Constitutions of Value

An Introduction

Feichtner, I.; Gordon, G.

DOI
10.4324/9781003221920-1

Publication date
2023

Document Version
Final published version

Published in
Constitutions of Value

Chapter 1

Constitutions of Value

An Introduction

Isabel Feichtner and Geoff Gordon

The contributions to this book are the fruits of the research project "Constitutions of Value".[1] They are based on presentations and discussions at two workshops – one that we convened at the University of Würzburg on 12 and 13 December 2019 and another that we held during the COVID pandemic online on 10 and 11 December 2020. In March 2020 we published preliminary and shortened versions of some of the contributions to the first workshop as a blog symposium.[2]

We had invited lawyers, an economist, a sociologist, a historian, a philosopher, and commons researcher and activist Silke Helfrich to think about the role of law, together with politics, economics, technology and science, in co-constituting practices of value production and valuation – or simply, in co-constituting value. In this introduction we seek to explain what we, as convenors and editors, have in mind when we propose the constitutional study of value as an avenue for scholarship that seeks to contribute to social-ecological transformation (section A) as well as our skepticism as regards prevalent calls for a greater values-orientation of policy and economics (section B). We also wish to indicate how the constitutional study of value might move beyond critique and towards a revaluation of value (section C). In order to do justice to the diversity of our authors' takes on value, this introduction in its last part distils additional themes that emerge from the chapters of this book, including the three reflections that we invited to point up paths not taken and potential pitfalls of a constitutional study of value (section D).

A. The Constitutional Study of Value

A starting point and motivation for this project's turn to value is the observation of the society- and world-(un)making effects of value. Practices of value

1 This project was funded with a grant from the state of Bavaria for the project "Democratizing Money and Credit" which was part of the research network ForDemocracy.

2 I. Feichtner and G. Gordon (eds.), 'Constitutions of Value', Verfassungsblog, March 2020, online at https://verfassungsblog.de/category/debates/constitutions-of-value-debates/.

DOI: 10.4324/9781003221920-1

production and valuation shape and make worlds. They also unmake worlds, have severe destructive effects and lie at the heart of today's interlocking crises. The worlds produced by current value practices are dystopian: they are characterized by violence, extraction and destruction that have taken us to the verge of global ecological and societal collapse. A project invested in change, therefore, must address value. Against the background of an analysis of the world-making effects of value, the reconfiguration of value becomes unavoidable and key to social-ecological transformation and a democratization of society.

With the project that has led to this book, we envisaged a collaborative study of value with two aims in particular: 1) a better understanding of how value and valuation are socially and materially – and in particular *legally* – constructed, on which basis 2) to prepare the ground for proposals for institutional experimentation and re-design to reshape practices of value production and valuation, with the objective of limiting their destructive effects, of reconstituting social relations and of revaluing value. We call this endeavour the "constitutional study of value". We use the adjective "constitutional" as we seek to explore the practices and institutions at the core of value production, its hardware, its central *constitutive* elements – with a focus on law as a significant building-block. This critical inquiry shall serve as a basis for reconfiguring, redesigning and revaluing value. Yet, our project should not be mistaken for one of constitutionalization understood as a project of restraining the excesses of value production by a legal framework of a higher order, drafted and interpreted by experts and imposed in a top-down manner.[3]

The world- and society-(un)making effects of value practices have prompted not only our own study of value. While within the liberal conception of state and society there is a notable absence of an engagement with value, scholarship on value is on the rise again, frequently taking inspiration from Karl Marx.[4] With David Graeber we understand value as "the way in which actions become meaningful to the actor by being incorporated in some larger, social totality".[5] And with Marx we see value as a function of historically contingent configurations of social and economic relations, and in turn that the construction of value also shapes relations, including relations with the non- or

3 Rather the project bears similarities with societal constitutionalism which is at the centre of the work of Gunther Teubner, including his contribution to this volume; see also G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (2012).

4 D. Graeber, *Toward an Anthropological Theory of Value* (2001); D. Graeber, 'It is Value that Brings Universes into Being', (2013) 3 *HAU: Journal of Ethnographic Theory* 219; M. De Angelis, *The Beginning of History. Value Struggles and Global Capital* (2007); F.H. Pitts, *Value* (2020); D. Harvey, 'Value in Motion', (2020) *New Left Review* 126; see also sociological work in the rather recent field of "valuation studies": C.-F. Helgesson and F. Muniesa, 'For What It's Worth: An Introduction to Valuation Studies', (2013) 1 *Valuation Studies* 1; M. Fourcade, 'Cents and Sensibility: Economic Valuation and the Nature of "Nature"', (2011) 6 *American Journal of Sociology* 1721.

5 Graeber, *Toward an Anthropological Theory of Value*, at xii.

more-than-human world.[6] Under the configuration of a capitalist political economy, economic surplus value becomes determinative in the formation of these relations and society as a whole.

Marxian *Wertkritik*, as formulated by Robert Kurz, and introduced by Klaus Kempter in this volume, goes so far as to hold that value in our capitalist political economy has totalizing effects and structures society in its entirety. According to *Wertkritik*, the drive towards surplus value production – Marx's automatic subject – brings (a particular) society into being. From this perspective, surplus value production in the form of money determines and explains the *totality* of society and not just the structure of the economy. It is "subjecting [human beings] totally and making them mere functionaries of an anonymous process that is beyond their control".[7] According to *Wertkritik* this operation of value is responsible for the three global and interlocking crises of environmental destruction, imperial (and potentially nuclear) wars as well as economic precarity and inequality. We note, however, that where *Wertkritik* ascribes to economic surplus value a totalizing function in the formation of society, Gunther Teubner, in his chapter to this volume, sees different modes of surplus value production at work in functionally differentiated societal subsystems. As Teubner explains, surplus value can be understood as the motivating force that drives operations in each subsystem – taking the form of money in the economy, power in politics, reputation in science, judicial authority in law. While Teubner does not agree with *Wertkritik* with respect to the totalizing force of economic surplus value, he nonetheless recognizes the society-forming effects of value, as well as the destructive, exploitative and expropriating implications of the drive for surplus value production.

Despite the plausibility of Teubner's suggestion that in our current societal configuration of functional differentiation it is not just economic surplus value that has society-making effects, many of the contributions to this volume focus on economic value. The extreme discontents that are the consequence of economic surplus value production and its legal constitution and protection – such as colonial displacements of indigenous ways of life (Christine Schwöbel-Patel), climate catastrophe (Julia Dehm), exploitation and commodification of workers (Florian Hoffmann) and nature (Oliver Schlaudt) – explain this emphasis.

Even though value production is central to the economic sphere, the discipline of economics currently has little to offer on value.[8] Mainstream (neoclassical) economics largely abandoned value theories. Several contributions to this volume point out how neoclassical economic theory does not identify material anchors of the value of commodities. How, instead, it refers to individual preferences as a (purportedly) subjective measure of value (utility) that

6 K. Marx, *Das Kapital* (1867), vol. 1.
7 Kempter in this volume, at 51.
8 For a recent effort to remedy this lack of attention, see M. Mazzucato, *The Value of Everything* (2018).

preexists exchange and which, aggregated, assumes an objective role in price formation. The contributions to this volume reject this neoclassical approach that replaces value with (perceptions of) individual utility and treats profit and value as equivalent. Likewise, the constitutional study of value seeks to go beyond the problematization of the separation of a real from a financial economy – with the real economy being understood as the place of value production (which is generally socially desirable and, through policy, can and should be aligned with social values) and the financial industry as a site where socially undesirable value *extraction* is taking place that should be restricted.[9] Though we find such problematizations of value from within the field of economics to be productive, we do not hold them to be sufficient in so far as they do not question more fundamentally the role of exchange value in structuring relations of production, consumption and exchange.[10]

Instead of building on the neoclassical understanding of value, contributions to this volume understand value as anchored in particular societal and material configurations and practices, and in doing so draw on renewed relational conceptions of economic value. Such a renewed relational understanding of economic value is formulated by André Orléan:

> I refuse to accept that economic value can be identified with a property, whether utility or any other, that preexists exchange. It must be considered instead as something that is uniquely the product of market relations, through which the commercial sphere itself attains a separate existence, independent of other social activities.[11]

Value is the product of relations.[12] Thus, when we take in this project inspiration from Marx, we do not do so in search of an objective value theory; nor to make the point that labour is (or should be) the only source of surplus value.[13] Marx's as well as Graeber's works serve for us as inspirations because they clarify the social relations underlying and reproduced by value practices, as well as their social and material – their world-making – effects. Moreover, Marx and Graeber both place questions of distribution squarely at the centre of attention – who wins and who loses, who exploits and who/what is being exploited by current value practices, how is value distributed within

9 Ibid.

10 For a convincing critique of the attempts to distinguish value production in the real economy from value production in the financial sector, see D. Alessandrini, *Value Making in International Economic Law and Regulation* (2016).

