Introduction

The title's reference to *redress* is tribute to Seamus Heaney's *The Redress of Poetry*. Heaney quotes from Simone Weil's *Gravity and Grace* where she announces with 'typical extremity and succinctness':

> When we know in what way society is unbalanced, we must do what we can to add weight to the lighter scale . . . We must be ever ready to change sides like justice, that fugitive from the camp of conquerors.

'And so far as poetry', adds Heaney, 'is an extension and refinement of the mind's extreme recognitions, and of language's most unexpected apprehensions, it too manifests the workings of Weil's law.'

What is this 'law'? Heaney says:

> Her whole book is informed by the idea of counterweighting, of balancing out of the forces, of *redress* – tilting the scales of reality towards some transcendent equilibrium. . . . [It involves the activity of] placing a counter-reality on the scales – a reality which may be only imagined but which nevertheless has weight because it is imagined within the gravitational pull of the actual and can therefore hold its own and balance out against the historical situation. The redressing effect comes from its being a glimpsed alternative, a revelation of potential that is denied or constantly threatened.
>
> (Heaney, 1995: 3–4)

To take 'redress' as the tilting that forces appearance – of 'a reality which can only be imagined' – is the insight that underpins the analysis of constitutionalism that this book offers. My argument will be that such redress has become highly improbable under conditions of a significant shift from a political to a market conception of constitutionalism. Redress aims to capture, and where unavailable to force, law's countervailing gesture. Since it is increasingly forged in a context that resists that gesture it calls for strategic thinking. The key *phenomenological* question is 'under what conditions might something *emerge* as a problem?' This is where *political rationality*, the possibility to think the given otherwise,

meets *a critical phenomenology*, the *forcing* to appear. Redress is not to be understood as the compensatory gesture that would commit to the already defeated site of a skewed equilibrium. Instead, as per Weil, redress asks of us to 'do what we can' to imagine alternatives and equip them with a 'gravitational pull' such that the weight of necessity does not submerge them. That at least is the aspiration that links the phenomenological account of the first part of the book with the strategic account of the final part. 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. While a phenomenology that navigates its way between Marxism and systems theory is going to be selective in its debts, there is scope, I argue, to extract significant dividends from the way in which appearance is thematised in both, allowing the traditions of phenomenology and Marxism to converge in a restatement of praxis philosophy: as a restatement, in the words of the phenomenologist Bernhard Waldenfels, of *a vision that transforms the seen*.

The 'redress *of* law' plays on the ambivalence of the connective *of:* 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.

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The subtitle of the book – *Globalisation, Constitutionalism and Market Capture* – carries three referents. *Globalisation,* at the most basic level, refers to the operation of the economy at the supranational level, an operation poised to ensure that the global flows of capital maximise its rates of return by circumventing welfare states and the loci of labour and social protection. At the level of the political and legal systems, globalisation has forced a comprehensive shift, and the main part of the book, presented in the mirror-image Parts II and III, describes the two competing paradigms of *constitutionalism*. It tracks the *paradigmatic* shift of constitutional thought from the first to the second, from a political to a market register. '*Market capture*' is a term that signifies the comprehensive intrusion of market thinking into the constitutional imaginary. More specifically it marks neo-liberalism's highly successful

venture to replace, I will argue, political constitutionalism's guiding distinction between the constituent and the constituted with asymmetries for which the market is both the site of production and regulation. Once uploaded to the transnational level constitutional processes are laid open to market capture through operations that appear to be beyond the purview of political control. The search for functional equivalents to the constitution at the global level misses a crucial fact: that to the extent that globalisation *consists in* the competitive alignment of national systems of labour protection, the search for functional equivalence (of labour protection) at the global level is a misnomer. This is the position critical theory finds itself in today, wrong-footed by the compelling ideological manoeuvre of the advocates of the free market to co-opt its founding commitments to justice and democracy and to subsume without remainder political rationality to market thinking.

