

The Constitution of Non-Monetary Surplus Values

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journals.sagepub.com/home/sls**Gunther Teubner** *Goethe University Frankfurt, Germany*

Abstract

The article rebuts the primacy of economic profit in advanced capitalist societies, and submits that the imperative to extract surplus value governs also the law and other social domains and is not merely a product of economic forces. Not only the economy but also the law and other function systems force each of their operations to generate a specific surplus value – but now explicitly non-monetary – beyond its immediate production of meaning. The object of the surplus orientation is the system's own communication medium – power, truth/reputation, money, and juridical authority. The success of surplus pressures is responsible for the immensely productive forces unleashed in capitalism. However, they demonstrate an excessive ambivalence: immense productivity and its destructive dark side. Similar to the monetary profit pressure in the economy, (auto- and hetero-) destructive tendencies of non-monetary surplus pressures have multiplied in the law and in other areas of life. Political-legal counterstrategies combating the negative side of diverse societal surplus productions could be inspired from Karl Polanyi's famous concept of false commodities and their replacement by non-market institutions.

Keywords

Communication medium, juridification, Karl Marx, Karl Polanyi, non-market institutions, Niklas Luhmann, profit, surplus value, systems theory

Generalization and Respecification

A whole series of Karl Marx' receptions have sought analogy to the capitalist logic of the economy in law and in other areas of society. Vilfredo Pareto, Gaetano Mosca and Max

Corresponding author:

Gunther Teubner, Law Faculty, Goethe University Frankfurt, Telemannstrasse 5, Frankfurt am Main 60323, Germany.

Email: G.Teubner@jur.uni-frankfurt.de

Weber had already attempted to identify equivalents to Marx' radical autonomy of the economy in the sphere of politics and thus to manoeuvre the political system out of its superstructure position and into a co-original base position with respect to the economy. With his influential metaphor of a new polytheism, Max Weber demonstrated successfully that modernity owes its characteristics not only to the formal rationality of capitalism but equally to a whole variety of analogously constructed formal rationalities, including the formal rationality of law (Weber, 1978 [1921]: 61). Otto Kirchheimer picked up on this and described an analogous autonomization of the 'machinery of law' along with, at the same time, his construct of juridification detailing its problematic society-wide expansion dynamics parallel to the economization of the world (Kirchheimer 1976 [1928]: 36ff). Niklas Luhmann generalized the expansion of the economy even more and identified processes of – simultaneous – politicization, juridification, scientification and medicalization of society (Luhmann, 2013: 95). Evgeny Pashukanis conceived the legal form in analogy to Marx' commodity form with all its alienation phenomena (Buckel, 2007: 94ff; Pashukanis, 2001 [1924]). With the construct of social capital, Pierre Bourdieu generalized Marx' concept of capital in order to apply it analogously as a resource of the actors competing for power in various social fields, albeit only metaphorically and without a sufficient theoretical elaboration (Bourdieu, 1986a).¹ Rudolf Wiethölter pushes these analogies further. He claims that the fundamental real contradiction (*Realwiderspruch*) of law is between productive forces and relations of production, not of the economy but of the law itself (Wiethölter, 2015: 30).

My proposal follows these lines of thought but goes in a different direction. In order to identify equivalents to the driving force of capitalism in other areas of society, I suggest the analogy of *avaritia*, the worst of all deadly sins (Aquinas, 1485: Question 84) – equivalent to the economic profit principle itself.

Non-Monetary Surplus Values?

The critique of capitalist society is therefore no longer solely directed at surplus value compulsion within the economy. Nor is it only challenging the increasing economization of social worlds, i.e. the expansion, pushed by neo-liberal fanatics, of the economic profit principle into non-economic areas of society, which threatens all social activities, to produce monetary profit or else be done away with completely. Rather, a more profound critique would have to deal with a different kind of society-wide expansion of the capitalist logic. My thesis is that not only the economy but also other function systems force each of their operations to extract a specific surplus value – but now explicitly non-monetary – out of their immediate production of meaning.

In politics, non-monetary surplus value means that each policy-decision needs to generate simultaneously a surplus of political power for future use. In science, successful research in the various subject areas, which is officially oriented towards the production of knowledge, is unofficially but effectively oriented towards maximizing reputation. In education, besides the specific skills of the person to be educated, a surplus of the medium of education, i.e. the success in educational selection, needs always to be produced in the form of institutionalized proofs of qualification. In law, the courts are under pressure to extract a normative surplus value, i.e. a specific persuasive authority

that can be generalized for the future, over and above the concrete decision in a dispute. Legal acts need to reproduce, and, if possible, to increase, juridical authority. And in this surplus of law, too, exploitation is at play – namely of those people who, although actually interested merely in the success of their concrete legal dispute, nevertheless also have to muster the extra energy that generates new resources of normativity for future use that emerge from their dispute (Luhmann, 1988b: 25ff), and, more generally, that enables the law to reproduce and even increase its capacity to create acceptance in law and society. Most drastic is Nils Christie's formula of law as expropriation of conflict (Christie, 1977): law is systematically unable to understand social conflicts and to resolve them adequately. The reason is that law's formalizing violence via legal procedures and conceptualizations expropriates conflicts from their proper context of social and moral understandings of the parties. The new formula is expropriate the expropriators! Give the conflict back to the people! With this suggestive slogan, Christie expresses the widespread uneasiness about law's surplus value expansion: non-responsive, inhuman, irrational and (non-em)pathetic.

In Marx' words: 'The production of surplus-value, or the making of profits (*Plusmacherei*), is the absolute law of this (capitalist) mode of production' (Marx, 2004 [1867], Chapter XXIII: 1). However, Marx' *ipsissima verba* cannot be restricted to the economy but apply to law and to other areas of society as well. It is in this specific sense that capitalist societies are surplus-driven societies, in a more universal and at the same time more particularistic sense than in the traditional critique of capitalism.