11 A. Orléan, *The Empire of Value: A New Foundation for Economics* (2014), at 4.

12 For more critique and elaboration of relational theories of value, see Pitts, *supra* note 4.

13 See, however, Clair Quentin's contribution to this volume that not only reads current efforts at equity in international taxation through the lens of a classical labour theory of value, but also makes the normative point that proposals in political economy to abandon the labour theory of value in an attempt to politicize value may be detrimental to global justice concerns.

and across societies and how is this distribution being sustained and justified? The relational understanding of value that pays close attention to questions of distribution further enables us to study value as a product of collective societal organization and to understand the institutions that produce, distribute and measure value as institutions of governance. In this vein, Christine Desan, in her chapter, deconstructs the understanding of value as an expression of individual preferences that precede exchange and reveals money as a governance technology that distributes value unequally across members of society.

While we rely on value as an analytical concept to understand the structure of society, our constitutional study of value further builds on the anthropological critique of value introduced by Fabian Muniesa in this volume. This approach, which draws on the works of Michel Foucault, does not examine value as an analytical concept, but is interested in notions of value as vernacular concepts. It seeks to understand how certain terms and notions regarding value and valuation come to enjoy a common-sensical authority, how rhetorics, techniques, routines and vocabularies of value and valuation – for example "true value", "undervaluation", "overvaluation", etc. – consolidate truth regimes. By looking at value as a vernacular phenomenon supporting truth regimes that in turn make some institutional practices viable and others not, the anthropological perspective deepens our understanding of value as a governance technology. We observe how notions of value that originated in the realm of finance and investment, how the "investor's gaze" has become influential far beyond that sphere and today determines policy-making, legislation and adjudication. Muniesa not only presents the anthropological study of value, but further points to the importance of inquiring into the operations of law and lawyers in sustaining governance regimes that rest on particular notions of value, in particular those that justify privileging the investor's gaze. The vernacular approach to value figures prominently across diverse contributions to this volume, including Toni Marzal's critique of the valuation of damages in international investment disputes, Clair Quentin's observations on policy debates prompted by the Organization of Economic Cooperation and Development's proposal to allocate the tax base where value is created, Dimitri Van Den Meerssche and Geoff Gordon's account of emerging legal-technological governance regimes, and Julia Dehm's account of how the value of nature is made legible by techniques of natural capital accounting.

In sum, our constitutional study of value inquires into the practices and institutions that co-constitute value production and valuation processes as well as the accompanying rhetorics and justifications. In conducting this inquiry from a legal vantage point, we place a particular focus on the constitutive role of law in value production and valuation, while aiming to pay sufficient attention to further constitutive forces, including politics, economics, technology and science.

As concerns the *legal dimension* of this examination, we propose a shift away from the usual suspects of legal scholarship that aims at progressive change.

Legal scholarship often looks to courts as well as regulators for the application and creation of law to improve the workings of the market and to contain the destructive effects of value production. Courts are called upon to defend and protect values (think for example of strategic climate and human rights litigation); regulation is called for to curb value extraction and to "re-define value", for instance to achieve a circular economy.[14] From our elaborations so far, it should be clear that this is not what we have in mind (and we explain a related skepticism of values (in the plural) as a remedy to the excesses of value production in more detail in the next section). We are not so much interested in corrections through court intervention or regulation, but in understanding how law is co-constitutive in bringing about what courts and regulators then are called upon (often unsuccessfully) to correct.[15] In this endeavour, our project joins forces with others who seek to clarify the central place of law in political economy, including lawyers and social scientists who follow the law to dismantle the black boxes of institutions such as money, capital, the corporation, global value chains. We take inspiration from the work of Christine Desan on money (including her contribution to this book).[16] Yet, we extend the purview of our project beyond the legal design of money to further institutions as well as social and technological dynamics that are central to value production and valuation. The attention to the role of law in *value* production and *valuation* processes gives our project its transformative horizon of alternative valuations – beyond other projects that examine the role of law in political economy[17] – though admittedly these distinctions are not hard and fast. In this volume, the contributions by Christine Desan, Anna Chadwick and Jamee K. Moudud go to the institutional heart of economic value production with their examinations of the internal and external governance dimensions of money as well as the legal constitution of the firm.

A final set of questions regard the project's constructive or utopian orientation – its quest not only for less destructive but for transformative value

14 See, e.g., N. Nasr, J. Russel et al., *Re-Defining Value - The Manufacturing Revolution: Remanufacturing, Refurbishment, Repair and Direct Reuse in the Circular Economy*, (2018) Report of the International Resource Panel, UNEP.

15 Cf. G. Gordon, B. Rieder and G. Sileno, 'On Mapping Values in AI Governance' (2022) 46 *Computer Law & Security Review* 105712.

16 C. Desan, *Making Money: Coin, Currency, and the Coming of Capitalism* (2015); C. Desan, 'Decoding the Design of Money', (Feb.–Mar. 2015) *The European Financial Review*, 24; C. Desan, 'The Constitutional Approach to Money: Monetary Design and the Production of the Modern World', in N. Bandelj, F. Wherry and V.A. Zelizer (eds.), *Money Talks. Explaining How Money Really Works* (2017), 109.

17 For just two more examples, see K. Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (2019); and J. Britton-Purdy et al., 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis', (2020) 129 *The Yale Law Journal* 1600. The rather recent scholarship on Law in Political Economy builds on older works of legal realists such as Robert L. Hale and institutional economists such as John R. Commons.

practices and the revaluation of value. Recognizing the world- and society-making effects of processes of value production and valuation, and understanding that value is not a thing, but the product of social relations, institutions, processes and practices co-constituted by law, becomes the basis for thinking about institutional re-design and experimentation.[18] With respect to our aim for a revaluation of value, a number of questions have emerged in the course of this project that we wish to flag here as items for further study. Several contributions, in particular those by Dehm, Muniesa and Schlaudt, point to the drawbacks of attempts to "correct" economic valuations in order to adequately account, for example, for the value of nature or human labour. These drawbacks include reductionism, which Sofia Stolk meditates on in her reflection, and the risk of expanding commodification and perpetuating a world in which the value of things and beings is limited to their exchange value as assessed from an investor's gaze. A project aimed at radical critique and transformation may thus be faced with a choice between, on the one hand, doing away with value altogether (as proposed by Kempter) or, on the other hand, restraining and taming value (as proposed by Teubner). Or is there another alternative, by which value may be *revalued* so that it remains a force of motivation, societal integration[19] and abundance,[20] in ways that are not destructive but supportive of life, solidarity and care? We return to this constructive dimension of the project in section C of this introduction, where we refer to commoning as a potential path to transformation and revaluation.

B. Contrasting the Constitutional Study of Value with Calls for "Bringing Back Values"

While we further elaborate our vision for a transformative project in section C, we first use this section to distinguish our constitutional study of value from other progressive projects that aim to revisit or redeem value – especially because discourses on values (in the plural) and value (in the singular) have become such a ubiquitous, if ambivalent, part of the current moment. To mention just a few examples of debates on value and values: for several years now, debates have been ongoing in academia as well as outside on how to prevent, resist and sanction an erosion of the EU's "fundamental values". Political movements (especially on the right of the political spectrum) organize around and justify their politics with "a defense of values". EU policy documents for the Digital Decade, as pointed out by Van Den Meerssche and Gordon in their

18 As concerns institutional design and institutional experimentation in the process of social-ecological transformation, the constitutional study of value builds on the work by Roberto Unger; see e.g., R. Unger, *Democracy Realized: The Progressive Alternative* (1998).

