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

Where is the l(ove)? Excavating law and labour in *The Redress of Law*

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Abstract

In his monograph *The Redress of Law*, Emilios Christodoulidis provides a sophisticated genealogical study of the emergence of total market thinking in Europe. With market constitutionalism having sidelined political constitutionalism, the potential of law to organise the political community is significantly restricted. By examining the commodification of labour, processes of bargaining, unemployment, and strikes, Christodoulidis demonstrates the destructive consequences of law in the service of market rationalities as well as its potential for strategic action to build collective identity in the EU (European Union).

Yet, I argue that this book comes with two significant blind spots, namely a dated understanding of both law and labour. First of all, Christodoulidis's systems theoretical understanding of law is neglecting the material conditions that law continuously re-produces in the course of globalization. Secondly, his vision of labour remains rather traditional, focused on unionised, white, and male workers. Both elements are central pillars of his analysis but do not reflect the current reality of the 21st century. In this Article, I challenge his conceptualization by situating his work in recent research on the role of law and labour regulation in global capitalism.

Keywords: European union; law; labour; globalization; capitalism

1. Reflecting, reimagining, and reclaiming *The Redress of Law*

How can we re-imagine a different reality; one in which law can be harnessed as a force for political emancipation; as a firewall against the ever-growing disintegration of societies; as a shield against the destructive forces of global markets? The task which Emilios Christodoulidis embarks upon is monumental, so it is unsurprising that his response, the 2021 monograph at the center of this symposium, is of equally herculean proportions. In *The Redress of Law*, Christodoulidis takes the reader on a journey that ranges from critical theory to the ordoliberals, from Greek mythology to the European Court of Justice (ECJ) on *Laval* and *Viking*, from Athenian democracy to the Gdansk shipyard strikes of 1980.[1] This rich and multi-dimensional work offers the reader countless starting points for reflecting, reimagining, and reclaiming the potential of critical theory for the study of law and labour in global capitalism.

Christodoulidis embraces the role of a guide, not an apostle. The monograph neither advocates for a political manifesto nor forces a uniform interpretation on the reader. It is easy to get lost in the wide net that Christodoulidis spans over more than 500 pages. Yet, this demonstrates not only the intricate complexity of the theoretical material that Christodoulidis brilliantly assembles but

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

also how much potential there is for creative re-imagination – if one just knows where to look for it. He embraces the perspective, succinctly put by Wendy Brown, to think of 'critical theory as a hope rather than a luxury in dark times'.[2] Because, in the end, Christodoulidis's book is not just an abstract tour de force through the world of critical theory. It is a deeply personal reflection, inspired by the political struggle in the context of the 2015 Greek bailout referendum, in which he asks an honest and straightforward question: how can we, the people, reclaim our (political) constitution under the structures of global capitalism?

This timely question has found strong repercussions in legal scholarship in recent years.[3] For instance, the 'critical legal studies' movement has prominently re-organised under the umbrella of the 'Law and Political Economy' (LPE) project to create not only an analysis of the ambiguous relationship between law and the political economy but also to critically reflect how legal scholarship and policy 'helped to facilitate rising inequality and precarity, political alienation, the entrenchment of racial hierarchies and intersectional exploitation, and ecological and social catastrophe'.[4] In a similar vein, Third World Approaches to International Law (TWAIL) scholars and Marxist international lawyers have long debated the role of law in the history of global capitalism.[5]

Christodoulidis identifies the book as 'a treatise in critical constitutional theory',[6] so it might be understandable why he does not address this emerging literature. However, his analysis of the market capture of political constitutionalism in Europe speaks clearly to those strands of scholarship. As Karen Alter recently demonstrated, investigations into the role of global law and capitalism no longer constitute fringe topics.[7] According to Ntina Tzouvala, 'a new middle ground has begun to emerge in legal scholarship. This new common sense acknowledges that such a thing as 'capitalism' does exist and is in need of varying degrees of transformation'.[8] However, this mainstreaming of a certain normative position discloses a major conceptual flaw; 'for both 'law and political economy' scholars and for those advancing 'new histories of capitalism' both law and capitalism remain relatively un-interrogated terms, relegated to the realm of common sense and self-evident reality'.[9]

Against this background, Christodoulidis uses a grid of four main thinkers to provide clearer contours of both law and capitalism, namely Hannah Arendt, Simone Weil, Niklas Luhmann, and Karl Marx. In his words:

> It is with the help of phenomenology that we explore the shaping of the constitutional imaginary of the age; with systems theory, oriented to the 'appearance of difference', that we explore what is selected and what suppressed as its expression in constitutional reason; and with critical theory in the tradition of 'immanent critique' that we explore strategic deployments.[10]

[2]W Brown, *Edgework. Critical Essays on Knowledge and Politics* (Princeton University Press 2006) 5.