In the language of systems theory, the orientation of a function system – politics, science, economy, law, art, education, religion² – towards its own surplus value means that there is constant pressure on each operation to regenerate and to augment its medium of communication, which only in the case of the economy is monetary profit, beyond the actual result of production. It is the surplus of the system's own communication medium – power, truth/reputation, money, normativity, style, education/selection, faith – which is produced via the reflexive application of operations to further operations. In this reflexive process, not only are the usual follow-up operations made possible, but at the same time each one's own ability to operate is restored or even increased.³ Moreover, if this is established as a criterion of self-regulation, then the various surplus pressures become the driving dynamics of the expansion imperatives in modern society.

Surplus is not simply directed to system maintenance, nor to strengthening all kinds of system structures, institutions, norms, programmes, values etc. Rather, the orientation of surplus extraction is exclusively to reproduce the communication medium in its capacities. It is this one-sided concentration that creates the 'capitalist' hyper-dynamics, which Hartmut Rosa describes as acceleration in late modernity (Rosa, 2005b). In particular, surplus of a systemic medium, is by no means to be confused with increasing performance, according to the motto 'Higher, further, faster'. Focusing on maximizing output misses the point. Instead, focusing on each operation regenerating its own medium is required. Defining social surplus value as relating exclusively to the communication medium distinguishes a rigorous systemic concept from other attempts, which describe as social surplus value all kinds of by-products of communication (usually associated with positive social policy ambitions, e.g. Donati, 2014; Moore, 2013).

Such an inflated use of surplus value would imply using it only metaphorically and result in a loss of its theory potential. The decisive difference is whether economic action is oriented on production output or on monetary profit; whether political action concentrates on policy results or on power gains; whether scholarly activities look primarily to scientific results or to increasing reputation; whether education is geared towards specific skills or towards selection, and whether judicial decisions aim toward conflict resolution or toward regenerating juridical authority. Of course, usually, the two orientations come in pairs, but the difference between them, between increasing output and increasing surplus, is what matters.

Surplus and Communication Medium

But why communication media? Why is it so important to increase the surplus of each system's communication medium? It is by no means immediately obvious that communication media in particular should be the exclusive target for the ubiquitous surplus pressures, which are felt within various function systems. In a first approximation, communication media are nothing but a special language for different problem areas and for different professions, for lawyers, doctors, managers, technicians, scientists. And their language is regenerated in the normal course of communication, but there is no special motivational pressure for its augmentation, no particular desire for a linguistic surplus. Historically, with increasing social differentiation, it has become a major problem to convey the results of specialized communication, particularly when they contradict immediate plausibility. Even refining the traditional persuasion techniques of eloquence and rhetoric has exhausted its potential. Why should you accept highly improbable assertions of learned scholars? Why obey inconvenient commands of self-proclaimed leaders? Why listen to educators who want to teach you a lesson? Why accept claims to exclusive ownership? Why follow rules that are not in your self-interest?

The answer is that the special contribution of communication media consists precisely in creating the motives (!) for accepting a communication, thus overcoming outright resistance. This is where the persuasive – even coercive – power of communication media comes in.⁴ They have the 'function of making the acceptance of a communication expectable in cases in which rejection is likely' (Luhmann, 2012: 316). Inconvenient or bothersome communicative offers become successful as soon as a specialized communication medium furthers drastically the chances for their acceptance: the seduction of money for handing over goods and services, power threats for obedience to commands, theoretical or empirical proof for implausible assertions, the pressure of credits and exams for accepting learning offers, and normative persuasion for legal judgments. Communication media are success-media, in contrast to mere dissemination-media (orality, writing, printing, digitality) (Baecker, 2016; for historical correlations between dissemination media and legal structures, see Vesting, 2018). Success-media make sure that a communicative offer is accepted. Once accepted, the offer becomes the premise of further communication without being questioned any more. This is a case of successful absorption of uncertainty. From this moment on it is no longer the original communication but its acceptance that counts as information, and so on and so on. In this way,

whole chains of successful communications become reality that is based on the acceptance of the former communicative offer. Insofar as success-media exert an almost irresistible motivational force, they work as the driving motor for the enormous internal dynamics of function systems.

And the turbocharger for this motor is surplus value extraction. Restoring and augmenting the motivational force of the specialized communication medium accelerates immensely the internal dynamics – this is the prominent role of surplus production in different social domains. Surplus value is responsible for uncanny pressures toward internal growth and external expansion, which each of the function systems develops endogenously. More precisely, by applying reflexively a communication medium upon itself, surplus production restores and augments the motivational power to accept communication. The primary motivation, which increases the chances for acceptance, is overlaid by a secondary motivation, which augments the primary motivation itself. When a contribution to the function of the social system is generated beyond the immediate activity and its meaning, this counts as a medial surplus value, which acts as a criterion of self-regulation, as a recursive principle of the self-legitimation of systemic operations.

While surplus pressures speed up the internal dynamics, at the same time they restrict drastically the scope of possible communication. In any case, they will reduce the probability of their occurrence. Certain activities will not take place because they do not create the necessary surplus. Of course, this is well-known for the economy. As a rule, corporations will exclude non-profitable production of goods and services. The pharma groups do not develop medicine for rare diseases, and, as we recently had to find out, even against urgent warnings of virologists, they do not care for protection against future pandemics. In science, scholars will not follow paths of research if an increase of their reputation is not to be expected. Learning offers will not be accepted if they are not accompanied by the pressure of exams and similar testing procedures. Politicians will not press for policies that foreseeably weaken their power position. Regularly, the virtue of ‘statesmanship’, which demands unpopular decisions for the sake of the public good, tends to end up in a loss of power, and only in rare occasions in public admiration. And courts shy away from judgments which would be felt as scandalous in society and thus diminish juridical surplus. There is a striking example from the German Constitutional Court in which the judge Winfried Hassemer produced a meticulously reasoned decision proposal to stop criminal punishment of incest between siblings, but the majority flatly refused to follow him (Bundesverfassungsgericht BVerfGE 120, 224–273 with dissenting opinion Hassemer). Juridical authority would have suffered if the judges had dared to touch this deep-seated taboo. The reason for this exclusion of certain activities is that the conditions of acceptability restrict the amount of viable decisions. This is different from the often-discussed legitimacy of law. The point is that the motivational force of communication media has become a scarce good that needs to be regenerated again and again. This necessary by-product has to be created by payment operations of the economy no differently than by dispute decisions in law, policy decisions in politics, epistemic operations of science, pedagogical moves in education, or curative interventions in medicine.