19 Graeber, *supra* note 4.

20 B. Massumi, *99 Theses on the Revaluation of Value: A Postcapitalist Manifesto* (2018).

contribution to this volume, note the importance of European values in guiding the regulation of new technologies. The German government advocates for a values-led foreign policy. As concerns value (in the singular), the diagnosis that (economic surplus) value production is at the root of social-ecological crises, that it is a cause of extinctions, expulsions and exploitations is widely shared. Investments in fossil fuels and their assetization[21] contribute to the climate crisis and impede mitigation efforts (as explained by Dehm in this volume); value creation through financialization is responsible for financial instability, price hikes of food and housing and aggravates social inequality. The International Resource Panel, an international institution aiming at responsible production and consumption (in accordance with Sustainable Development Goal 12) puts forward proposals on "re-defining value" to make headway towards the circular economy.[22] Since the financial crisis, the discipline of economics is evidencing a renewed engagement with value in which distinctions between the finance industry and the real economy, between "value extraction" and "value creation"[23] figure prominently as alluded to above.

Given the ubiquity of value(s) discourses, we want to explain why, in this project, we deliberately sought to put the focus on value (in the singular) and not on values (in the plural) and what distinguishes our perspective from other contemporary engagements with values and value. In the following, we therefore juxtapose our proposal for a constitutional study of value with what we call here the "values-approach to value". We use this label to cover a variety of research projects within economics and the social sciences that link debates on values and value and posit that the production of value (in the singular) should be guided by values (in the plural).[24] These projects frequently diagnose a "decoupling" of the economy and politics from societal values. Such decoupling is regarded as one reason for an economy that produces value at the cost of excessive social and environmental "externalities" and a politics unable or unwilling to contain these destructive excesses of economic value production.[25] This diagnosis is then followed by a prescription for "recoupling", i.e., a call on researchers and policy-makers to help bring economic value production (back) in line with societal, moral and constitutional values. Values, under this approach, shall serve as an orientation and corrective to destructive processes

21 K. Birch and F. Muniesa (eds.), *Assetization: Turning Things into Assets in Technoscientific Capitalism* (2020).

22 N. Nasr et al, *supra* note 14.

23 Mazzucato, *supra* note 8.

24 Mazzucato, *supra* note 8; K. Raworth, *Doughnut Economics: Seven Ways to Think Like a 21st Century Economist* (2017); M. Gabriel et al, *Towards a New Enlightenment. The Case for Future-oriented Humanities* (2022); see also the research programme *Socio-Economic Transformation* directed by Dennis Snower at THE NEW INSTITUTE, online at https://thenew.institute/en/programmes/socio-economic-transformation.

25 Cf. Gabriel et al., *supra* note 24.

of value production. Steps and instruments in the process of recoupling include the identification of indicators of the common good and new measurements of social progress,[26] as well as nudges that are "tapping into underlying norms and values".[27] Values made measurable by indicators are to inform policy proposals that can then be implemented in the form of legal regulation.

In law, too, a frequent observation holds that economies based on value extraction harm social values – social values that are held to be embodied *inter alia* in constitutions and international agreements. Attempts at "recoupling" in international law scholarship, in this vein, often take the form of calls for more and more effective legal instruments for the protection of human rights and the environment as well as for the better integration of societal concerns with economic value production. Such proposals for integration (recoupling) abounded at the high point of the constitutionalization and fragmentation debates. Countless "trade and…" books put forward doctrinal arguments for the integration of international economic law with human rights and environmental protection regimes.[28] Ernst-Ulrich Petersmann even argued for a reconstruction of WTO law as a Kantian constitution of world trade that restricts power and protects human rights.[29] Geopolitical changes as well as postcolonial critiques had the effect that international lawyers today are more hesitant to reconstruct international law as a constitution that gives expression to the values of an international community. "Recoupling", however, remains a prevalent theme in international law, most apparently perhaps in the ongoing "business and human rights" debates. More "modest" proposals seek to narrow the perceived gap between the law and practice of a globalized economy, on the one hand, and non-economic normative commitments on the other, through the infusion of virtue ethics into organizations of business and government[30] and the establishment of new legitimacy narratives based on institutional ethics[31] to align value production with social values.

26 See "The Recoupling Dashboard 2020", online at www.global-solutions-initiative.org/recoupling-dashboard-homepage/recoupling-dashboard-2020/.

27 Raworth, *supra* note 24, at 125.

28 See, e.g., H. Hestermeyer, *Human Rights and the WTO* (2007); M. Böckenförde, *Grüne Gentechnik und Welthandel* (2004); J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (2009).

29 E.-U. Petersmann, 'Human Rights, International Economic Law and "Constitutional Justice"', (2008) 19 *European Journal of International Law* 769.

30 J. Klabbers, 'Controlling International Organizations: A Virtue Ethics Approach', (2011) 2 *Helsinki Review of Global Governance* 49; J. Klabbers, 'Law, Ethics and Global Governance. Accountability in Perspective', (2013) 11 *The New Zealand Journal of Public and International Law* 309.

31 R. Howse and K. Nicolaïdis, 'Toward a Global Ethics of Trade Governance: Subsidiarity Writ Large', (2016) 79 *Law and Contemporary Problems* 259.

The constitutional study of value differs in various respects from the values-approach, including the just described proposals in legal scholarship to recouple, integrate and constitutionalize. It doubts that guidance by moral and social values can contain the excesses of (economic surplus) value production. To further specify our own perspective, we focus on three points of divergence: first, the differing understandings of values as corrective versus values as accomplice; second, the envisaged pathways of change; and third, the modes of critique.

B.1 Values as Accomplice

We turn to our first discontent with the values-approach: our view that the values-approach overestimates the function that social values can play as a *corrective* to the excesses of (economic surplus) value production. The reason for this assessment lies in the complicity of values in practices of violent and destructive economic value production. The history of colonialism reveals how the professing of liberal values coincides with the establishment of capitalist value practices at the cost of displacing alternative economies and ways of life, and how these values enable and sustain such value practices. The complicity made visible by colonial practices calls into question the diagnosis that contemporary crises are prompted by a decoupling of value from values, and allows us to understand the current state not as a deterioration of a desirable status quo, but to see the ways in which values perform a facilitating and legitimating function for economic value production. Colonial history, thus, helps us to reverse the perspective on the relationship between values and value: to see it not as a relationship of a continuous frustration of social and moral values by practices of value production, but rather as a relationship in which values work to enable and sustain value production. Our point is not that the values are false or a sham, but that whatever else they may do, they actively work in a capitalist society to sustain economic value production.

The short history of German colonialism is instructive in this respect.[32] The German Empire, compared to other European states, was rather late in acquiring colonies in the Pacific, China and on the African continent, when chancellor Bismarck in the 1880s changed course and proclaimed territorial sovereignty over lands "acquired" by merchants and colonial companies in the Southwest of Africa, today's Namibia. Making the colonies "profitable" was a political concern throughout German colonization. Economic profitability gained heightened attention in legitimizing the colonial project after the colonial wars and the genocide of Herero and Nama populations had prompted

32 We draw in this section on I. Feichtner, 'Koloniales Wirtschaftsrecht und der Wert der Kolonisation', in P. Dann, I. Feichtner and J. von Bernstorff, (*Post-)Koloniale Rechtswissenschaft* (2022 – forthcoming); foundational on the implication of liberal ideas in colonization: O. Ince, *Colonial Capitalism and the Dilemmas of Liberalism* (2018).

critique of the colonial project in Germany. After the genocide, German colonial politics took a "liberal turn" which prepared the ground for the colonies' integration into a global capitalist economy, in particular through the building of thousands of kilometres of railways. Prominent liberals, among them Bernhard Dernburg who headed the Colonial Office of the Reich and his (initially) good friend and adviser, the German industrialist Walther Rathenau, criticized previous colonial policy and administrations that had aimed for domination and extinction of the Black populations of the colonies. They advocated not only for the rationalization and scientification of colonial policy, but also a turn from a mode of extinction and domination in relating to local populations to one of welfare and care (*Fürsorge*). Their progressive moral arguments were joined with progressive economic ones. The Africans, they argued, were the "most valuable economic activum" of the colonies.[33] They were thus to be cared for and not destroyed. Forced and slave labour were to be replaced by "free labour". Welfare and care were recognized as essential in putting this "activum" to work, *inter alia* in railway construction.