The book is a defence of political constitutionalism, where the predication 'political' imports a particular reflexivity, which critical phenomenology is deployed to sustain: to sustain the integrity of constitutional rationality from folding into market thinking. At the level of what appears, of what appears otherwise than given, and at the level of how to act on it, critical phenomenology and strategy give meaning to redress.

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The writing of this book is characterised by an attention to (what belatedly came close to an obsession with) symmetry. Each of the four parts of the book has four chapters. The third chapter of each part, like a current running through each of the parts, is about *work*. The two middle parts of the book are mirror images of the two paradigms of constitutionalism whose shift the book attempts to track. Of the two 'bookend' parts, I and IV, the first part sets out the methodology to ask the *phenomenological* question: under what conditions does something appear, and under what conditions might it be *forced to appear as a problem*? The final chapter attempts an answer to the question 'what can be done?' under conditions of market capture of constitutionalism, and invites us to think about law, beyond the communicative paradigm, as *strategy*. They too, however, mirror each other. The reason for such an attachment to symmetry is that the book's breadth would make it unmanageable, and each part could be a book in its own right. This also explains why the writing is pulled taut at times. The argument of the book is in the linkages. For example, *contradiction* is *first* linked in 1.4 to

the tapping of a critical phenomenology, *then* in its constitutional expression in 2.1, *subsequently* in the way it subtends the promise of social rights constitutionalism in 2.3, finally as political strategy in 4.4. Linkages proliferated, and the process of writing the book became a difficult balance between paring back the spread of any one argument to hold on to the symmetry, while allowing space for the manifold connections to emerge. I cannot anticipate them all in this introduction, partly because I cannot frontload adequate complexity to do it, and also because the pleasure of writing it consisted largely in allowing them to unfold in their own time and pace.

The argument spans an unlikely range as it moves from thoughts about the role of necessity in tragedy and the Homeric epic, to unemployment statistics and the use of indicators. What has preoccupied me throughout and serves to gather it together, is what is at the heart of *critical theory*: the distribution of contingency and the meaning of necessity, with all the ambivalence that such a formulation carries. Concerns that underlie the whole analysis are the emphasis on making meaningful, the interposition of distance from what impacts as compulsion, the putting to question, the imagination of alternatives, in other words the claiming of the space for contingency with which to counter the supposed necessity of the factual, of the '*fait accompli*', of the unavailability of options. Reclaiming contingency becomes integral to political rationality, a rationality that at a deeper level cannot be divorced from ethics, and which informs the capacity of society to act on the distinction between necessary and unnecessary suffering.[1]

I have tried to reset the parameters on which the discussion of necessity and politics can be undertaken as a question about the *constitution*. The book, as a treatise in critical constitutional theory, centres the discussion on phenomenality (appearance), critique and strategy. It has involved a selective excavation of the concepts that frame and distribute givens and opportunities on the constitutional terrain, a *genealogical* excavation to ensure that established path-dependencies do not always repeat the givens of the past. Against what comes to install itself as the apparent objectivity of the present, the genealogical method re-orients our reading of the past to the history of blocked opportunities, interruptions, discontinuities and 'false starts'. As ever the subjugation of those histories and opportunities is coincident with the emergence of current

[1] A point insightfully made by Maurice Glasman in *Unnecessary Suffering* (1996).

certitudes about the 'rational' scope of opportunity. 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.