Individual Versus Institutional Surplus Orientation

To avoid misunderstanding, it should be emphasized that the motivational power of communication media is not directed towards influencing mental states of individuals. Instead, it forms binding social expectations in relation to social positions (persons, organizations, networks), i.e. semantic constructs of communication that get by with the mere assumption, with the mere supposition, almost with the fiction – not with the actual realization – of corresponding states of individual consciousness. Individual greed needs to be sharply distinguished from social surplus orientation. What really motivates people's actions is not the primary target of socially established surplus orientation. Communicative media form social motives and have only indirect effects on individual intrapsychic processes. *Homo oeconomicus, politicus, juridicus, scientificus, educativus* – these *homunculi* are not to be identified with real people, nor are they mere constructs of the social sciences. Instead, they are social institutions, constructed by the social practices themselves.⁵ This strict separation of communicative processes in society and psychic processes in individual consciousness is crucial for understanding the dynamics of surplus orientation.⁶ The starting point is the strict division of psychic from social processes, both of which are accountable for the creation of meaning in their own right. Luhmann's greatest achievement was to construct beside the Husserlian phenomenology of consciousness an independent phenomenology of communication – not to substitute the former for the latter (for a concise conceptualization, see Luhmann, 1995: 153ff, 1996). This leads to a typical duplication of phenomena, which hitherto had been understood only psychologically. And the same is true for the profit motive in the economy and for the other surplus motives in society. Social processes are oriented towards surplus value production, as cool and detached calculations of success, which measure achievement, whether or not they are accompanied by individual greed for power, money, career or reputation.

However, this does not exclude an elective affinity between psychic processes and social structures, between individual greed and social surplus pressures, rather it brings the affinity to the fore in a relation of mutual re-enforcement. After all, hedge funds fascinate and attract greedy personalities. Lawyers are said to be authoritarian personalities. Communication media produce only indirectly impulses for consciousness, but when they fire constantly, they force the single individual in Max Weber's 'iron cage of the slavery of the future' which is understood here not only as the repressive modern bureaucracy but as the overwhelming motivational pressure to extract surplus value. The motivational force of the various communication media 'always striving for its own increase, in this view is the "automatic subject" of society (Marx, 2004 [1867], Chapter IV: 1), constituted by human beings through their daily actions, but at the same time subjecting them totally and making them mere functionaries of an anonymous, unconscious process that is out of their control' (Kempster, 2020: 1).

Medial Substrate, Medial Form, Medial Competence

It needs to be stressed that surplus pressures are focused directly towards decentralized social positions (persons, organizations, or networks) within a social system – and not

upon the social system as a whole. This distinction clarifies the exact focus of the surplus orientation. While the economy-wide reproduction of money is a matter for the central banks' decisions, which are explicitly not profit-oriented, profit orientation is needed for the single economic enterprise to reproduce and increase its ability to pay. The enterprise must regenerate the money medium's motivational force for its own use. Since each payment reduces the amount of money attributed to singular economic actors, it is a question of survival for them to focus on profitability. Similarly, when political actors realize their power threats, the power potential, which has been attributed to them, is liquidated, thus they need to regenerate and augment their positional power. In science, the strategy for individual researchers and research institutions is to augment their own reputation, otherwise it will fade. In education, the pedagogical authority of the educator is contingent upon the augmentation of the single person's knowledge and is reinforced by a series of educational certificates. And in law, singular courts as well as other jusgenerative institutions are under strong competitive pressures to regenerate their juridical authority, otherwise they will fall back in their relative position. Not only legislators, courts and administrative authorities compete for gains in law-making power, but recently, with the growth of legal pluralism, particularly in transnational relations, instances of private ordering, formal organizations, standardization agencies, arbitration courts and institutions of alternative conflict resolution have entered the competition for surplus in juridical authority.

If it is true that surplus production is expected from individual social positions, which capacity then is to be augmented? What is the proverbial talent one should invest to raise one's yield?⁷ The answer can be found if one looks into the details of media theory. It is the difference medium/form, more precisely the difference between the medial substrate and its medial forms that is at work here (introduced by the media theory of Heider, 1926, for perception; further elaborated by Luhmann, 2012: 113ff, for communication). The general term 'medium' is a shorthand for circular processes taking place between three components: (1) the medial substrate; (2) the medial form; and (3) the medial competence of each social position. (1) Medial substrate is the specialized language of a function system (money, power, truth, biography, normativity), the motivational force of which is the condition for communicative success. (2) This indeterminate language is condensed by single operations into determinate medial forms (payment, command, cognition, knowledge, obligation), which are the concrete bearers of motivational force. (3) Medial competence (ability to pay, power potential, scholarly authority/reputation, knowledge and skills acquired in education, normative authority) is ascribed to a social position as its capacity to mobilize medial forms.

Here an important distinction comes in: while the medial substrate is regenerating in the course of communication, medial competence is consummated in each operation of the medial form. Thus, again and again, the medial competence of a social position needs at least to be regenerated as a by-product of its operations (Luhmann, 1990: 197). If this does not happen, the researchers' reputation will fade, the power of political parties or of individual politicians will be liquidated, the courts' normative authority delegitimated, the economic actors' money spent and the personal knowledge petrified. And here is the point where surplus value comes in. Its production regenerates and augments the medial competence of single social positions. *Homo oeconomicus, politicus, juridicus*,

educativus, scientificus – while producing goods and services, policies, conflict resolutions, pedagogical impulses or research results – are all at the same time under an obligation to increase their own medial competence.