[3]This holds particularly true for this journal. Since the time of writing this article in the summer of 2022, V Bogoeski and F Costamagna published a symposium on 'Law and the Production of Precarious Work in Europe' in Vol. 1, issue 3 (2022) and A Becker, KH Eller, and PF Kjaer organized a special issue on 'Transformative Law of Political Economy in Europe' in Vol. 1, issue 4 (2022). Both collections feature many excellent contributions that, due to the nature of the publication process, can now only be selectively included in the footnotes but would have deserved a much more substantive reflection.

[4]See The Law and Political Economy (LPE) Project, <https://lpeproject.org> accessed 29 August 2022.

[5]See, for instance, the work of Evgeny Pashukanis, Anthony Angie, BS Chimni, Susan Marks, Sundhya Pahuja, China Míeville, Robert Knox, and Ntina Tzouvala.

[6]See Christodoulidis (n 1) 4.

[7]KJ Alter, 'From Colonial to Multilateral International Law: A Global Capitalism and Law Investigation' 19 (3) (2021) International Journal of Constitutional Law 793.

[8]N Tzouvala, 'Global Capitalism and Law, and Where to Find Them: Afterword to the Foreword by Karen Alter' 20 (2022) ICON 1, 60.

[9]Ibid., 61.

[10]Christodoulidis (n 1) 2.

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Methodologically, his work is primarily genealogical, reconstructing discourses and debates surrounding numerous concepts. However, this genealogical method is not neutral, but serves as a tool for critical reflection on the historical contingencies of certain events:

> Against what comes to install itself as the apparent objectivity of the present, the genealogical method re-orients our reading of the part to the history of blocked opportunities, interruptions, discontinuities, and 'false starts'.. .. We ask whether institutional forms of solidarity were not too speedily sacrificed in the process, whether democratic institutions and the tradition of virtue, which had force within the economy, were not too readily abandoned to the a priori truths of 'rational action' thinking. We ask why starts were deemed 'false', what options were blocked, under what pretension were sanction and representativeness withdrawn from collective procedures, what harnessed the distribution of rationality and irrationality to competition and accumulation.[11]

In short, the work centers on 'phenomenality (appearance), critique and strategy.[12] This trinity of perspectives unfolds dynamically. In the first step, he applies critical phenomenology to understand the nature of work, arguing against Hannah Arendt's bourgeois public sphere and with Simone Weil's call for action and the lived experience of workers. In a second step, he critically traces how labour became commodified as an example of total market thinking when political constitutionalism turned into market constitutionalism. In the third step, he embraces Marxist ideas on struggle, rupture, and strategy to formulate opportunities how to find 'redress' in law. In his analysis, this trinity is structurally coherent. He explores the three approaches as structurally congruent, without addressing obvious potential incompatibilities, for instance between systems theory and Marxist approaches. Those incompatibilities pose the springboard for my criticism in this essay.

The productive force of critical theory and the genealogical method provides ample scope for identifying historical turning points and practical implications of discursive shifts. Yet, the theoretical–conceptual net that Christodoulidis weaves so masterfully throughout space and time glosses over two central concepts: both 'law' and 'labour' remain surprisingly vague, underdetermined, and detached from the practice of emancipatory struggle. In particular, I challenge Christodoulidis on two points. First, I argue that his systems theoretical understanding of law is neglecting the material conditions that law continuously re-produces in the course of globalisation. Secondly, I claim that his approach to labour remains rather traditional, focused on industrialised and unionised workers, which makes him overlook the diversity of work struggles, also from non-male, non-white, and non-European working people, types of organisation and forms of activism around work that have evolved over recent last decades. Both blind spots cast doubts on the emancipatory strategies that Christodoulidis sketches in the last chapter.