The point we wish to underline here is that the turn to recognizing the basic needs of the colonies' Black population, that this turn to "values" did not put an end to colonial violence. Forced displacements – primitive accumulation in Marxian terms – continued in order to enable economic value production and integrate populations, as workforce and consumers, into the global capitalist economy. They were a precondition for people to become not only wage labourers, but also tax payers and as such an important guarantee for the debts that the colonial state incurred, *inter alia* to finance the building of railways.[34] Only once the local population was no longer able to live off the abundant fruits of their land would they be willing to sell their labour in exchange for a salary that would pay for commodities required to satisfy their basic needs.[35] Before the "liberal turn", expropriations and expulsions had already done much to establish a state of scarcity. Yet, even after the denouncement of brute force, other instruments remained at the colonizers' disposal to produce and sustain scarcity and thus "gently" to force people to assume their new roles as wage labourers and consumers – among them land reforms and tax laws. During this process of establishing scarcity, alternative economies and whole cosmologies and ways of life were displaced and destroyed, and durable dependencies were created.[36] The violence behind this integration and dependency may have changed its forms over time, but it has not disappeared.

33 W. Rathenau, 'Erwägungen über die Erschließung des Deutsch-Ostafrikanischen Schutzgebietes', in Büttner et al. (eds.), *Schriften der Wilhelminischen Zeit 1885–1914* (2015), at 583

34 R. Luxemburg, *Die Akkumulation des Kapitals. Ein Beitrag zur ökonomischen Erklärung des Imperialismus* (1913); Parvus, *Die Kolonialpolitik und der Zusammenbruch* (1907).

35 For contemporary justifications of various forms of forced labour, see this dissertation in law: A. Bauer, *Der Arbeitszwang in Deutsch-Ostafrika (*1919).

36 A.G. Frank, *The Development of Underdevelopment* (1966).

Against this background, values such as freedom, provision for basic needs, and corporate social responsibility appear as part and parcel of an ongoing colonization and integration into the realm of economic value production of ever more spheres of life and geographies, including recent expansions of resource extraction into the deep sea and outer space.[37]

We have used the historical example of German colonialism to illustrate the complicity of values in value production and to criticize the framing of current crises as the outcome of a "decoupling" of value from values. Where the values-approach to value sees a "decoupling", the constitutional study of value seeks to draw out colonial continuities. In this volume, such colonial continuities and complicity are addressed in the chapters by Christine Schwöbel-Patel, Oliver Schlaudt, and Clair Quentin as well as in the reflection by Jessie Hohmann. Schlaudt complexifies our description in this introduction of colonial continuities. He points to the significant difference between violent colonial expropriations on the one hand and exchanges that follow the liberal "rules of the game" on the other. Today's rules of production and exchange invisibilize inequalities and violence. One way to make visible contemporary unequal exchanges between the Global South and Global North is to apply measures of value that differ from exchange value. Florian Hoffmann, with reference to Marx, emphasizes not only the historical, but also the conceptual interdependencies between value production and liberal rights (often posited as values).[38] Despite acknowledging the complicity of rights in the violence of capitalist value production, however, Hoffmann cautions against discarding and dismissing rights too swiftly, and stresses their emancipatory potential in resisting the commodification of human beings.

B.2 Pathways of Change

The second difference between the constitutional study of value and the values-approach that we wish to highlight, concerns pathways of change and transformation. The values-approach envisages *inter alia* the translation of societal values into indicators and policy prescriptions. Legal documents such as constitutions and international treaties are frequently invoked as the codification of these values. Here we want to question to what extent such indicators and policy prescriptions are able to change the mechanics of value production.

37 For such colonial continuities in today's human rights law and corporate social responsibility, see G. Baars, *The Corporation, Law and Capitalism* (2019).

38 It is an omission that this book does not more squarely address value in the context of racialized capitalism. We wish to thank Robert Knox for adding this perspective to our workshops. See R. Knox, 'Haiti at the League of Nations: Racialisation, Accumulation and Representation', (2021) 21 *Melbourne Journal of International Law* 245; R. Knox, 'Valuing race? Stretched Marxism and the Logic of Imperialism', (2016) 4 *London Review of International Law* 81.

Our doubts can be substantiated based on the critique of political economy as reconstructed, for example, by Kempter in his chapter. An illustration of the impotence of policy-makers to escape the demands of economic surplus value production can be found in contemporary policy documents. As Van Den Meerssche and Gordon point out in their contribution to this volume: while EU policy documents on data governance postulate that the EU data infrastructure shall be informed by European values, a closer look reveals how these "values encompass a still impressionistic and sometimes contradictory mix that prioritizes free market mechanisms, privileging competition and private property ownership by individual entities".[39]

Systems theory offers a further explanation for the limited purchase that values-informed policy prescriptions may have over value production: if different societal spheres work according to different logics and on the basis of communication in different media (money in the economic system and power in the political system), then policy and legal prescriptions will not suffice to align value and values. Neither the legal nor the political system can simply redirect the course of value production in the economic system on the basis of moral or other values. These are the reasons why the constitutional study of value concentrates on the institutions, procedures and practices – the mechanics or *hardware* – of value production. It does not place its bets for social-ecological transformation on values serving as correctives, nor on a "recoupling" of values and value as a plausible remedy to destructive value production, but rather on a rewiring of value production itself.

We also wish to draw attention to the potentially antidemocratic implications of the enlistment of values in projects of transformation. When lawyers, past and present, have interpreted constitutions and international treaties as value orders,[40] this not seldom has had the effect of stabilizing the status quo and working against efforts of democratization and redistribution of power and resources.[41] In recent decades, the tendency of lawyers to engage in the kind of antidemocratic legal analysis that aims at building a coherent system or "rule of law" on the basis of values or principles can be observed in the field of international investment law. Acting as scholars, counsellors and arbitrators, international investment lawyers have reconstructed, from a multitude of

39 Van Den Meerssche and Gordon in this volume, at 241. See also, G. Gordon, 'Digital Sovereignty's Quantum Futures' (text on file with editors).

40 See, e.g., A.v. Bogdandy, *Strukturwandel des öffentlichen Rechts: Entstehung und Demokratisierung der europäischen Gesellschaft* (2022); and the critique by F. Meinel, 'Auch keine Philosophie der europäischen Integration', (2022), *Soziopolis,* online at www.soziopolis.de/auch-keine-philosophie-der-europaeischen-integration.html.

41 R.M. Unger, *What Should Legal Analysis Become?* (1996); H. Ridder, *Die soziale Ordnung des Grundgesetzes* (1975); for an introduction to Ridder's constitutional thought, see I. Feichtner, 'Helmut Ridder´s gesellschaftskritische Rechtswissenschaft und die demokratische Gesamtverfassung', in I. Feichtner and T. Wihl (eds.), *Gesamtverfassung. Das Verfassungsdenken Helmut Ridders* (2021), 11.

diverse treaties, a multilateral system[42] – a "metaconstitution" – predicated on an expression of individual rights and rule of law (values!) that severely restricts the scope for democratic politics and sustains given distributions of power and property. In this volume, Julia Dehm points to these antidemocratic effects and Toni Marzal focuses on one particular element of this "metaconstitution" of investment protection, namely the valuation of damages. Marzal shows how a formerly diverse practice has converged around a particular method of damages calculation and how in this process arbitrators have transferred authority to economists and their valuation techniques that eschew questions of distributive justice.

The constitutional study of value, too, must come to grips with its implications for democratic self-governance. With our proposal to engage in institutional (re-)design and experimentation, we do not want to advocate social engineering. To the contrary, we hold our study to be more easily reconcilable with democracy than the values-approach. Where variants of the values-approach tend to narrow the scope for democratization – for example when constitutions are read and consolidated as "value orders" from which specific policy prescriptions can be derived – the institutional analysis and re-design proposed by the constitutional study of value may open avenues for democratization. By setting out the distributive consequences of existing institutional designs and by proposing alternative institutional experiments, it not only offers choice. More importantly, alternative institutional experiments may be steps towards the democratization of social spheres heretofore relatively insulated from democratic self-governance[43] – think, for example, of projects to democratize the institutions of money and work.[44]

B.3 Modes of Critique

Our third and final point of divergence concerns the mode of critique. It is captured by the Marxian distinction between "vulgar" and "true critique" – as explained by Christoph Menke.[45] Vulgar critique brings into position the good against the real and its social and political effects; i.e., it assesses practices (for example of value production) against an external standard of morality or values. In this sense, the values-approach can be understood as engaging in vulgar critique when it bemoans a decoupling of value from values. True critique, by contrast, addresses the internal genesis of the thing that is being critiqued. Applied to capitalist value production, it would mean to reveal the necessity of

42 S. Schill, *The Multilateralization of International Investment Law* (2010); against "multilateralization" and "constitutionalization", M. Sornarajah, *The International Law on Foreign Investment* (2021).

