York University school of governance that includes the prolific work of Sally Engle Merry, Benedict Kingsbury, and Kevin E. Davies on governance indicators.[46] The moves of the NYU school are stylised into three steps: first indicators contribute to 'disembedding' laws from society and generalising them into measurable phenomena. Second, indicators create benchmarking procedures to order identify 'best practices,' and, ultimately, they provide for the 're-entry' of best practices as efficient global standards under a total market thinking of cutting costs and maximising returns.[47]

This 'epistemological co-option, mobilised by the logic of governance,' as Christodoulidis explains, does not live in an abstract world because '[g]overnance displaces the political on both the registers of democracy and epistemology.'[48] Christodoulidis's thesis is powerful and convincing. However, the reader is left to imagine which particular legal processes, material forces

[39]See 'OECD Best Practices in Development Co-operation, Managing for Sustainable Development Results' (Organisation for Economic Co-operation and Development 2019) <https://www.oecd-ilibrary.org/development/managing-for-sustainable-development-results_44a288bc-en> accessed 5 October 2022.

[40]See L McHugh-Russell, 'Doing Business Guidance, Legal Origins Theory, and the Politics of Governance by Knowledge,' (2022) Canadian Journal of Development Studies/ Revue canadienne d'études du développement 43.

[41]See SE Merry, *The Seduction of Quantification, Measuring Human Rights, Gender Violence and Sex Trafficking* (University of Chicago Press 2016).

[42]See R Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006), 339.

[43]Christodoulidis (n 1) 332.

[44]Ibid., 342.

[45]Ibid., 344.

[46]See KE Davis and others (eds), *Governance by Indicators: Global Power through Classification and Rankings* (Oxford University Press 2012).

[47]Christodoulidis (n 1) 352–4.

[48]Ibid., 354.

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and institutional actors have created not only this epistemological cooptation but also enabled the power dynamic for the indicators to rise as a technique of global governance.

As part of the epistemic cooption through governance indicators, Christodoulidis shows how comparative law has become a discoursive practice that oscillates between reproducing neoliberal policies in the market and in the family,[49] and reinforcing existing hierarchies between capital and labor and power structures between donors and recipients of foreign aid.[50] The global governance discourse captured by total market constitutionalism seems to offer very little space for the redress of law through ruptures, open dialectic and contradiction when it comes to those impacted by the 'hypocrisy trap' of the World Bank.[51] Along these lines the book could have narrated an alternative story, informed by constitutional and legal reasoning, to the one of Slobodian's *Globalists* – how Mont Pèlerin economists used international law to encase markets and protect property rights from national democracies[52] – or Martin's *Meddlers* – how after World War I international institutions reproduced, through their development policies, imperial and colonial practices of the winners that later continued within the Bretton Woods institutions.[53] An alternative legal narrative has been put forward by James T. Gathii via alternative genealogies and critical legal reasoning that challenged the orthodox approaches to the African right to development.[54]

The next part of this contribution pushes Christodoulidis's total market thinking beyond the social rights contradiction, namely the dialectic between capitalism and democracy that is at the core of the European labour saga in order to broaden its application to global governance. This review also deepens Christodoulidis's paradigm of market constitutionalism by opening some blind spots of the book on racial capitalism, governance feminism and the persistence of colonial hierarchies in global governance as advanced by universalist cathegories in European legal thought. [55]

6. Legal assumptions in global governance

Christodoulidis explores in depth how total market thinking reshapes constitutionalism, in particular by means of keeping beyond the realm of what is and should be discussed five key assumptions. To put it differently. Market constitutionalism shapes the worldviews of global governance experts (lawyers, scholars, judges and civil servants) who as a result reproduce in their work, in international organisations or multilateral investment banks, existing inequalities defined in terms of racial, gender and social hierarchies as well as colonial continuities within international organisations.[56] The effects have been massive. These assumptions have contributed to global governance failures ranging from the creation of global inequalities to the heightening of unsustainable economic patterns but they have also contributed to resistances as forms of redress of law.[57]

A first legal assumption emerges from the comparative practice of relying on the notion of legal convergence that presumes consensus and harmonisation towards what are framed as 'best practices' that reproduce the legal standards in the West and more specifically advanced capitalist

[49]See FG Nicola, 'Family Law Exceptionalism in Comparative Law' 58 (2010) American Journal of Comparative Law, 777.

[50]See GA Sarfati, *Values in Translation. Human Rights and the Culture of the World Bank* (Stanford University Press 2012).

[51]See C Weaver, *Hypocrisy Trap: The World Bank and the Poverty of Reform* (Princetown University Press 2008).

[52]See Slobodian (n 32).

[53]J Martin, *The Meddlers: Sovereignity, Empire and the Birth of Global Governance* (Harvard University press 2022).

[54]See JT Gathii, 'Africa and the Radical Origins of the Right to Developmnet' (2020) TWAIL Review 28.