2. Missing Marxism: Law, constitutionalism, and strategy

'I don't always invoke Marxist theory, but when I do, I do not write as a Marxist' – this meme, originally coined in response to Martti Koskenniemi's 2004 article on 'What Should International Lawyers Learn from Karl Marx?'[13] – reverberates also in *The Redress of Law*. Even though Christodoulidis embraces Marxist theory for both his understanding of critical phenomenology and strategy, his analysis of constitutionalism lacks any discussion on Marxist theory or Marxist approaches to law. As a long-practising Luhmannian, it is not surprising that he conceives of law as an autonomous system, functionally differentiated from other systems, such as the politics or the economic system. Those systems do not function in isolation but are structurally coupled.

[11]Ibid., 5.

[12]Ibid., 4.

[13]Internationally Wrongful Memes, *The Most Interesting Man Most Highly Qualified Publicist in the World*, <https://memecogens.tumblr.com/post/118701855024/the-most-interesting-man-most-highly-qualified#notes> accessed 29 August 2022.

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According to Christodoulidis, this coupling is threatened under the combined pressures of transnationalisation, constitutional pluralism, and global turbo-capitalism.

Against this background, Christodoulidis puts significant emphasis on 'counter-weighing' or 'balance' that has to be re-gained between the political and the economic system, respectively the state and the market in the constitutional function.[14] While Christodoulidis calls out the asymmetry in *favour* of the economy that has strengthened market constitutionalism at the expense of political constitutionalism in Europe, he nonetheless assumes that harmonious balance between both forms of constitutionalism is not only achievable but has also existed previously, at some unspecified period of time in the past, or at least in the domestic sphere. In the subchapter, 'Europe's "Social Market" and the Disembedding of Labour Protection' he locates this original sin in the 'original asymmetry, a coupure (sic) into the fabric of European societies' which disembedded Europe's economy from its society:

> It cut into the political economy in order to replicate at the European level the radical separation of the political from the economic system, that was the hallmark of the liberal settlement of post-war Germany. But once uploaded to the transnational, European, level, the separation generated an asymmetry between the differentiated systems, the economic system uploaded to the transnational level and the political system left tied to democratic processes and solidarity-based institutions at the national level, an asymmetry that assumed its own momentum. The magnitude of the breach and the effects of the asymmetric configuration of supranational and national, can only be appreciated in retrospect.[15]

Christodoulidis does neither discuss the role of law nor of legal institutions and practices in facilitating this shift towards market constitutionalism.[16] In his argument, law is autonomous and neutral. It does not intervene, facilitate or hinder the historical process. Instead, Christodoulidis considers that the constitutional imaginary determines the scope of political constitutionalism. There are only two characteristics of law that Christodoulidis points out: instrumental and autopoietic:

> Law becomes both the means of redress and itself the object of redress. In the former sense the emphasis lies in its strategic deployment, in the latter sense it captures the move that is performed throughout the analysis, of turning the law upon itself in a gesture of *self*-reflection.[17]

Naturally, this Luhmannian approach to law runs counter to Marxist legal scholars. In general, Marxist legal theorists consider law central for the reproduction and maintenance of the capitalist mode of production.[18] Yet, one does not need to subscribe to a crude materialist view of law as an instrument of class suppression to integrate certain Marxist insights into Christodoulidis's argumentation. For instance, his chapter on 'The Deep Commodification of Labour' demonstrates the relative autonomy of both EU labour law as well of the judges and judicial institutions vis-à-vis market pressure.[19] It is thus not only the commodification of labour but the commodification of the legal form of labour regulation, relying on Evgeny Pashukanis,[20] that took place at the ECJ.

[14]See, for instance, Christodoulidis (n 1) 214.

[15]Ibid., 365.

[16]See, in contrast, I Kampourakis, 'Legal theory in search of social transformation', 1 (2022) European Law Open 808–821.

[17]Christodoulidis (n 1), 3.

[18]See, for instance, H Collins, *Marxism and Law* (Oxford University Press 1984); A Hunt, 'A Marxist Theory of Law' in D Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell 1996) 355.

[19]Christodoulidis (n 1) 395.

[20]See, for instance, E Pashukanis, *The General Theory of Law and Marxism* (originally published 1924, Routledge, 2002).