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A concern with what appears, under what circumstances and at the cost of what exclusions, is why the methodology of this book is defined as a *critical* phenomenology; it overlaps with the critique of ideology in the Marxist sense. Part I of the book argues within the tradition of phenomenology *against* Hannah Arendt and *with* Simone Weil. It asks why such a profound a phenomenological exercise such as Arendt's, perhaps the most influential phenomenology within political theory today, yields so anaemic an understanding of the public sphere. It argues that it is because her phenomenology sustains the meaning of the public sphere by forever renewing and re-embedding the constitutive distinction between what is 'political' and what merely 'social'. The result is disempowering: the pivot on the distinction as formative of the political perspective as such becomes impossible to redress from that perspective. Against Arendt, for Weil the rationality of work is not to be consigned to a vacuous instrumentality but should be understood as an intelligence to be collaborated with. It is not the blind working of necessity (labour) or the means-ends instrumentality (work) that *The Human Condition* set at the antipode of communication, the latter for Arendt and, later, Habermas offered as the supposed meaningful alternative to meaningless labour, immured behind categorical distinctions and conceptual boundaries. In contrast, Weil invites us to hold on to the notion of *attention* towards lives lived under conditions of necessity. We owe to Weil that she turns her phenomenology towards lives that are denied worldliness, a *redress* in the full sense that Heaney gives the term. And we owe thanks to Jacques Rancière for the careful ethnography of workers' lives in *Nights of Labour*, *a recuperation certainly*, but not one premised on usurping the worker's speaking position. Instead, he offers us a painstaking recollection and reassembly of those voices, the diary entries and the short stories that dignified lives

lost to 'the forces of servitude'.[2] This is an 'attention' indexed not just to proximity but to humility: no grand reconstructions of historical regularities for Rancière, no Marxist 'overdetermination' or 'stageism', but instead the staging of resistance of what breaks incongruently with the crushing regularities of days expended. To the extent that the analysis in this book is undertaken as a critical phenomenology it aspires to do something similar, certainly not in terms of the ethnographic exactitude of Rancière's writing, but in the *form-giving* impetus that fashions something as a problem and as worthy of attention. It is Aristotle who argues that 'equality or inequality comes down to *aporia* and political philosophy'.[3] Rancière adds that philosophy becomes 'political' when it embraces aporia as its proper quandary. The third chapter of this first part (1.3) turns this problematic frontally to 'the forgetting of labour', to re-think it in terms of democracy, solidarity and dignity, *aporetic* to the measure that those registers are ordinarily denied it. The final chapter of this part (1.4) provides a statement of the phenomenological method as critical thought.

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The shift from political to market constitutionalism is the subject of the central parts of the book. The discussion here engages diverse interlocutors: while Arendt, Weil and Husserl move to the background, Marx and Luhmann remain on centre stage, joined now by Polanyi, Foucault, Hayek and Gorz amongst others. All have in various ways contributed their profound insights to forging an understanding of the constitutional paradigm shift that faces us, and some to tracking what we might *immanently* identify as redress. Let me say something more at the outset about what I take to be the paradigm shift from 'political' to 'market' constitutionalism.

The meaning of *political constitutionalism*, developed in Part II of the book, draws constitutively on the distinction between constituent and constituted power. The meaning of the 'constituent' finds its root in the revolutionary tradition, and imports into constitutionalism – understood

[2] 'What [these workers] found intolerable was not exactly poverty and low wages, or the ever-present spectre of hunger. It was something more basic: the anguish of time [expended] every day working up wood or iron, sewing clothes, or stitching footwear, for no other reason than to maintain indefinitely the forces of servitude with those of domination; the humiliating absurdity of having to go out begging, day after day, for this labour in which one's life was lost.' (Rancière, 1989, vii.)

[3] In *Politics* III 1282 b. 21, trans. T. A. Sinclair (1992), p. 207.