43 Unger, *supra* note 18.

44 I. Ferreras, J. Battilana and D. Meda, *Democratize Work. The Case for Reorganizing the Economy* (2022); A. Riles, *Financial Citizenship* (2018).

45 C. Menke, *Kritik der Rechte* (2015), 11–12.

surplus value production through an analysis of its genealogy and to confront the practice of surplus value production not with moral intentions (values) but with its genesis. From this mode of critique, then, a radical objection may be formulated against that which exists.[46] Relating back to our brief note on German colonialism, true critique would mean not to lament how the liberal colonialists failed to fully implement the values they professed, but to reveal the implication of the professed values in the value production that requires and sustains violent displacements of alternative ways of producing and provisioning.[47] Similarly, Muniesa, in his contribution to this volume, describes the critique that the anthropological study of vernacular concepts of value as political technologies engages in, as "pressuring the conditions in which concepts can or cannot make sense and thus operate".[48]

C. Towards a Revaluation of Value

In this section we reflect on possible ways ahead. As explained above, the world-making effects of value – and the destruction in the course of value production of other worlds and relations – were the motivating force for this project. While we sought to make value the subject of our critical inquiry, our aim was to go beyond the formulation of radical objections. Beyond critique, we envisaged engagements with institutional re-designs and experiments. In this respect, we remain unsatisfied with the fruits of our project. While Outi Korhonen and Juho Rantala in their chapter gesture towards a utopian alternative future enabled by blockchain technology, the utopian and constructive ambition of our project overall remains underdeveloped.

We can think of several reasons for the hesitation to engage in institutional imagination. We have hinted at one of them already – the reluctance to propose legal fixes in line with a type of legal (constitutionalist) scholarship that we critiqued for its antidemocratic implications. Anna Chadwick in her chapter spells out another one. She draws pragmatic attention to the political, economic and legal limitations as regards the redesign of money, in particular in political economies of the Global South that are highly dependent on foreign investments and the dollar as reserve currency. And in a similar vein John D. Haskell in his reflection points to the hubris of a project that is made up, in the main, by (legal) academics and aims for radical transformation. Reluctance to think about alternative value forms, institutional designs, experiments and practices, may thus be read as self-restraint whether in light of the limited agency or undue aggrandizement of lawyers and academics in general. Perhaps

46 For this mode of critique in international law, see S. Marks, 'Human Rights and Root Causes', (2011) 74 *The Modern Law Review* 57.

47 Cf. Ince, *supra* note 32.

48 Muniesa in this volume, at 172.

there is also a shared sense of a lack of political momentum for radical change in the current moment.

Looking ahead, we nonetheless want to introduce a potential way forward by linking our project to the practice-theory of commoning. We thus also wish to acknowledge Silke Helfrich and the impact that she and her work have had on our thinking on value. Engagements with commons and commoning, including the work of Helfrich and her collaborator David Bollier, have flourished outside the institutions of academia. Building on Elinor Ostrom's work on democratic practises in the collective management of common resources, they significantly expand this research.[49] Their focus is not only on the collective management of shared resources that fit the definition of common pool resource. Instead, they focus on processes of commoning, i.e., democratic practices that aim at the management of, and care for, shared resources but equally at the collective, democratic and cooperative organization of the production, administration and distribution of goods to satisfy the needs and desires of collectives and their members. The commons thus produced include knowledge, seeds, food, digital infrastructures, urban space and many more.[50]

The aim of commoning is often formulated as the reclaiming of common wealth. Movements to claim and reclaim common wealth have been manifold throughout history and are on the rise again today. In the 1970s, for example, the peoples of the former colonies claimed the seabed as a global commons. They insisted that it be recognized as the common heritage of humankind in order to prevent a neocolonial scramble for the riches of the Ocean floor. On a local level, in many cities today people organize to reclaim urban space as their common wealth. Civil society initiatives to repurpose abandoned buildings, to de-privatize and socialize housing are just a few examples. Commoning initiatives also exist in the realms of food and digital technologies.[51] Resisting appropriation and attempts at deprivatization and decommodification are necessary, but not sufficient to create a commons. The example of the deep seabed is telling: despite its designation as a common heritage, states eventually opted for a system of administration and exploitation based on the granting of private rights to competitively mine the Ocean floor.[52] More is thus needed than a

49 E. Ostrom, *Governing the Commons. The Evolution of Institutions for Collective Action* (1990). For an account of the current landscape of research on the commons and commoning, see S. Foster, Ch. Swiney, 'Introduction, Commons Research in the Twenty-First Century and Beyond' in S. Foster, Ch. Swiney (eds.), *The Cambridge Handbook of Commons Research* (2022) 1.

50 For numerous examples, see D. Bollier and S. Helfrich, *Free, Fair, and Alive: The Insurgent Power of the Commons* (2019).

51 On urban commons initiatives in Italy see Ch. Iaione, E. De Nictolis, 'The City as a Commons Reloaded: From the Urban Commons to Co-Cities Empirical Evidence on the Bologna Regulation, in S. Foster, Ch. Swiney (eds.), *supra* note 49, 124; on food as a commons see J.L. Vivero-Pol, T. Ferrando, O. De Schutter and U. Mattei (eds.), *Routledge Handbook of Food as a Commons* (2019).

52 S. Ranganathan, 'Ocean Floor Grab: International Law and the Making of an Extractive Imaginary', (2019) 30 *European Journal of International Law* 573; I. Feichtner, 'Sharing the Riches of the Sea: The

legal-constitutional fix such as the formal designation of the seabed as common heritage in order to turn a shared resource into a common. When it is recognized that commons are "self-organized social systems"[53] then the norms and institutions that are necessary to sustain these systems come into focus. Ostrom's research on the commons identified a number of design principles that characterize successful systems of collective government of the commons. Taking this work further, Silke Helfrich initiated the project of a pattern language of commoning. Inspired by architect Christopher Alexander's pattern language of design,[54] it aims at "mining" patterns from practical experiences in successful processes of commoning. The emerging pattern language makes that experiential knowledge of patterns mobile and thus available for application in comparable contexts in order to overcome recurring obstacles to commoning.[55]

The practice-theory of commoning is of particular relevance for the constructive-utopian dimension of our own project for the following reasons: first, it may give further direction to envisaged institutional design and experimentation. So far, we have formulated the democratization of society, including the economy, as an aim of transformative institutional experimentation. Commoning can help to concretize this aim. For instance, contemporary initiatives to de-privatize and reclaim housing as an urban commons work towards designing institutions that allow the inhabitants of a city collectively to decide how living and working space should be administered and distributed.[56] These projects for urban commons seek to create institutions to enhance democratic self-organization and satisfy basic needs through the fair provisioning of urban space; in this way they provide alternatives both to centralized municipal governance and the real-estate market.

Second, the project of a pattern language of commoning hints at ways to overcome colonial continuities and the antidemocratic effects of governance by experts. In its attention to successful practices of commoning, the pattern language project privileges vernacular knowledge and order[57] over abstract values and top-down prescriptions. It bears similarities with a decolonial approach to international law as proposed, for example, by Judge Weeramantry in his separate opinion in the case *Gabčíkovo-Nagymaros* before the International

Redistributive and Fiscal Dimension of Deep Seabed Exploitation', (2019) 30 *European Journal of International Law* 601.

53 *D. Bollier,* 'Reinventing Commons Governance in Modern Times', 7 October 2021, www.bollier.org/blog/reinventing-commons-governance-modern-times.

54 Ch. Alexander et al., *A Pattern Language: Towns, Buildings, Construction* (1977); see also Ch. Alexander*, The Nature of Order*, vols 1–4 (2002–2004).

55 J. Euler and S. Preissing 'Mustersprache des Commoning: Theorie, Methodik, Praxis', (2022) 45 *Zeitschrift für Gemeinwirtschaft und Gemeinwohl* 265.