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There are at least two counter-arguments against this criticism of *The Redress of Law*: First of all, why should a Luhmannian adopt a Marxist reading of law? And, secondly, would the inclusion of Marxist theory have made a difference? I think both questions are perfectly plausible. Yet, I argue that, for the first question, Christodoulidis's book is not only built on Marxist theory from the start but also attempts to integrate Marxist perspectives – even when they contradict a strictly systems theoretical analysis. For instance, in his discussion on human rights, Christodoulidis is much closer to Marx than to Luhmann. For the latter, human rights are indispensable guarantees for the functional differentiation of society:

> The function of human rights relates to the maintenance of autonomous societal spheres and facilitates the inclusion of individuals in all of them, in the sense *at least* that one's partial (or non-)inclusion in one system (say through *economic* deprivation) is prevented from spilling over into others (say the right to *political* participation, or access to *education*).[21]

Officially and theoretically, Christodoulidis subscribes to the positive understanding of Luhmann who conceives of solidarity as a rights question.[22] The practice of the EU fundamental rights jurisprudence in labour law contradicts this understanding. Christodoulidis analyses how social rights have been integrated into the logic of the reproduction of capital[23] and the ECJ limits the scope of collective industrial action on account of fundamental rights and freedoms. Consequently, Christodoulidis shares much of the rights criticism of Marxist legal scholars but fails to engage with modern Marxist scholarship that aims at unlocking the emancipatory potential of human rights for social struggle.[24]

This leaves the second question: If the book already integrates Marxist perspectives (even if only selectively), would a stronger reliance on Marxist theory have changed anything? To that, I'd argue that Christodulidis's inclusion of systems theory dilutes rather than strengthens the defense of political constitutionalism. In particular, I believe that including Marxist legal scholarship could have benefitted his analysis of constitutionalism and strategy. Here, I rely on two scholarly pieces by modern Marxist legal scholars. First, Nimer Sultany's excellent contribution on 'Marx and Critical Constitutional Theory' highlights how a political constitution could be structured to overcome the alienation of the citizen under capitalism. According to Sultany, Marx considers constitutions as class compromises by their very nature. The state employs force to stabilise this constitutional order. In democracies, citizens thus benefit from political emancipation through the right to vote but are barred from social emancipation as the political constitution has to uphold the (material) class compromise:

> The very constitution that establishes an electoral democracy inhibits the ability of the masses' political power to fundamentally change the social order (such as in protecting property rights and erecting counter-majoritarian structures) .... It attempts to deprive the proletariat, peasantry, and petty bourgeoisie from the power to transform their society by democratising the economy. Put differently, the masses are denied their constituent power to expand the political and deepen democracy because the constitution entrenches the socio-political order and blocks a further revolution.[25]

[21]Christodoulidis (n 1) 301.

[22]Ibid., 300.

[23]Ibid., 251.

[24]See, for instance, BS Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (Cambridge University Press; 2nd ed, 2018); P O'Connell, 'On the Human Rights Question' 40 (4) (2018) Human Rights Quarterly 962.

[25]N Sultany, 'Marx and Critical Constitutional Theory' in P O' Connell and U Özsu (eds), *Research Handbook on Law and Marxism* (Edward Elgar 2021) 209, 232.

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Marx thus appeals to further democratization of the political constitution which centers constituent power in the people and thus extends democracy to the economic sphere. Again, Christodoulidis's adherence to Luhmann upholds the functional differentiation between the political and the economic constitution. Yet, by doing so, he creates an artificial binary in which the political constitution is depicted as something inherently positive and democratic while the economic constitution is inherently destructive and entrenches capitalism. He locates the original sin in the imbalance, the encroachment from the economic to the political constitution. This analysis thus overlooks the interlinkages between the political and the economic constitution. There is no innocent victim. The political constitution consistently reproduces market capitalism, also in the EU. Christodoulidis thus overlooks not only a possible cause, but also a potential starting point for reinvigorating the political constitution.