What about the politically explosive aspects of economic profit and other surplus values – exploitation and expropriation? Are they lost in this abstract conceptualization? Not at all. In many social fields, exploitation is a brutal consequence of surplus production, but it reappears now in different forms. It is not exploitation of people by individuals that is at stake, but rather systemic exploitation. Social systems exploit human beings and systems exploit systems. In its various forms, systemic surplus extraction exploits human energies – bodily, psychic and social – by compelling a redirection from the diversity of their substantive values to the one and only one formal value of increasing the media's motivating power.

As for expropriation, surplus pressures do not primarily aim at skimming off surpluses for private use, as in the conventional understanding of economic profit as income for workers or capitalists. It is not at all about the antagonism between public production and private appropriation; on the contrary, it is precisely about a detachment from private motives in favour of the public aspects of surplus production (Luhmann, 1988a: 56 develops this argument for the profit principle of the economy). The aspect of expropriating the surplus that somebody else has produced has been overemphasized in the discussion of economic profit. Indeed, this overemphasis on appropriation and on power struggles about distribution of surplus ruins Bourdieu's theory of social fields. By combining theories of social differentiation with theories of class struggles, he generalizes productively the category of capital and respecifies different types of capital in various social fields. However, taking on board the idea that all history is the history of class struggles, Bourdieu claims to capture the totality of modern societies which subsumes the whole variety of social fields (Bourdieu, 1986a; and for the legal system, in particular, see Bourdieu, 1986b). Via the predominance of the power field against other social fields, he attributes primacy to class relations and class identities over other social relations or collective identities. With this theory manoeuvre, he downplays the qualitative differences between social fields and impoverishes Weber's new polytheism as mere power struggles and distribution conflicts that are fought between dominating elites and dominated people. Thus, the intrinsic rationalities and normativities of different fields lose their motivating power and serve only as constraints on action, while power is supposed to be the real motivational force in the competition for social positions. That is the reason why Bourdieu misses the crucial role of the other motivational forces embedded in the different media of communication.

Whether and to what degree appropriation is involved in surplus production depends very much on the (contingently institutionalized) attribution of surplus to one or the other social position (are the managers surplus producers and thus entitled to a fair share?). Indeed, how to distribute surplus among different social positions is a highly contested issue, which is open to political controversy and in need of political decisions, obviously so in the economy and in politics, but also in science, where attribution of authorship and immaterial property rights is a perennial political question.

Indeed, exploitation of human energies and expropriation of realized surplus values can occur at any time in various social systems, which incites moral and political

condemnation of surplus value as such. But this is an overhasty judgment. Massive exploitation, frequent expropriation of surplus and a whole series of other negative aspects should not blind us to the simultaneous public good qualities of surplus values. The pressure to produce a surplus of motivational force is in substance a system-immanent ‘taxation’ of every operation for the fulfilment of the system’s functions: monetary surplus in the economy for securing the future needs of society (Luhmann, 1982: 192), normative surplus of concrete dispute adjudication in law for norm production in society, power surplus of policies as generalized resources for future political decisions, surplus knowledge for the formation of theories in science, educational surplus in the form of a series of certificates, and surplus medical value of individual operations for the development of the health sector.

Regeneration or Augmentation?

While it is plausible that each operation needs to regenerate simultaneously the motivational force of its communication medium, it is less clear why augmentation takes place in ubiquitous surplus extraction. For the economy it is clear that, while mere rentability regenerates the payment capacities for the survival of companies, augmentation is needed for securing the fulfilment of future needs. But what about the non-economic surplus production? Armin Nassehi has dealt with the phenomenon of permanent augmentation in modernity which he called the ‘increase of options’ under functional differentiation. He identified binary coding as being responsible for the relentless growth dynamics of systemic operations: ‘Since modern function systems are coded systems, they lack an in-built stop-rule and the capacity of an adequate self-limitation’ (Nassehi, 2019: 181 and 178ff). The lack of stop-rules results in a radical increase of options which he demonstrates for science, medicine, the economy, mass media, politics and religious fundamentalism, as well as for digital processes. Indeed, binary coding is a necessary condition for the augmentation tendencies. However, it is not sufficient for explaining the very dynamics of augmentation. What makes function systems move is not the binary code of a function system but the motivational force of its communication medium and the acceleration via surplus pressures.

Why? The tentative answer is that a moment of excessive expectations, a type of high-risk ‘credit’ in future communications, lies hidden in the motivation to accept a communication created by the communicative media – property/money, power, legal normativity, truth/reputation. This moment can only be ‘cashed in’ there with permanently higher ‘payments’, and with their reaction, in turn, to increasing ‘credit’-expectations, so that a necessary increase-dynamics, a growth-spiral of surplus production, develops. Again, this underlying cause for the growth-spiral should no longer be regarded as particular to the money-medium, but instead as a general characteristic of various function systems. The augmentation dynamics are better understood if one identifies three different dimensions of surplus production – its temporal, material and social dimensions. For its temporal dimension, Hartmut Rosa has diagnosed an acceleration cycle which transforms time-structures ending in a permanent acceleration of medial reproduction (Rosa, 2005b). In its material dimension, Rudolf Stichweh has observed in several social systems a tendency to increase, not only to regenerate but

to augment, symbol production which is driven by an inherent growth imperative. He registers the difference between the normal state of 'slightly inflationary growth processes' and crisis-inducing excessive growth (Stichweh, 2011: 46ff). However, it is particularly in the social dimension that the compulsion to medial augmentation, instead of mere *restitutio in integrum*, instead of mere system maintenance, becomes evident. Surplus pressures are caused by a 'social epidemy', i.e. imitation, spreading and contagion, which has been identified particularly in the 'herd behaviour' of financial markets (Stäheli, 2011). In a more abstract register, it is mimetic conflicts in René Girard's sense creating a competitive dynamic that results in mutual overbidding of surplus production (Girard, 2016: 283ff). In all three dimensions advance 'payments' are generating expectations of an increase in 'payments', which, in turn, compel the next advance 'payment' in an initially stable dynamic with the tendency to tip into augmentation excesses. This releases a dynamic, which can no longer be regarded as a static cycle, but instead as a rapidly accelerating growth spiral.