56 An example is the initiative *Deutsche Wohnen & Co. Enteignen* in Berlin.

57 On vernacular order, see J. Scott, *Two Cheers for Anarchism* (2012).

Court of Justice. In this opinion, Weeramantry drew attention to precolonial practices of collective water management as a source of general principles that could specify the meaning of sustainable development.[58] Both approaches – to draw on practices that are decolonial, departing from the logics of (neo)colonial value extraction, and to aim at collective provisioning outside the realm of state and market – can be made productive for a new law of value production in current struggles for transformation. Another site that comes to mind, in addition to resource management, is food sovereignty.[59]

Finally, commoning opens possibilities for a revaluation of value. The concerns of commoning, namely deprivatization and decommodification and provisioning based on solidarity, responding to desire and need, suggest an abandonment of exchange value. Yet, surplus value (in a non-monetary form) may still play a role as motivation, integrating force and source of abundance. Christopher Alexander, one of the key figures behind the pattern language of commoning, influenced by the works of philosopher Alfred North Whitehead, was interested in what makes a good design. He referred to a "quality without a name" that designers should aim for. Attempting to specify this quality, he used terms such as alive, whole, free, egoless, eternal – not simply beauty or fitness for purpose. In German, this "quality without a name" has been translated with *Lebendigkeit* (vivacity).[60] What makes a good design or a viable institution, thus, is not determined by its correspondence to an external standard of values, but by whether it creates a surplus value of vitality and lived experience.[61] In order to achieve this aim, institutional design must draw on a wide range of experiences and expertise and employ all senses. We can see here diverse links to and possibilities in the contributions to this volume. One example is the reflection by Sofia Stolk, who demonstrates how poetry may further sensitivity and close attention to patterns and the "quality without a name". Another example is the anthropological study of value proposed by Fabian Muniesa. Commoning refocuses attention – away from vernacular concepts of exchange value originating in the realm of finance and investment and towards vernacular concepts of value and practices of valuation in spheres of collective production and provisioning guided by solidarity, needs and desires. The challenge for a constitutional study of value that aims beyond critique might then be to explore how the investor's gaze that looks for value in the form of a rate of (monetary) return on an investment may be rendered non-sensical. And how instead the commoner's gaze may be elevated to the new common sense.

58 Ch. Weeramantry, '*Separate Opinion, Gabcikovo-Nagumaros Project (Hung. v. Slovk.)*', (1997) I.C.J. 7 (September 25), 88.

59 Vivero-Pol et al. *supra* note 51; M. Fakhri, *Interim Report of the Special Rapporteur on the Right to Food*, 27 July 2021, A/76/237.

60 H. Leitner, 'Working with Patterns: An Introduction' in D. Bollier and S. Helfrich (eds.), *Patterns of Commoning* (2015), https://patternsofcommoning.org/working-with-patterns-an-introduction/.

61 Cf. Massumi, *supra* note 20.

D. The Contributions to this Volume – Additional Themes

To this point in the Introduction, we have elaborated a framework that we have developed over the course of our project. This "introductory" framework is in fact our take-away, or our conclusion based on three years of study and interaction with our contributors. Thus, this framework is not where the project started. Likewise, it does not encompass the scope of every approach to value and values brought to the project by our contributors. Rather the contrary: every contribution to this volume goes outside of the framework that we have settled on in one way or another. In part, it is in surveying this diversity of approaches to value that we have arrived at a relatively focused framework. The sheer variety of approaches to value and values has persuaded us that the place to start is a foundational one, to address the world-making properties of value, singular, and law's constitutive role in the value practices that sustain or unsettle it. Some contributions share this priority for value, but may identify the salient points of its singular character differently. Other contributions remain invested in multiple values. The plurality of perspectives and considerations has been crucial to our analysis, which remains open and unfinished. In this concluding section, we revisit the chapters in brief, to summarize some of the various themes taken up throughout this volume. We do not cover every theme in every contribution, but selectively highlight some of the diverse issues and debates that they have brought to this project. For this purpose, we have broken up this overview into subsections defined by the scale and subject of our contributors' interventions, addressing systems, institutions, techniques, technologies and ecologies.

D.1 Systems

Gunther Teubner works in the register of Luhmannian systems theory, which he has been instrumental in developing for legal studies. He focuses on the production of surplus value as the central feature of any subsystem of a functionally differentiated society – legal, economic, political, etc. In doing so, Teubner observes the driving force of capitalism at work across social systems: capitalism thus serves as an overall frame for the chapter, but the analysis into surplus value production and its discontents is decentred. In this vein, there is a key debate between Teubner and the chapter by Klaus Kempter. For both, capitalism is the frame, but for Kempter, surplus value remains centred on commodity production per se, whereas for Teubner, surplus value takes on distinct characteristics in each function system. In short, every function system must produce a surplus value central to its own operation in the medium of its communication: in politics, policy decisions must produce a surplus of political power; in law, legal decisions must produce a surplus of juridical authority. The surplus is that measure of power or authority (in the cases of politics and law, respectively) surpassing what is necessary to give effect to the decision in question, and so can be generalized and drawn on to reproduce and grow the system into the future. Significantly, Teubner takes pains to demonstrate that function system surplus values are institutional artefacts, not matters of individual motivation. Thus, his chapter, like the others in this volume, addresses the problematics of value production as relational phenomena. But Teubner specifies his programme with a tight focus on the communication medium and no other systemic "values". Identifying the surplus value in a legal decision, for example, requires separating out that part of the decision dedicated to deciding the particular case, from that part of the decision which can be drawn on to reproduce the legal authority for decision making. Teubner suggests that the rigorous focus on system-specific practices also makes addressing and regulating them more feasible. And this is his goal. Surplus values are engines of autopoietic reproduction; as such, their productive capacities tip consistently into colonial, pathological extension. Against these constitutive tendencies, Teubner proposes constitutional limitations.

Kempter's chapter stands in contrast, and enters into an express debate with Teubner. Their fundamental disagreement over the uniformity (or not) of surplus value across social systems leads to stark disagreement over how to address its discontents. Where Teubner proposes constitutional limitations, Kempter proposes revolutionary disavowal. Kempter relies on *Wertkritik*, a variant of Marxian critique principally associated with Robert Kurz, for his analysis. Following *Wertkritik*, the constitution of value in capitalist society is always coercive at its root. Kempter's critique is at once broad and narrow, expressly totalizing in scope while singularly organized around the fetishization of commodities. In this sense, Kempter's *Wertkritik* distinguishes itself from traditional Marxism, rejecting a progressive history vested in the proletariat, observing instead a pervasive alienation. In this condition, human agency is forfeit before the thing that capitalism installs as the automatic subject of society, namely, the need for ever more surplus value. Under capitalism, people uniformly cede the capacity to determine their own values socially; instead, value is determined by the self-valorizing exigencies of the automatic subject. This systemic condition accounts, following Kempter, for the ubiquity of the term value. All of the various uses of "value" are evidence of social spheres colonized and made legible to the automatic subject of capitalism. Whereas Teubner insists on the distinctions of surplus value as it manifests in the communication media of diverse function systems, Kempter observes an invasive and homogenizing force: "the market", as the elaboration of commodity-valorizing processes. This expansive systemic perspective puts Kempter in dialogue with the chapters by Desan and Chadwick, because the homogenizing force of capitalist value has a singular measure, namely money. As with Desan and Chadwick, money is no neutral technology – but whereas Desan points to the non-neutral character of money as a provision of credit, and Chadwick focuses on the relative constraints of floating currencies specifically in the foreign exchange market, Kempter identifies money as the essential keystone of fetishistic commodity valorization. The state occupies an important role in this context, existing in "polar complementary" relation to the market, in tension but not autonomous. Regulation, in this situation, is never merely for the market, but never independent of it, either. On this conflicted basis, Kempter observes a mounting irrationality driven by the ineluctable tension between the two poles of state and market. The totalizing nature of Kempter's critique and its radical implications raise a question in our project: what scale of transformation, and how far reaching, will be adequate to avert the worst discontents of capitalist value production?

Christine Schwöbel-Patel specifies the concern with capitalist value production differently, focusing on imperial dimensions of rentier capitalism elevated to a systemic mode of international relations. Using the example of the interest expressed by former US president Donald Trump to purchase Greenland, Schwöbel-Patel observes a transformation of the nation state into real-estate. Property value is a principal value in this context, extending to ownership of natural resources, but so are the values of branding and select services, for instance tourist-related. Across these several values, the connecting thread is the way in which nation states have become objects and instruments of rent-seeking enterprises, and, likewise, the ways in which nation states have become rent-seeking enterprises in themselves. By focusing on Greenland, Schwöbel-Patel also highlights the colonial dimension of expansive capitalist dynamics and the ongoing subjection of indigenous peoples. She highlights several international legal regimes implicated in the production and reproduction of value for rentier capitalism as a vector of international relations, such as international investment law, laws governing resource extraction, and fundamental principles of sovereignty, at least insofar as they are deployed to limit possibilities for self-determination.