The second modern Marxist piece is Robert Knox's 'Strategy and Tactics'. Almost an instant classic, Knox dissects the difference between short-term interventions in a variety of topics, which he summarises as mere 'tactics', and those aimed at overhauling structural elements that can be analyzed as 'strategic' interventions:

> In terms of Marxist political economy, the prime example of such [structures] would be the mode of production (for instance feudalism or capitalism) and the relations of production of which it is composed. Strategic questions are those that are addressed at critiquing and overturning these relationships. Accordingly, we might say that strategic interventions are 'revolutionary', inasmuch as they address critiquing or abolishing the basic logic of the system.[26]

This differentiation establishes a helpful guide to categorizing the interventions by critical legal scholars. Knox concedes that strategy and tactics are often difficult to distinguish in practice. Nonetheless, he finds that most critical interventions take the form of 'tactics', even when they are couched in 'strategical' language. This 'perpetual focus on short term, conjunctural considerations turns a supposedly "strategic" adoption of liberal legalism into a capitulation to it.'[27]

Christodoulidis locates the redress that law can provide in strategic usage. He advocates to 'reclaim a notion of constitutional "strategy"'[28] in three possible ways: militant formalism, strategies of rupture, and immanent critique. All three interventions can amount to strategies in Marxist terms as they have the potential to confront structural issues. Yet, there is a significant range of activities between the type of militant formalism in legal discourse that Christodoulidis posits in chapter 4.2 and the mass strike he discusses in the following section. While militant formalism does mostly attempt to re-claim certain legal concepts by mode of interpretation, it does not address the legal structure as such. Similarly, the mass strike, the most radical proposal listed by Christodoulidis, leaves almost no role for law or legal intervention. Its effectiveness stems from its political nature – the mass strike is a political action in excellence, it is 'pure withdrawal'.[29] While it addresses a structural issue, it is beyond a legal intervention. Adopting Knox's differentiation could have thus provided necessary clarity on the goals, forms, and effects different tactical and strategical interventions might have in and beyond law.

The absence of Marxist legal scholarship is particularly surprising in this book as Christodoulidis, together with Marco Goldoni, has published a forceful defence of 'Marxism and the political economy of law' in the Edward Elgar *Research Handbook of Critical Legal*

[26]R Knox, 'Strategy and Tactics' 21 (2010) Finnish Yearbook of International Law 193, 199.
[27]Ibid., 193.
[28]Christodoulidis (n 1) 452.
[29]Ibid., 521.

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Theory in 2019.[30] In this chapter, Christodoulidis and Goldoni reject a reductionist understanding of the Marxian approach to law. Instead, they promote a 'materialist understanding of law' which requires to study law in the specific conditions of its political and economic context. Law is thus not the outcome; indeed, the formation of the legal order is part of the struggle:

> [L]aw is immanent to the social order, not an epiphenomenon of the economic order, and class struggle both shapes and is shaped by legal instruments. The emphasis on the ordering properties of law and its internal connection with class struggle implies a relative autonomy of the legal field, and the recognition of the contingency of certain legal decisions (that is, legal arrangements could have been otherwise) which leaves open the potential for a genuine political imagination.[31]

This passionate appeal for a Marxist understanding of law and its analysis of the effect on both the social and the economic system raises the question of why Christodoulidis did not follow this approach in *The Redress of Law*. The absence of a materialist analysis of law can only be explained by the inherent contradiction this would pose to the systems theoretical understanding of constitutionalism. Yet, his theoretical path dependency significantly limits the explanatory power of Christodoulidis's analysis of labour regulation and the systematic consequences of working conditions. As I will discuss in the following section, law sustains the capitalist exploitation of workers, in particular those who already suffer from discrimination and exclusion in the political sphere.

3. Modernizing labour: Racial capitalism and invisible workers

The cover of *The Redress of Law* features a striking image in black and white: a never-ending mass of dock workers at the late 19th or early 20th century. No political motive is visible, except for a single banner. The sheer enormity of this organised mass of workers is underscored by their similarity; they all wear a similar style of clothing, in particular workman's caps. This gives the impression of uniformity. While no official insignias are visible, those people clearly form a community. Everyone looks in the same direction with faces only partly visible. No one stands out. This underscores their homogeneity. The image depicts the type of rallies that characterised organised labour in the industrial age: European, mostly white, male workers in factories or other locations of hard, manual labour, coming together in unison. One can almost hear the type of songs, anthems on fraternity, solidarity, and the red banner, which fill the air. There is power in a union.

In 2022, this type of image mainly exists in history books. The workers of the world look very different from the turn of the 20th century. This does not only concern the diversity in race and gender among the workers but also the types of working modes with temporary, gig-work, or other precarious working conditions becoming increasingly normalised.[32] Whether a unitary 'working class' exists at all anymore is up for debate and while recent high-profile cases of union organisation, for instance at Starbucks or Amazon, made headlines, union membership has often dropped to single percent numbers.