Differences in Surplus Orientation: Economy, Politics, Law, Science, Education

Obviously, there are important differences between various surplus orientations. Different social areas are not all necessarily homologous in their surplus orientation. Rather, comparative analysis looks not only for similarities and convergence, but equally for differences and deviations. By using surplus value as its *tertium comparationis*, the analysis compares different social systems in order to produce new questions for empirical, theoretical and normative research: how far can one generalize a principle which is firmly institutionalized within one particular social system? To what degree does it need to be respecified for the particular context of another? Can one identify equivalents to the economic profit orientation in other contexts? What, if they exist, do they have in common? Do they differ in important aspects?

Such a comparison demonstrates the high visibility the profit principle has in the economy, in contrast to surplus values in other social domains. To understand this difference, we use again the distinction between medial substrate and medial forms. The substrates of communication media consist of loosely coupled components, while they are also condensed in medial forms whose components are strictly coupled to each other (Heider, 1926; Luhmann, 2012: 113ff). The point is that this coupling differs in degrees of strictness. These variations are responsible for the differences between several forms of surplus production. Money, the medial substrate of the economy, is a paradigmatic case for the very strict coupling of its medial forms. Although there are many forms of the monetary medium – commodity money, fiat money, fiduciary money, commercial bank money, coinage money, as well as several currencies, and more recently, even varieties of digital money – the unique advantage of the economic medium/form relation is its high degree of formalization, even mathematization and digitalization. This allows for an improbably high precision of surplus value calculation and for an easy mutual convertibility of its various medial forms. The economic value of almost everything in the world can be formalized numerically in monetary terms, which is the premise for

rational calculation in the name of the one and only one bottom line visible everywhere – monetary profit.

In contrast, surplus value calculation in politics has a much lower level of precision and reliability because a whole variety of medial forms is inscribed into the power medium. Power is expressed in many diverse forms which are not easily convertible into each other. And they are less formalized. It is true that the calculation of voting results, seats in parliament and majority decisions do accurately measure the amount of power, and polling techniques, as well as popularity indices, allow for a satisficing formalization of potential power differences. But what count equally, if not more, in the competition for power surplus are the relevant non-formalized power gains in the day-to-day political manoeuvring, as well as in long-term powershifts. Thus, the amount of power surplus can be assessed only imprecisely via educated guess, in contrast to the precise calculation of economic profit.

And in law, the surplus extraction is almost invisible. Why? One needs to remember the famous parable ‘Return of the Twelfth Camel’ to see its contours. Three heirs of a Sheikh’s fortune find it impossible to divide their late father’s herd of 11 camels among them. The wise Khadi resolves the conflict by lending them his own camel. Now they can divide 12 camels according to the somewhat strange proportions in their father’s testament and – *miracolo!* – return the 12th camel to the khadi.⁸ The return of the khadi’s camel is the very point of the parable. It symbolizes the surplus value of law. For a successful regeneration of law’s medium it is crucial that the khadi formulates his decision in such a way that the 12th camel – the juridical authority which guarantees acceptance – is not used only to resolve the concrete case, but at the same time the authority of the law will be reproduced when the parties to the conflict accept the decision. This is meant by the return of the camel from the people to the khadi. When courts do not only attempt to come up with a correct and fair decision but at the same time try to extract juridical surplus, they make sure that the persuasive force of juridical authority is restored and augmented. This, however, happens – and this explains why the surplus orientation is almost invisible – in a great variety of medial forms: via the threat of sanctions, via the hierarchical authority of the higher courts, via the symbolic representation of law’s authority in images and in architecture, via doctrinal consistency, via the rhetorical use of suggestive metaphors, via decisions that satisfy the needs of the conflicting parties and, last but not least, via reasons that are plausible for the broader public. Thus, in law the condensation of medium to form occurs in so many different manifestations that the overarching surplus orientation of legal acts becomes almost indiscernible.

Even more problematic is the orientation towards surplus value in science (Luhmann, 1970; Schimank, 2016). Here, it is not its low visibility but its questionable legitimacy that creates the problem. At first sight, science looks like an easy case for surplus production. Its communication medium is ‘truth’, here understood as compelling certainty of the ‘transfer’ from one communicative act to the other, which make it possible that even improbable assertions, which contradict common sense knowledge, are accepted. Now, surplus value would be produced in principle by increasing the refinement of theories and through empirical methods which strengthen the plausibility of research results. However, there are limits to the production of the motivational force of

truth, via increasing the plausibility of the concrete results of research. Heightening the methodological requirements for certainty renders plausibility into a scarce good. With growing specialization within disciplines, the numbers of colleagues who are competent to judge the scientific value of research are drastically diminishing, so that, for the scientific community as a whole, methodological and theoretical refinements tend to lose their force to motivate acceptance. In addition, theories and methods do not possess the capacity to guide distribution of resources and coordinate scientific cooperation.

The way out of this dilemma is to create a surrogate for the motivational force of truth via theories and methods. It is reputation that becomes the surrogate for truth. The public opinion within the scientific community determines and distributes reputation as a means to facilitate consensus about scientific quality. Reputation serves as a symptom for truth. In this quality, reputation becomes the primary medium of communication within science. It creates the motives for accepting research results, motivates allocation of resources and orients recruitment decisions: in short, reputation serves as a self-regulating mechanism of the scientific process.