[55]See L Salaymeh, R Michaels, 'Decolonial Comparative Law: A Conceptual Beginning '(2022) The Rabel Journal of Comparative and International Private Law 166, 179 (Explaining that a decolonial approach rejects universalits assumptions and cultivates diverse genealogies when it comes to the construction of racial national religious and dgender classifications, yet this does not 'entail an outright rejection of Western Knowledge', especially a hermeneutics of suspicion.).

[56]See M Bradley 'Colonial continuities and colonial unknowing in international migration management: the International Organization for Migration reconsidered' (2023) Journal of Ethnic and Migration Studies 22.

[57]See FG Nicola 'Local, Resistances to Global Convergence' in E Fahey (ed.) *Framing Convergence with the Global Order: The EU and the World.* (Hart Publishing, 2020).

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economies of the Global North. After World War II, with the consolidation of multilateralism in the International Financial Institutions (IFIs), the European Union (EU), the Organisation for Economic Co-operation and Development (OECD), and the World Trade Organisation (WTO) regulating the global political economy, harmonisation and standardisation processes were central for the protection of global capital during a rapid decolonisation of European and Commonwealth colonial structures.[58] Legal convergence became one of the main drivers of globalisation imbued in a variety of normative aspirations ranging from universalist human rights to neoliberal financial goals.[59] However, comparative scholars have challenged both normatively[60] and descriptively whether legal convergence is possible to be achieved,[61] and have emphasised the notion of counter-movements in societies and in law.[62] For instance, the vast literature on legal transplants is often justified by borrowing or adapting a law because of legal prestige, efficiency or best practices rather than the direct or indirect reproduction of colonial practices in the form of development policies.[63] Comparative law scholars have increasingly emphasised that legal transplantation and harmonisation of abstract rules simply are not, and could never be, technical or apolitical processes when re-embedded in the global political economy. They inevitably incorporate distributive effects that reinforce or weaken existing hegemonies between the Global North and South and distributive conflicts between capital and labour.

Second, as shown by Christodoulidis, global governance experts assume that comparative law advances efficiency in the total market thinking logic.[64] Such thinking derives from the experts' belief that law has predictable efficiency results, and that efficiency is a primary virtue of harmonising legal orders. When global governance experts use comparative legal analysis, they do so in a prescriptive way to distill the most efficient legal rules for the global political economy. To debunk this assumption, Karl Polanyi provided the basic understanding that markets develop in societal structures and are sustained by ethical and cultural beliefs. Under the scrutiny of this socio-legal analysis, ranking countries based on what legislation is more efficient for the global political economy is illusive, both descriptively and normatively. This is because what global governance experts present as best practices to create efficient legal regimes also create inevitable wealth and power inequalities.[65]

Third, global governance experts assume that comparative law is isolated from social norms. Global governance experts are collecting laws in the books on family law and anti-discrimination policies while dismissing the economics of care often provided by racialised women and immigrants rather than citizens. The World Bank's *Women, Business and the Law* project experts have shied away from collecting data on the 'laws in action' that have different distributive consequences from the laws on the books. Gender mainstreaming experts have promoted laws advancing anti-discrimination objectives for middle-class women that fail to account for social norms and intersectional perspectives in their implementation.[66] An alternative approach to the one mentioned above would consider inter-class and inter-racial effects that advance the

[58]Slobodian (n 32).

[59]See R La Porta and others, 'Law and Finance' (1998) Journal of Political Economy 1113.

[60]D Kennedy 'The Hermeneutic of Suspicion in Contemporary American Legal Thought' (2014) Law and Critique 139.

[61]See P Legrand, 'The Impossibility of Legal Transplants' (1997) Maastricht Journal of European Law 111.

[62]See K Polanyi, *The Great Transformation* (Beacon Press 1944).

[63]See JW Cairns, 'Watson, Walton, and the History of Legal Transplants' (2013) Georgia Journal of International and Comparative Law 637.

[64]Christodoulidis (n 1) 436.

[65]See I Ortize and L Baunach, 'Its Time to End the Controversial World Bank's Doing Business Resport' (Inter Press Service 2020) <www.ipsnews.net/2020/09/time-end-controversial-world-banks-business-report/> accessed 18 October 2022.

[66]See KW Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) University of Chicago Legal Forum 140.