Christodoulidis's analysis of work, workers, and the power of organised labour aims to reconcile those two images. He finds particular inspiration in Simone Weil and her experiences of submission, suffering, and alienation in the workplace. Contemporary working conditions are characterised by 'the suffocation of the workplace by managerial prerogative', 'the withdrawal of recognition', and

[30]E Christodoulidis and M Goldoni, 'Marxism and the Political Economy of Law' in E Christodoulidis, R Dukes and M Goldoni (eds), *Research Handbook of Critical Legal Theory* (Edward Elgar 2021) 95.

[31]Ibid., 112.

[32]See, notably, the work of Veena Dubal, for instance, 'The Drive to Precarity: A Political History of Work, Regulation, & Labour Advocacy in San Francisco's Taxi & Uber Economies' 38 (2017) Berkeley Journal of Employment and Labour Law 73–136.

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ultimately, 'the assumption of individual responsibility for one's occupational degradation'.[33] Importantly, it is not only the type of work but also the effect of this work on the physical and psychological well-being that he calls out forcefully. The 'systematic form of insecurity and existential precariousness'[34] destroys the social element of work. Against this background, Christodoulidis aims 'to constitutionalise solidarity in the forms of social rights, of social protection and social insurance, means, at minimum, to introduce it as axiomatic and non-negotiable interdiction'.[35] Social constitutionalism might not resolve the tension between democracy and capitalism as such but 'has demonstratable capacity to shelter democracy from capitalist excess'.[36] His hope lies in social rights, in their individual dimension as a justiciable right as well as in their collective dimension, thus further enabling community and organization. Organised labour, in this sense, has been instrumental in safeguarding the social contract of embedded liberalism.[37]

Are social rights sufficient? Scholarship on economic and social rights remains doubtful; too often their promise was not fulfilled. Some scholars argue that ESC (Economic, Social, and Cultural) rights have not challenged the existing inequalities in society but at most cushioned the blow, while others claim that ESC as such have been co-opted by a neoliberal paradigm.[38] This ultimately resulted in 'trade-related, market-friendly human rights'.[39] Moreover, on the empirical argument, it is certainly plausible that a strong entitlement to social rights facilitates the creation of organised labour structures, however, a clear causality, in particular towards the type of strong collectives able to call for a mass strike, has certainly not been established.

Most problematically, however, is that Christodoulidis again neglects to discuss the role of law in sustaining capitalism and enabling market capture of the political constitution. His vision of organised labour law is a nostalgic one and remains ignorant of the various ways *law*, including legal institutions such as rights, are used and have been used to divide, restrict, and alienate working people.[40] In particular, he thus 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 colour.[41]

Here, I want to highlight two strands of scholarship which fill the blanks of this book. They depict two different ways for how law is implicated in sustaining the capitalist exploitation of workers: on the one hand, by legal regulations that enable racial capitalism; on the other, by not legally acknowledging certain types of work and thus barring certain workers from the enjoyment of rights and protection. Admittedly, some of those studies have been published only after the publication of this book so they might rather serve as inspiration for further engagement.

The first strand of scholarship concerns the intersection of law with racial capitalism. Those analyses investigate the deep embeddedness of (international) law in structures of domination and exploitation, which have sustained legacies of colonialism and white supremacy. Labour regulations have been crucial in this regard. For instance, Ali Hammoudi's recent article 'International order and racial capitalism: The standardization of "free labour" exploitation in international law' impressively demonstrates how inter-war international institutions such as the League of Nations

[33]Christodoulidis (n 1) 90.

[34]Ibid.

[35]Ibid., 243.

[36]Ibid.

[37]See also R Knox, 'Law, Neoliberalism and the Constitution of Political Subjectivity: The Case of Organised Labour' in H Brabazon (ed), *Neoliberal Legality. Understanding the Role of Law in the Neoliberal Project* (Routledge 2016) 92.

[38]G MacNaughton and DF Frey (eds), *Economic and Social Rights in a Neoliberal World* (Cambridge University Press 2018).

[39]U Baxi, *Human Rights Futures* (Oxford University Press 2012) 273.

[40]On the diverging impact of EU labour regulations, see the contributions in the special symposium, V Bogoeski and F Costamagna, 'Law and the Protection of Precarious Work in Europe: An Introduction' 1 (2022) European Law Open 660–668.