D.2 Institutions

Clair Quentin's chapter addresses the milieus (theoretical, discursive, material) in which legal policy – specifically international corporate tax policy – becomes institutional common sense. Quentin tells a polemical story in which a conceptual understanding of value moves progressively farther away from a grounding in labour. Those moves had material prompts: the flight of capital away from industrial centres in the second half of the 20th century, the rise of information technologies as consumer goods at the end of the 20th and into the 21st century, and finally the rise of platform economies dominated by the likes of Facebook, Amazon, Google, etc., in the second decade of the 21st century. This timeline of material conditions informs a historicist insight, namely, that "the political pressure to extend the boundaries of what value can do as a concept is, as already intimated, a historically contingent one".[62] The broad material conditions just listed are supplemented in Quentin's account with attention to professional networks where the material conditions would have been debated for policy purposes: namely, in Paris and London, in the social and professional circles around the Organization for Economic Cooperation and Development. Quentin observes a funny thing arguably to have happened in those circles, namely that a strand of Marxian theory, postoperaismo (and its legacy in works such as Hardt and Negri's *Empire*) became a bona fide source of knowledge to address the changed conditions of valuation encountered at the moment of financial crisis at the end of the 2000s. Quentin describes the consequences, however: that the making of a world organized around a mutable notion of value ultimately was only practically available to economic actors and policy-makers in the Global North, thereby supporting the sustained immiseration of the Global South.

Jamee K. Moudud's contribution takes aim at the legal disposition of the business firm, as a site of capitalist investment and value production. Following Moudud's analysis, the firm functions today as part of a neoclassical economic regime that generates an ever-growing condition of precarity for workers around the globe. Moudud's investigation of value production in this context is squarely directed at surplus value production, and the social, legal and economic conditions that enable it. While Moudud's chapter goes forward largely on the terrain of economic theory, it calls for methods suited to the examination of legal techniques: Moudud's analysis "requires one to recognize the sociolegal nature of the business enterprise and the fact that all income-earning capital assets have to be legally-coded".[63] Further, in line with Muniesa and Marzal (as well as Dehm), Moudud's analytical appreciation of law's constitutive role "also entails an understanding of the metrics of profitability that have driven value creation over the past several decades".[64] Moudud pushes these observations in the direction of law and political economy, an orientation which he shares with Desan and Chadwick, who focus on money and monetary policy. So is a concern for distributional effects, insofar as Moudud's "framework provides an understanding of how the legal and political foundations of the economy structure distributional struggles between capital and labor and non-labor business costs".[65] Throughout, Moudud relies on legal realism to locate value in the practical interactions of lawyers, economists and policy-makers, interactions that have served to concentrate power in the hands of a few, while multiplying precarity among many. Thus, Moudud's contribution would get

62 Quentin in this volume, at 89.
63 Moudud in this volume, at 111.
64 Ibid.
65 Ibid. at 112.

"beyond mechanical demand-stimulus policies … as taught in macroeconomics" by practically interrogating "power relations within the economy", in order to make clear "how they could be restructured".[66] This argument, it bears noting, places no small faith in the state and its potential to restructure economic relations and the distribution of powers among them, a faith not exactly shared by many of the other contributors to this volume.

Christine Desan's chapter articulates a credit theory of money, and in the process argues that exchange itself is constitutive of value, and that money creates the commensurability that enables economic exchange, thus making money a key technology in the production of value. In this sense, Desan's chapter problematizes value (singular). Her credit theory of money begins, like Moudud's analysis of the firm, with an argument against neoclassical economics, in which "a jumble of accounts inconsistently theorize money's ability to capture and compare value".[67] Instead, Desan demonstrates the relative coherence of money not as the carrier of a value determined by price and preference, but as a political technology to determine and produce value. In this sense, Desan's chapter foregrounds a temporal dimension that is at work in several chapters, but which is especially clear here, for instance when she writes that "if money creates commensurability, our preferences as expressed in the market depend on money rather than preceding it".[68] Several things follow from these observations, including the observation that the technology of money determines value in the act of distribution: "Money as a credit operates by creating capacity as a relative resource. The process of money's dissemination articulates value in that unit".[69] This makes the legal construction of money a crucial stage in the social determination of value and its distribution: "as a condition inherent to its construction, money carries value differentially to participants, those who are graced with credit and those who are not".[70] Temporal logic is also at work insofar as the parties that receive money-as-credit first are privileged with an ability to determine prices. The take-away directs considerable responsibility to the design and deployment of the technology: "according to the way money is created—definitionally we might say—individuals will not be equally situated in the process that generates prices", and so will not be equal participants in the determination and production of values, or their enjoyment.[71] The responsibility, however, is also an opportunity, because if money is never neutral and always selective by design, then it might also be redesigned to remedy value inequalities.

66 Ibid. at 133.
67 Desan in this volume, at 134.
68 Ibid. at 134.
69 Ibid. at 135.
70 Ibid. at 134.
71 Ibid. at 149.

Anna Chadwick develops on themes introduced by Desan, moving the examination of money to the level of international exchange and transnational law. She focuses on the creation of credit money denominated in the US dollar outside the US jurisdiction and the foreign exchange market to reveal the difficulties and repercussions for institutional redesign that aims at strengthening monetary sovereignty. In doing so, she deploys observations of money as a political and legal technology to problematize the focus on knowledge regimes evident in other contributions to this volume: "The corollary of the emphasis placed on the generative powers of monetary design is the implication that changing how money is conceptualised and, therefore, governed could impact on wider processes of value production".[72] Quentin also comes to mind here, for the complementary demonstration of how changing conceptualizations may ultimately be more likely to serve and sustain imperial interests rather than achieve more equitable global redistributions of value. Moreover, by examining the construction of money in the transnational context of foreign exchange and credit creation, she decentres money as a technology of value. Instead, the design of money as Chadwick describes it produces a technology in a transnational assemblage of like technologies, the capacities of any one money being relative to the capacities exercised by the others. Likewise, in this transnational context, the redesign of monetary policy will be subject to contestation or exploitation by a diverse variety of powerful private actors entangled with the system. Thus, the foreign exchange market constrains the ability of the public bodies responsible for monetary policy to determine, produce and distribute value. That constraint, however, is not evenly distributed – the US dollar is relatively less constrained than other currencies, and so US monetary policy operates as a relative constraint on other monetary policies. Likewise, by showing the constraints that the foreign exchange market imposes on the capacity of money to determine, produce and distribute value, Chadwick exposes limitations on the legal and political possibilities available for transformative change, for instance as suggested by Desan in her chapter.

D.3 Techniques

Fabian Muniesa looks at legal technique as a matter of vernacular, attending to "the form of dispositions, measures and rules that determine what should be done and how".[73] Focusing on financial valuation practices, Muniesa's chapter is "less about understanding the social logic and effects of legal opinions, and more about comprehending the instituting force of juristic artifice", which includes a combination of legal forms and techniques.[74] To comprehend that

72 Chadwick in this volume, at 152.
73 Muniesa in this volume, at 172.
74 Ibid. at 169.

instituting (or constitutive) force, Muniesa "takes up operations of the law in an anthropological register, to examine the performative properties of juristic artifice for the capacity to constitute value".[75] Notably, Muniesa does not develop an immanent critique of law's logic, nor does he measure law's effects against a given standard. Instead, he examines the world-making character of legal practices. He analyzes legal practices involved in financial valuation as "part of the internal justificatory repertoire of a capitalistic worldview".[76] For this purpose, Muniesa adopts a Foucauldian method, to observe law's participation in regimes of truth and veridiction, regimes that determine what will be recognized and recognizable as sensible participation in the discourses of the field. Struggles over value, in this context, are "controlled by a regime of representational truth", meaning that competing values will be acknowledged and ordered according to discursive conditions that make social and material phenomena knowable according to something like common sense or shared notions about how things in the world are or should be. Muniesa thus adopts an anthropological analysis of legal practice "to clarify the type of order that such a regime of representational truth serves".[77] The purpose is not to expose the shortcomings of legal practices for financial valuation according to pre-existing logics, whether legal, moral or otherwise. Muniesa aims instead at "pressuring the conditions in which concepts can or cannot make sense and thus operate".[78] In this objective, Muniesa's anthropological attention to legal techniques dovetails closely with our aim to problematize law's participation in the conditions by which value is made real.