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careers of middle-class white women at the expense of racialised and low-paid immigrant workers from the Global South who often work in the informal economy.[67]

Fourth, global governance experts assume that comparative law is a-historical due to their focus on effects rather than causes.[68] This view understands comparative law as similar to linguistics, which focuses on what happens at any given point in time as synchronic rather than diachronic.[69] Global governance experts assume that legal concepts are synchronic and a-historical without complex genealogies. Their comparisons avoid historical and geographical contextualisation in a way that bridles path dependencies entrenched in enriched colonial histories and racial capitalism.[70] In contrast, embedding comparisons in legal history and genealogies of legal concepts encapsulate alternative modes of understanding law as contested and open-ended with meaning shaped by different professional communities. These histories vary in time and space, as legal concepts carry their own cultural and political baggage depending on how legal elites re-packaged them at a particular historical moment and in each context.[71]

Fifth, global governance experts assume that comparative law is removed from institutional and professional politics. When global governance experts assess the legal failures and successes of legal regimes in recipient countries, they ignore the oversized role played by the IFIs' institutional and professional politics, which is largely directed by lawyers and economists trained in the elite institutions of the Global North.[72] Yet, those political practices and professional cultures influence particular agents' use of comparative law on the ground. This issue reflects a point long emphasised by comparative scholars, that comparative legal analysis is a situated practice informed by professional and institutional politics.[73] The legal reforms implemented by the Washington Consensus result from the institutional and professional politics often driven by donor countries in the Global North setting best practices to be implemented by recipient countries in the Global South.[74]

These assumptions show how Christodoulidis's theory of total market constitutionalism resonates with the practice and the legal assumptions held by global governance experts. These assumptions have fuelled the continuation of colonial patterns between donors and recipient countries and the protection of global capitalism through the reproduction of the soft law regime of the indicators that promote neoliberal and privatized legal regimes as best practices for international development.

7. Conclusion: beyond Constitutionalism

In his book, Christodoulidis revisits critical thinking with a view to rediscover the redress of and through law. This entails grappling with the damaging effects of the rise of market constitutionalism and in the process achieving a more democratic and egalitarian political constitutionalism. The book is situated in the Western tradition, in which critical phenomenology makes us pause and re-evaluate the hidden meanings of legal concepts.

Having said that, it should be observed that these strategies of redress of and through law, which include formalism, rupture, and immanent critique stem from a theoretical inquiry

[67]See I Wilkerson, *Caste: The Origins of Our Discontents* (Random House 2020).

[68]Christodoulidis (n 1) 332.

[69]Sacco (n 18) 343–401.

[70]See J Miller and FG Nicola, 'The Failure to Grapple with Racial Capitalism in European Constitutionalism' in J Komárek (ed), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023).

[71]See RW Gordon, *Taming the Past* (Cambridge University Press 2017).

[72]See D McClintick, 'How Harvard Lost Russia' (Institutional Investor 2006). <https://www.institutionalinvestor.com/article/b150npp3q49x7w/how-harvard-lost-russia> accessed 19 October 2022.

[73]See A Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (University of Chicago Press 2011).

[74]See Y Dezalay and B Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996).

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grounded on critical thinking rather than on professional practices.[75] For instance, a hermeneutics of suspicion unearths embedded rationalities that are often in tension with social realities without providing for how ideology is translated into social processes or affirmed by social networks. Instead, Christodoulidis points to new contradictions, conflicts and dialectics between formal and material constitutionalism, socialism and capitalism, living and dead labour.[76] As a consequence, the author leaves the readers with a presupposition that materiality of law and legal processes are symmetrical to ideology. However, some of the author's theoretical strategies of redress, with the exception of the strategic use of strikes and collective action, have no obvious immediate practical application in the legal field. While Christodoulidis's notion of antagonism between constituent and constituted power is meaningful in redressing what appears as an entrenched market ideology in the European constitutional law saga, this becomes less effective when market constitutionalism re-emerges in global governance through the mulitilateralism of international financial institutions.

Without doubt, Christodoulidis's critique of market constitutionalism fills a gap in European legal theory dominated by liberal constitutionalism. At the same time, though, the book leaves unexplored other crucial avenues of legal redress especially when tackling the failures of global governance in which law is not a pre-constituted field but rather an unstable configuration of legal doctrines and ideological assumptions practiced by networks of legal professionals. For instance, international lawyers have reproduced in global governance capitalist and colonial hierachies of the Global North,[77] multilateral trade regimes have reproduced forms of racial capitalism deeply entrenched in international labour law,[78] and the rationalisation of social reproduction as investment has been harmonized in neoliberal legal orders;[79] all these remain blind spots calling for a non constitutional redress of and through law.

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[75]Christodoulidis (n 1) 158.

[76]Ibid., 548.

[77]See L Eslava, M Fakhri and V Nesiah (eds.), *Bandung, Global History, and International Law Critical Pasts and Pending Futures*. (Cambridge University Press 2017).

[78]See D Ashiagbor, 'Race and Colonialism in the Construction of Labour Markets and Precarity' (2021) Industrial Law Journal 1.

[79]See S Federici, *Caliban and the Witch: Women, the Body and Priminve Accumulation* (Autonomedia 2004); I Isailovic, 'Gender Equality as Investment: EU Work-Life Balance Measures and the Neo-Liberal Shift' (2021) Yale Journal of International Law 277; FG Nicola and G Frankenberg, 'The Logic of Patriarchy' (Verfassungsblog, 2022) <https://verfassungsblog.de/the-logic-of-patriarchy/> accessed 30 October 2022.

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