[41]See also, A White, 'Marxism, Labour and Employment Law, and the Limits of Legal Reform in Class Society' in P O' Connell and U Özsu (eds), *Research Handbook on Law and Marxism* (Edward Elgar 2021) 299.

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and the ILO legitimised labour exploitation in Africa and the Third World.[42] The commodification of labour that Christodoulidis explains due to the rise of total market thinking thus precedes the advent of neoliberalism – at least if one applies a non-Eurocentric perspective. Similarly, Diamond Ashiagbor argues how labour markets have been racially constituted, ie, 'race is embedded in the legal form by which labour is regulated'.[43] She analyses how legacies of colonialism and racism have shaped labour market institutions. These effects can be observed until today, for instance, 'racialised workers are more greatly exposed to precarity and exclusion from employment protection legislation'.[44] Lastly, a recent special issue edited by James Thuo Gathii and Ntina Tzouvala argues that international economic law 'is deeply implicated in how relationships of expropriation, exploitation, and hierarchy along race and ethnicity are produced and in the ways in which some people are subordinated by others through processes of economic extraction and wealth acquisition'.[45] Yet, in EU law, the topic has so far only received spare attention.[46] As Jeffrey Miller and Fernanda Nicola have succinctly pointed out, European Constitutionalism has so far 'failed' to 'grapple with racial capitalism' both in its historical past as well as in recent ECJ antidiscrimination jurisprudence.[47] The postcolonial turn in EU law is still in its infacy - but, hopefully, won't remain for long.[48]

A second strand of scholarship concerns the legal regulation of 'invisible workers'. This means that it studies how law excludes certain types of workers, for instance by not recognising informal employment, or failing to acknowledge certain activities as work as such. The latter particularly concerns reproductive labour, often also called 'care work'. The term 'invisible workers' stems from Desirée LeClerq who investigated the absence of 'domestic workers, migrant workers, informal workers, and gig workers, not to mention women workers' at the table of international economic law.[49] While those workers are just as much affected by trade and investment agreements, they are not represented by unions and have generally no voice in policy-making. Civil society associations have attempted to lobby on behalf of those workers, yet, this has not been very fruitful. In a similar line, Tomaso Ferrando and Elizabeth Mpofu focus on peasants and their intentional exclusion and silencing by international economic law. They discuss the farmers' movement 'La Vía Campesina' as a form of organised labour and a 'platform for translocal solidarity that combines support for local production and the formulation of alternative knowledges, political visions, and legal arrangements to redefine the local and international arena'.[50] Similar legal arrangements can also be critically analysed in the European context. For instance, Miriam BakMcKenna and Maj Grasten's Article 'Legal borderlands in the global economy of care' investigates how Danish labour law denies legal protection to foreign au pairs working in private homes

[42]A Hammoudi, 'International Order and Racial Capitalism: The Standardization of 'Free Labour' Exploitation in International Law' 35 (2022) Leiden Journal of International Law 779–799.

[43]D Ashiagbor, 'Race and Colonialism in the Construction of Labour Markets and Precarity' 50 (4) (2021) Industrial Law Journal 506.

[44]Ibid., 527f.

[45]JT Gathii and N Tzouvala, 'Racial Capitalism and International Economic Law: Introduction' 25 (2) (2022) Journal of International Economic Law 199.

[46]See, for a notable exception, the work of Iyiola Solanke on EU integration and racial integration from the perspective of anti-discriminational law and policy.

[47]J Miller and F Nicola, 'The Failure to Grapple with Racial Capitalism in European Constitutionalism' (2020) *iCourts Working Paper Series*, 201/2022.

[48]See, for instance, the recent work of Signe Rehling Larsen, 'European public law after empires'1 (2022) European Law Open 6–25. In a similar vein, see Jenny Orlando-Salling, 'Reimagining a European Constitution. Why Putin's War Could Be a Major Constitutional Moment for the EU' Verfassungsblog (15 March 2022).

[49]D LeClerq, 'Invisible Workers' 116 (2022) AJIL Unbound 107, 109.

[50]T Ferrando and E Mpofu, 'Peasants as "Cosmopolitan Insurgents"' 116 (2022) AJIL Unbound 96, 98.

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in Denmark.[51] Transnational migrant workers in the care sector thus find themselves in a legal borderland, often facing multiple structural disadvantages not only on grounds of gender but also of race that are stabilised through legal regulations.