But a surrogate remains a surrogate! The original intention, which is to judge the quality of scientific research, is replaced by reputation which orients scholarly activities towards symptoms instead of the matter itself. Reputation is only a credit for truth. Moreover, reputation value has become quantifiable: numbers of publications, impact factors, citation indices and the financial volume of grants (see e.g. Flink and Simon, 2014). Here, all kinds of market failures come in: mainstreaming of research due to peer reviews; ossification via citation cartels; ghost-writing; exploitation of research assistants; hierarchy abuses in collaborative research projects; falsification of data; plagiarism; suboptimal research techniques, and so on. Thus, the legitimacy of reputation has always been questionable. But, in spite of all these dysfunctions, reputation tests are routinely used in personal career calculations, in procedures of academic recruitment, in preselecting credible information in research and in the allocation of monetary resources.

A different ambivalence of surplus orientation can be observed in education. Here it is not a surrogate code which replaces the primary code: rather, a second code is overlaying the first code. Surrogate codes are applied alternatively, second codes cumulatively. Science communicates either in the truth-code or in the reputation-code. Education uses the education-code simultaneously with the selection-code: 'Education and selection operate in the same system and need to be adaptive to each other' (Luhmann, 2002: 74). The communicative medium of biography is condensed in the form of the individual acquisition of knowledge and skills. However, as usual, the pedagogical impulses do not follow one and only one binary code: instead, they oscillate between two binary codes – the code of knowledge acquisition on the one side and the code of educational selection on the other. However, now the surplus pressures concentrate on the selection code and its medium. What really counts in education is not the widening of the individual horizons or the *Bildung* of the students' personality, but competing for grades, collecting credits, passing hard-core exams, *concours* and other test procedures (for a detailed analysis of medium/form in university education, see Stichweh, 2013: 2, 266ff). In addition, what Bourdieu calls 'institutional social capital', in our language the medial competence, is open to a remarkable quantification of surplus value: documentation of the permanent proof of individual knowledge and the grades, credits, degrees, titles,

awards and other professional gratifications, academically sanctioned by legally guaranteed qualifications (Bourdieu, 1986a: 66).

Excessive Ambivalence

It should be acknowledged that the precise calibration of the many surplus pressures towards one and only one communicative medium in their specific context has been the basis for immense productive forces to be unleashed under conditions of functional differentiation. Driven by a one-dimensional surplus orientation, each specialized social domain has been able to realize its own rationality in exclusivity, without any consideration for other rationalities. This almost paradoxical multiple unfunctionality of autonomous spheres has enabled high productivity in each system of action. In view of such immense advantages, it is difficult to see that society will abandon its various surplus orientations.

But, not unlike the monetary profit pressure in the economy, the non-monetary surplus pressures have their ugly face. The (auto- and hetero-) destructive tendencies that Marx rightly attributed to the relentless profit maximization in the economy have multiplied in the non-monetary surplus pressures of other areas of life which are working with no less force. Their endogenous growth dynamics lead to all kinds of dysfunctions. Within each social system – in politics, the economy, law, science and technology – ruthless surplus maximization becomes almost a collective addiction, namely the repetition and multiplication of a self-damaging social behaviour despite the keen knowledge of its harmful effects (on collective addiction which needs to be distinguished from individual addiction, see Femia, 2013: 152, 161, 165; Teubner, 2011: 4–42, 147). And in their external relations, the systems' colonizing expansion extracts surplus value from other domains of society. Processes of global economization, politicization, scientification and juridification take place, even simultaneously, with disastrous consequences for the ecology in the broadest sense: that is, for the natural world, society and individuals. Again and again, it is both through internally maximizing surplus value and externally skimming off surplus from other areas of society that modern society commits its mortal sins (on the pathological pressures of repetition and multiplication (*Steigerungszwang*) in function systems, see Nassehi, 2019: 178ff; Rosa, 2005a: 295ff).

To name, blame and shame the most conspicuous examples: the totalitarian regimes of the 20th century realized excessive increases in the surplus value of political power and in the far-reaching politicization of other social areas (*Gleichschaltung*), which siphoned off their power surplus value. Fukushima stands for the excesses of technological surplus pressures. Dr Mengele, who sent the results of his cruel experiments on concentration camp prisoners to the Kaiser Wilhelm Institute in Heidelberg, exemplifies the perversion of surplus pressure for scientific knowledge freed from all moral constraints. And new pathologies arise from excessive medicalization which wants to branch off a medical therapy surplus for each individual case of suffering.

And in law? Excessive juridification of society results in new injustices because law seeks to extract its normative surplus from conflicts in various social systems. And it does so without due regard to the danger that human conflicts are torn out of their living context and distorted by being subjected to legal formalization. Under the dramatic

heading 'Colonialization of the life-world', Jürgen Habermas analysed excessive juridification (1985: 203) which is interpreted here as law's exploitation of conflicts. The temptation towards total juridification stems from law's desire for normative surplus which is extended to society as a whole. Instead of restricting itself to equal/unequal judgments in conflict resolution as opposed to the different requirements of political distributive justice and the recognition of justice in morality, with an acute fever of righteousness law attempts to realize a just society by applying the contingency formula of juridical justice. It is just to decide the problems of the world with the help of the binary code of law – this is the *summum jus summa injuria* of functional differentiation. Such an expansionist drive can be observed in other contingency formulas as well, with that of the economy describing all the problems of the world as a question of scarcity which can be solved only by economic means, with the legitimacy formula of politics and with the limitationality formula of science. All these contingency formulas promise to produce the good society, although in fact they do nothing but extract surplus for themselves from other social sectors. Justicialization as an attempt to bring the whole of society to justice with juridical instruments is disastrous: it represents the surplus imperialism of legal rationality, in parallel to economic, political and scientific expansionism – a unidirectional growth of juridical justice which needs to be resisted politically. The expansion of law's surplus orientation is dangerous because it meets the human desire for a non-divisible justice. Although it is well known that this desire cannot be fulfilled in modernity, juridical justice as justice for the whole of society continues to offer the false promise of salvation. It produces a dangerous mixture of unanswerable questions and hypocritical answers. Human rights ideology is the ideal of a just society, but the imperialism of juridical surplus extraction projects the limited juridical justice onto the whole society.