as the *form* of the distinction that holds the two poles together – the irreducible measure of *potentiality* at the 'constituent' pole. The other pole routes that potentiality back to the pathways of the 'constituted'. As a dynamic relationship the antinomic articulation between 'constituent' and 'constituted' captures what is particular about constitutional 'reflexivity'. The first chapter (2.1) contains an analysis of the concept of *constituent power*; the second chapter (2.2) contains an account of Luhmann's constitutional theory, and in particular his difficult and oft-misunderstood account of the reflexivity of recursively closed ('autopoietic') systems. 'Constituent' is the term that carries the animus of democracy into the distinction. (I take it, relatively uncontroversially, that *democracy* is the organising principle of the political and that any concept of the political that does not incorporate democracy as constitutive of its meaning falls short definitionally, not merely normatively.) The other pole of the distinction, the 'constituted', captures the moment of institutionalisation. It is clearly conceded here that the *pure* constituent moment attains to no *self*-reflection, and finds no *unmediated* expression in political constitutionalism. Instead, what is provided in these two chapters taken together is a definition of political constitutionalism as an evolutionary achievement that keeps the two terms alive and 'co-original'. The relationship of mutual implication that defines political constitutionalism means that the solutions in each case are measured against the other pole, the former (constituent) as reservoir of constitutional 'energies', the latter (constituted) as defining the reach of constitutional reflexivity, its measure and limit. The chapters contain an analysis of the notion of reflexivity in its institutional specificity across the three dimensions of its meaning:[4] in the *social* dimension the question is over the subject that the constitution names; in the *temporal* dimension the question is over the constitution's ability to recruit the past in its expectation-binding operation for the future; in the *material* dimension the question is over the threshold of *unity* that would gather it (the legal system) as a meaningful whole. These are threshold requirements for ascribing constitutional meaning, and it is in that function that they underpin and organise all expressions of *constitutional reflexivity.*

Where the second chapter looks at the *formal* dimension of the constitution, the third chapter (2.3) concerns the *substantive* dimension, with an emphasis on the *social* constitution. It looks at *social rights* and

[4] On the three dimensions of meaning, see Luhmann, 1992, and Chapter 1.1 below.

specifically the protection of work. Drawing on the 'dogmatic' resource of *solidarity*, and with specific references to the democratic thinking of industrial relations, this chapter looks at how the tradition of labour constitutionalism has drawn constitutively on the legal-dogmatic resources of solidarity and dignity. To understand solidarity as the foundation of the social state and the founding commitment to mutualise the risks of existence through the provision of social protection, is to understand societal valorisation as irreducibly collective. Solidarity and dignity, then, in this tradition of thought, are what the *ratio juris* upholds by virtue of its very deployment. They sustain what Ernst Bloch famously called 'the *orthopedia* of upright carriage' that for him 'pointed far beyond the tradition of the bourgeois world' (Bloch, 1986: 174). In all cases, the withdrawal and contraction of the constitutional values of solidarity and dignity is a sign of profound pathology of constitutional thought.

The fourth, and final, chapter of this part (2.4) tracks this pathology by looking at the process of the *undoing* of the constitutional form under the pressure of *total market thinking*. Two developments mark this transition. The first is the rise of celebratory 'pluralisms' of 'cosmopolitan' and other 'radical' varieties that herald the rediscovery of constitutionalism at the global level. At the same time, and this is the second development, constitutionalism has come undone from any antecedent framing function and has been reconceived in a new temporal modality as *ongoing constitutionalisation*. At this double juncture of 'constitutional pluralism' and 'constitutionalisation', the released energies of the constitutional imagination are running amok: constitutional actors proliferate, values multiply, any differentiation of levels of lawmaking disappears and the orchestration of the complex hierarchy of emphasis that was constitutional ordering collapses. The liberation of constitutional energies lays the field bare except for the markers that allow the new circulation: these are the new markers of 'market constitutionalism'. And with this, the impasse is turned productive, the paradox of the crippling justice deficit of the European and the global 'constitution' is unfolded in what is becoming the *evolutionary achievement* of a global constitutionalism, with pluralism substituting for democracy and constitutionalisation substituting for constitutionality.

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Where the logic of the undoing is described in the last chapter of Part II, the rise and rise of market constitutionalism is the subject of Part III.