Both strands of scholarship reiterate the call for social struggle and community that Christodoulidis advocates. They also agree that those activities require changes in the law which have to be pursued in a strategic matter. In Christodoulidis's words:

> The important point about strategy is over the question when to deploy formal mechanisms of closure against the erosion of democratically enacted law, and when to release the formalist hold over the institutional imagination for more political and politicised uses.[52]

Christodoulidis believes that an increased self-reflexivity as well as a constitutionalisation of solidarity practices such as strikes can re-invigorate the democratization of constituent power.[53]

Yet, the times of mass strikes are long past. Institutional arrangements often deepen animosity rather than enable social community. The collectives that Christodoulidis envisions to create situations of rupture are built upon self-reflexivity and mutual recognition. Workers have to recognise their common practices, and their mutual experiences of alienation and exploitation – not only across sectors but also across borders. In practice, political leaders and neoliberal market logics have often been successful in exploiting those internal contradictions, for instance, when workers in Land A are pitched against those of Land B. Transnational labor movements have been generally unsuccessful in strategically influencing a further legal constitutionalisation of labour and social rights beyond the national spheres. This holds particularly true for those strategies which attempt to influence international economic law. Accordingly, in the end, Christodoulidis does not spell it out but the only logical solution remains further retreat to the national sphere. The constitutional commitment to workers' rights will, at the end, always remain protectionist.

4. Conclusion

In her *Walter Benjamin Lectures* in June 2022 'The Three Faces of Capitalist Labour: Uncovering the Hidden Ties Amon Gender, Race, and Class', Nancy Fraser sketched an intersectional approach to organised labour. Similar to Christodoulidis, she emphasises the urgent need for solidarity, mutual recognition, and community in the face of multiple and multi-dimensional crises. She rejects identity politics which puts different types of work – exploited work, expropriated work, and care work – against each other. On the contrary, she calls for the formation of counter-hegemonies by reconciling the classical workers movement, the feminist movement, and the anti-racist movement. Critical theory, in her words, thus needs to 'foster that what the young Marx called the self-clarification of the struggles and the wishes of the age'.[54] A task both intellectual and practical. On the one hand, 'critical theory must construct a diagnosis of our situation, disclosing the socio-historical roots of the crisis and determining what must be changed in order to resolve it'.[55] On the other hand, she also claims that critical theorists need to identify the social forces, groups, movements, parties, and other organizations that could at least

[51]M BakMcKenna and M Grasten, 'Legal Borderlands in the Global Economy of Care' 13 (2022) Transnational Legal Theory 131–156.

[52]Christoulidis (n 1) 463.

[53]In a similar vein, see also the proposals made by Wolfgang Streeck and Ruth Dukes in *Democracy at Work: Contract, Status and Post-Industrial Justice* (Polity 2022) published after the writing of this contribution.

[54]N Fraser, 'Klasse jenseits der Klasse: Vorschläge für eine Politik der Gegen-Hegemonie' 2022, <https://criticaltheoryinberlin.de/benjamin_lectures/2022/> accessed 31 August 2022.

[55]Ibid.

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attempt this transformative project in the society 'and could conceivably come together in a counter-hegemonic bloc'.[56]

The Redress of Law perfectly captures the first task but fails at the second. The genealogical phenomenology allows the reader to comprehend the historical developments which led to the disentanglement of the political and the private sphere, the alienation of workers, and ultimately the way market constitutionalism has captured the project of political constitutionalism in the EU. Doing so, Christodoulidis shifts between 'semantics and structures' which contributed to this emerging social divide. Yet, his limited focus on law and labour overlooks the intersectional perspective. He thus does not problematise how law reproduces racial capitalism and enables the exploitation of invisible workers. From a legal perspective, it would have thus been important to address how democratization of political constitutionalism in the field of labour might be able to achieve this intersectional solidarity. Law might hereby demonstrate its emancipatory as well as its destructive character for social progress.

Instead, Christodoulidis nudges the reader in a multitude of directions and shines a light on aspects and authors that have been overlooked. The red line of 'semantics and structures', which covers all four parts of the book, provides orientation but, in this wild and dense jungle of conceptual reflections, Christodoulidis purposefully leaves much for the reader to discover by herself.

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[56] Ibid.

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