Constitutional Problematique

At this point, at the least, it becomes clear that such an excessive ambivalence of surplus values creates constitutional problems of high relevance. Since function systems themselves do not dispose of stop-rules which would limit their expansive dynamics, it is the role of constitutions in particular to produce limits to destructive growth tendencies (Nassehi, 2019; Teubner, 2012). But when critique of capitalism means no longer just critique of the economic profit principle but of ubiquitous surplus production, how should constitutions deal with its excessive ambivalence? Surplus restrictions? Changes to profit distribution? Collectivization of the non-monetary generation of profit? If it is true that the compulsion to siphon off surplus value is structurally rooted everywhere throughout the whole of society, albeit in different forms, then it is obviously no longer sufficient to make a constitutional decision for or against a profit-driven economy. Hopes for the abolition of private property and the elimination of the monetary profit orientation are in vain because the destructive tendencies of non-monetary profit maximization in other systems, especially in science, technology and, of course, politics, would remain completely unaffected.

The way constitutions deal with diverse societal surplus productions would have to be conceived more carefully than any simple prohibition strategy would do. One suggestion

could be to learn from – *horribile dictu* – economic experiences with external societal pressures on commercial enterprises, which are currently being exerted in the direction of monetary profit generation. This is because the concrete design of surplus generation and distribution is not solely left up to the companies, but rather imposed externally by a triad of surplus transfers: returns, taxes and employee wages (Luhmann, 1981: 404ff). Various collective actors force the companies to achieve a profit beyond mere production and direct them as to how they distribute it to different beneficiaries. The state skims off taxes; trade unions fight for wages and working conditions; capital owners collect the residual profits for their risk exposure; and the companies themselves reinvest. And constitutional law plays a prominent role here because various social constitutions provide for the legal protection of such pressures: financial constitution, property constitution and labour constitution. Constitutional changes influence considerably the economic profit principle, such as state participation in companies, taxation for non-fiscal purposes, workers' co-determination, or the transfer of profit-oriented enterprises into the third sector or into the recently much-discussed commons. These changes have arisen in the past quite regularly and are topical again for the future in view of the more recent criticism of capitalism.

However, would it be worthwhile for constitutional law to learn from such experiences in the economic constitution, to free them from the tight corset of economic monetary profit, and make them fruitful in numerous areas of life for a political–legal direction of non-monetary surplus productions? Two constitutional strategies aim at correcting the failures of surplus pressures: replacing false commodities and redirecting surplus pressures.

False Surplus Pressures

Inspiration could come from a reformulation of Karl Polanyi's famous 'double movement', from the history of the economy's disembedding and its re-embedding in the broader society. Certain tendencies of re-embedding the economy have been realized, not endogenously but only when exogenous societal forces have exerted pressures for setting up new non-market institutions which mediate between surplus reproduction and democratic values. Now, the most fascinating elements of Polanyi's theory are the three false (or fictitious) commodities and their replacement by non-market modes of economic integration (Polanyi, 1991 [1944]; the text follows the interpretation of Polanyi's work by Klein 2020). False commodities – land, labour and money – are for Polanyi the sites where monetary surplus production runs up against the protests of collective political actors. And societal resistance against them has created new modes of economic integration (redistribution, reciprocity and householding) and has replaced markets by non-profit-oriented modes of economic organization. For Polanyi, in particular labour unions and central banks were the new collective institutions that had the potential to counteract the economy's disembedding, precisely at the very points where false commodities had revealed the failures of the economic profit principle.⁹ Labour institutions have replaced economic surplus orientation with an orientation towards reciprocity, and the non-market institution of central banks with an orientation towards redistribution (on the consequences of Polanyi's theory for law, see Joerges, 2011: 474ff).

Now, can one identify equivalents to false commodities in social areas which are driven by non-monetary surplus orientation? False surplus pressures would be the equivalent momentum which counteracts the public interest. To identify them would reveal the sites where the agonistic relation between surplus orientation and democratic egalitarianism lead to unresolvable conflicts. False surplus-pressures are the points of highest tension between the medial competences of singular social positions which have an incentive to maximize non-monetary surplus on the one side and democratic ideals embodied in non-surplus-oriented institutions on the other. This situation creates the need for democratic channelling of the collective demands of the constituencies formed around areas of false surplus-pressures.¹⁰ In clearly circumscribed areas, self-regulation of social systems via false surplus orientation would be replaced by social protection intended to preserve the ecology in its broadest sense (people, society and nature).

From this perspective, the challenge for the future would be to identify areas of false surplus pressures in the various social domains. Institutional imagination would be needed to replace them by non-surplus institutions. In politics, the great historical example has been minorities which had been repressed in a regime based on false pressures for power surplus. As a response, constitutional courts (i.e. non-majoritarian institutions which are relatively independent from power politics) have advanced constitutional rights for minority protection. For the future, in the digital world, in economic organizations, in the news media and in other social domains, constitutional rights – when applied not only against the state but also against power constellations in society – could play a similarly decisive role when false surplus pressures violate the vulnerability of individual life or the integrity of institutional dynamics. In particular, in science and medicine, where new biotechnological developments increase surplus pressures that threaten humans' and animals' interests, non-surplus-oriented institutions need to be created which counteract the combined surplus pressures of professional reputation and economic profit (for an elaboration of this argument, Karavas, 2019). Although the spontaneous reaction to false surplus pressure is to search for political interventions of the state, alternative institutional mechanisms may be superior, which will not directly involve state power but societal non-surplus-oriented forms of collective decision-making. Thus, collective actors should be created which are experimenting with new democratic forms outside institutionalized politics. A promising example is ICANN which attempts to counteract the combined surplus pressures from economic, technological, scientific and political interests. After having tried in vain to copy voting procedures from the political system, ICANN has done so now by transforming itself into a non-profit and non-state organization which is legitimized by a stakeholder constitution (Mahler, 2019).