Constitutional function initially shrinks to what Hayek calls 'catallaxy' – the protection of property title and the stability of expectations. But this particular function is subsequently part-generalised and part-displaced under the pressure of globalisation, and as the differentiation it promises gives way to fragmentation. We look at processes whereby constitutional actors and values are variably flattened, re-grouped, re-named, dispersed, re-configured more generally and in relation to the labour constitution and with special emphasis on Europe. The main argument here is that under conditions of a comprehensive *market turn* in constitutional thinking, the opportunity to fashion a political register as proper to public and constitutional law thinking is undercut by a *comprehensive substitution*. The 'market turn' informs and underwrites a different constitutional imaginary, on a terrain it re-configures so as to make any meaningful sense of 'the constituent' disappear. Gone is the notion of the common good, unpinned from any 'natural' constituency for it, and then pluralised, the two moments jointly generating a dislocation so severe that it undercuts society as a field of association. Lost are the histories of practices and the forms of collectivity that made societies meaningful to people in terms of the mutuality of action and the recognition of dependency. The space vacated is stormed by new pluralisms that aggregate utilities through indicators, management-speak and the aspiration of optimisation, *whatever* the object and *however* it is understood in *the new worlds of governance* imbued, as they are, by the new spirit of 'democratic experimentalism'. This widely celebrated 'plasticity' comes constitutively tied to the rigidities of price-setting markets in labour, land and money (Polanyi) that install and accelerate both commodification and circulation. Under the pressure of globalisation and the incessant search to increase the rates of return for capital, the ferocity of the market re-launches the 'common good' on the global scale, severed off from tradition, mutuality and association, and reconfigured through competition as what the optimal function of the market envisions. As a question about the constitution, the devastating consequence that we can only project at this stage, is that the absorption of the constituent into the constituted is the high mark of a market constitutionalism whose forever renewed, forever inclusive gesture allows every contestation to find its place in the mobilisation of those adaptive devices through which the constituent 'excess' is incorporated as productive to total market thinking.

By drawing on legal theory we revisit and insist on the difference between what public law and private law promise and allow, and

confront the pervasive move that no longer pits them against each other but in an inclusionary way underwrites them both: where the market principle – previously understood as the principle subtending the transactional nature of private law as distinct from public law – gradually becomes the arbiter of the separation itself and guarantor of the circulation ('balancing' in the preferred idiom) of public goods. The substitution it effects is played out on the legal plane under the sign of *governance*. The new worlds of governance come with the panoply of 'democratic experimentalism', and institutional plasticity on which to perform it. The result is that we suffer a loss of language as we move from level to meta-level. As framing the debate, the market principle receives the immunity that all framing conditions enjoy: they cannot be simultaneously deployed and queried. The 'critique of economic reason' attempted in this part of the book takes the form of challenging the self-propelling of market thinking to economic, democratic and epistemological levels.

The third and fourth chapters (3.3 and 3.4) look at Europe's 'social market' and the hollow promises of 'capability' and 'proportionality' to give labour protection its due weight in it, and to restore it to its dignity. The analysis here places special emphasis on 'social' Europe where the logic of *debt* raises the matter of the 'social' to the first intensity. One cannot talk about politics today without taking account of how debt is experienced, how it furnishes the horizon of action in terms of modalities, opportunities, undertakings, but also of subject-positions as the latter are determined through lines of addressivity of the 'indebted man'.[5] And of how it informs our capacity today to re-imagine the European citizen at the difficult juncture of market fanaticism, indebtedness, the various 'exits', and the xenophobic contraction of public space – the space that affords appearance to political subjects. In other words, in a Europe where the pursuit of market utopia[6] is forcing the shrinkage of the idea of collective subjecthood back to the depleted and largely abhorrent identifications with a defensive nationalism, the European challenge to think of the many sites of subjecthood and the variety of subject-positions becomes both more urgent and more improbable during the twilight of European constitutionalism.[7]

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[5] The reference is to Lazzarato, 2012.
[6] For 'market utopia' see Polanyi, 1944.
[7] The reference is to Dobner and Loughlin, 2010.