Ecologizing Surplus Orientations

While this constitutional strategy would aim at abolishing surplus pressures in certain carefully circumscribed social areas, where these pressures create unbearable consequences, an alternative strategy would aim at influencing social surplus pressures in order to increase their irritability towards their social environment. Again, economic experiences with external societal pressures on commercial enterprises could serve as an

example. Since experience shows that profit-threatening strategies are the most successful means to incite changes within the economy (Krause, 1986: 108ff; Van der Heijden, 2020), this could be generalized into a strategy of threatening surplus extraction in various social areas. As a consequence, surplus orientation can be seen as the most sensitive point of any social system. When the reproduction of their medial competences is threatened, their irritability for outside impulses is at its peak. Thus, instead of broad-side interventions, the external pressures could concentrate on one and only one issue: they could calibrate on the specific surplus orientation and push it towards a new – possibly ecological – orientation (Mölders, 2014). One would have to identify those ‘leverage points of systems’: ‘places in the system where a small change could lead to a large shift in behaviour’ (Meadows, 2008: 145; and for recent concepts of regulation, see Bora et al., 2017).

This would imply the following guiding principles:

- Fight surplus excesses and reduce their parasitic use to the necessary minimum so that the motivational force is maintained.
- Reduce the distance of secondary goals from primary goals, i.e. move surplus closer to output.
- Create motives for ‘states(wo)manship’, i.e. for the sacrifice of power interests gains in favour of the public interest.
- In other areas, create ‘artificially’ surplus value for action in the public interest: medical research for rare diseases, economic incentives for the production of ecological goods, scientific research in areas where immediate reputation gains are not to be expected. Facilitate the framework conditions for third-sector activities and for the commons.

And what about law’s false surplus? In order to combat the dark side of juridification, the law would have to turn against itself. As the debate over alternatives to the legal system has rightly shown, the law is by no means particularly suited for solving disputes among people satisfactorily to all concerned (Fitzpatrick, 1992). Mediation, arbitration and settlement have the potential to do more justice to the nature of conflicts, their causes and the needs of the people at dispute. Accordingly, one could in certain conflicts very well do without the law. Under certain conditions, law falsifies the realities of the conflict and produces decisions that are distorted by their inadequate legal formalization. Thus, for false surplus pressures in law, a paradoxical strategy follows: juridify de-juridification.

More generally, the role of law would be to promote a society-wide reflection on different surplus values, both their production and distribution, including the surplus values of law itself. Left to their own devices, systemic surplus extractions will only follow their tunnel vision, which focuses them on maximizing their own function. External pressures from civil society, from politics and law, particularly constitutional law, should induce them to become ecologically sensitive, to counteract their negative effects and to promote their positive effects on nature, society and people.

Counter-institutions¹¹ would be needed to protect the integrity of social domains of action against the expansive, indeed, totalizing, tendencies of surplus strategies of other

social domains of action. Institutional guarantees would have to be effective against the motivational imperatives of highly selective communicative media: seduction through money, negative sanctions of power, binding demands of law, scientific truth claims and technological feasibility fantasies. Counter-institutions are thus directed against the 'structural violence' (Johan Galtung), which radiates from the surplus pressures of various communicative media. These institutions would resist one-dimensional motivational imperatives and would seek to liberate the potential of collective political judgment from these restrictions.

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ORCID iD

Gunther Teubner  <https://orcid.org/0000-0002-2839-7578>

Notes

1. Bourdieu pays his tribute to Marx and Engels with the argument 'that in the last analysis', 'economic capital is at the root of all the other types of capital' (1986a: 47).
2. On the question of whether or not a social configuration counts as a function system in the strict sense, see Moeller (2012: 29); Roth and Schütz (2015: 14).
3. This generalizes Luhmann's theses on the profit principle of the economy for other function systems (Luhmann, 1988a: 55ff). Occasionally, Luhmann uses the concept of surplus value metaphorically in a non-economic, particular legal context, but he does not work out a full-fledged theory of surplus value.
4. Foucault's discourse/power syndrome is not far away from Luhmann's theory of communication media and their motivating power (Foucault, 1979: 135ff). But Foucault conflates the concept of power to such a degree that the differences of the various communication media and their specific motivational effects get lost. Moreover, Foucault's aggregation of diverse disciplinary powers to the bio-power of the state ends up in a state-centrism that he initially wanted to avoid.
5. For more on this argument against both psychological and economic theories of the rational actor and replacing them by a sociological reformulation, see Hutter and Teubner (2000).
6. For an extensive treatment of the separation of psychic and social systems and their interrelations, see Moeller (2012: 79ff).

7. In the parable of the talents, Matthew 25, 14–30 and Luke 19, 12–27, arguably an early version of a generalized surplus value concept, the transfer of meaning takes place not as usually understood from the medium of money to the manifold talents of people, but to the communication medium of religion, i.e. to faith.
8. For various interpretations of the parable see Dupuy (1988) and the contributions in *Zeitschrift für Rechtssoziologie* (2000) 21 and *Droit et Société* (2001).
9. This implies powerful normative prescriptions which seem not to be visible for Emiliios Christodoulides' eyes: 'While Polanyi's diagnosis – of the disembedding of the economy from European society – is painfully relevant, his prescription is painfully unavailable' (Christodoulidis, 2013: 638). But, of course, Polanyi's prescriptions are definitely more moderate than Christodoulidis would like to have them.
10. These arguments transfer Polanyi's and Klein's ideas on false commodities and their replacement with non-market-institutions from the economy to other social systems: Klein (2020); Polanyi (1991 [1944]).
11. Worker participation is a successful case for a political counter-institution to the prevailing economic rationality in enterprises, Luhmann (2018 [1966]).

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