Toni Marzal's contribution, concerning legal techniques involved in dispute settlement at the stage of quantifying damages, complements Muniesa's attention to legal vernacular, and shares the aim of interrogating the conditions in which concepts can or cannot make sense and thus operate. Focusing on the valuation of assets in Investor-State Dispute Settlement (ISDS) proceedings at the stage of determining damages, Marzal observes the ways in which what was once a hotly contested area of dispute, with political stakes organized around a fault line between the Global South and North, was transformed seemingly overnight into a matter of technical detail favouring investors suing states for breaches of investment law. Marzal's genealogical tracing of shifts in the professional vernacular demonstrates how a divisive and controversial question of law was replaced with something approaching "a principle of natural law", "truly universal", "non-ideological", and a matter of "fundamental right".[79] This switch was effected when a mainstream among practitioners began to

75 Ibid. at 169.
76 Ibid. at 170.
77 Ibid. at 171.
78 Ibid. at 172.
79 Marzal in this volume, at 184.

reformulate contests over the value of an investment as matters of economic fact, determined by popular formulas with ready acronyms like fair market value (FMV) and discounted cash flow (DCF).[80] And while valuation judgments remain central to ISDS, they are today treated as closed questions of technical complexity, rather than open controversies of law and equity. As a result, damages run to billions of euros, sometimes amounting to substantial shares of a respondent nation's domestic economic product. In this way, legal practice participates in world-making through determinations of value, but sublimates the consequential political stakes into the vernacular of specialized technique. In closing, however, Marzal optimistically supposes that the world-making achieved with technical practices in legal determinations of value also substantiates the possibility of alternatives. In other words, he supposes that the radical change in favour of investors can be reversed in favour of host states.

Florian Hoffmann's contribution shifts to a different discursive space, organized around a complex entanglement between values and "rights talk", in which human rights carry and construct values, even as there may be a relatively independent value (however ambivalent) to rights.[81] Hoffmann leaves the genealogy of the space to others, observing that human rights "occupy a privileged discursive position",[82] and focuses on the work that is possible from within this discursive situation today. Hoffmann acknowledges and affirms critiques (principally Marxian and from critical theory) directed at human rights, all of which are tied to the complex relationships between human rights and value production, but nonetheless Hoffmann also investigates the possibilities for redemptive practice afforded by human rights' privileged discursive position. The critiques circle around three main dilemmas: one, that rights are participants in the production of social harms like inequality; two, that addressing social harms with rights has the effect of suppressing political action; and three, that by participating in the production of inequalities, while suppressing political responses, rights contribute to the stabilization of a dominant system of value production – namely a liberal, capitalist one – and the social harms that are part of its organization. Hoffmann gives these critiques a sympathetic airing, but nonetheless insists that human rights can be exploited despite their entanglement with, or complicity in, capitalist relations: while rights may be "enactments of capitalist political economy, … they [nonetheless] are capable of irritating 'the system' despite and beyond their function".[83] He further points to their aspirational role in sustaining visions of a shared space of concrete utopias, thus as participants in discourses for transformative politics today.

80 Marzal in this volume, at 189.
81 Hoffmann in this volume, at 199.
82 Ibid. at 201.
83 Ibid. at 213.

D.4 Technologies

Outi Korhonen and Juho Rantala take up value production and money in a speculative register, exploring possibilities associated with blockchain innovations. They propose to do this by taking seriously the revolutionary claims sometimes associated with cryptocurrencies. The permissionless, decentralized possibilities attributed to blockchain technologies open for Korhonen and Rantala a future path away from the centripetal forces of banks and international institutions. Banks and international institutions, in their chapter, perpetuate the consolidation of power by and for narrow classes of elites. Cryptocurrencies, by contrast, support a possibility for transindividuation, a notion that Korhonen and Rantala adopt from Gilbert Simondon, meaning something like a new way of being in which individual becoming is supported by a proper social technology for value production, one predicated on decentralized relations that are not dominated under law by any centralized, hierarchically determined institution like a bank. Korhonen and Rantala recognize some of the criticisms commonly directed at cryptocurrencies, like the extreme and wasteful energy consumption that they incentivize, or a track record blemished by popular use of cryptocurrencies as investment vehicles and the collusion of powerful actors to overcome decentralization. Against these drawbacks, they point to a diversity of aspirational goals associated with various cryptocurrency initiatives, using the ecologically conscious constitution of the SEEDS cryptocurrency as an example.

Dimitri Van Den Meerssche and Geoff Gordon look at different sociotechnical systems, focusing on AI technologies in governmental ecologies. They open with an observation of ubiquitous references to democratic values in policy discourses addressing computational technologies. But they note a disjunction between these representations of democratic values and the actual use and treatment of computational technologies in governance routines. They aim, in this light, to assess ways in which AI technologies may be altering value practices in governmental contexts. They identify two vectors of change, temporal and informational, which together suggest a distinct mode of governance, which they refer to as operadiction. To explain operadiction, which they propose as an ideal-type simplification, they offer two points of comparison, with what they call a classical regime and a regime of veridiction. The classical regime operates according to a fixed goal; the veridiction regime dispenses with fixed goals, to operate instead according to truth conditions allowing for multiple possible objectives. Operadiction, in turn, dispenses with comparable truth conditions. Relying on neural network models and subsymbolic logics, operadiction works on the basis of reiterative correlation of data points for patterns immanent in the field of its operation, rather than satisfaction of any external truth conditions. Consequently, the values that operadiction puts in play are unstable things, as instantiated by data that is exploitable on a recombinant and reiterative basis, over and over. On this basis, operadiction appears not to support or produce any one objective in practice, but is a mode of governance that works in constant suspension, constantly reconstructing a present for governmental intervention on the basis of transient correlations, according to patterns immanent in flows of information as computational technologies like AI are trained to read them. In this suspension, the operadiction regime attains to optimization rather than closure (per a classical regime) or compliance (per a veridiction regime), and optimization is arguably an extension of efficiency as associated with capitalist value practices, but now taking on arguably novel characteristics. To suppress threats to its optimization function, the operadiction regime deploys risk calculations based on the same pattern recognition processes.

D.5 Ecologies

Julia Dehm writes at an intersection of resource extraction and international investment law. Her chapter overlaps in interesting ways with several others: she overlaps with Kempter's chapter when she investigates why political processes seem uniformly incapable of addressing impending ecological disaster. But she overlaps with Teubner when she points to legal interventions that might establish a renewed constitution for sustainable values. Crucial to this project is an understanding of value as a vector for the co-articulation of individuals and social collectives. Dehm is perhaps clearest among the authors in this collection regarding the relational character of value-productive processes, which she explains by reference to a variety of past and present thinkers occupied with questions of value. Like Schwöbel-Patel, Dehm locates an architectural substrate of legally constituted value production in the ways in which law facilitates the domination of labour by capital. From that foundation, a profoundly disempowering system of value production arises. She investigates the current system with two brief studies, one focused on the so-called Green Economy, the other focused on international investment law, and the doctrinal production of so-called stranded assets. In both studies, she traces the development of legal instruments designed to make ecological disaster legible to economic actors. Notably, a key element of Dehm's analysis includes the recognition that some of these legal innovations were intended to support environmental protections, especially in the case of the Green Economy. But the legal architecture that supports environmental protection by making it legible to economic actors has meant making it legible according to the values of economic actors. For that reason, in the world constituted by such legal regimes, ecological flourishing remains secondary to values of efficiency and growth, and so while environmental catastrophe may be marginally slowed by well-meaning initiatives under law, it proceeds all the same – and hardly slowly.

Oliver Schlaudt's chapter approaches value as an economic concept through the theory of unequal exchange. Like in other chapters – by Kempter, Schwöbel-Patel, Marzal and Muniesa – the economic notion of value in his chapter is an imperial one. Like Moudud, Chadwick, Desan and others, Schlaudt focuses specifically on the notion of value at the root of neoclassical economics, expressed in price as marginal utility. Schlaudt identifies three main critiques of the price mechanism: the critique of national accounting methods (critiqued for leaving out things relevant to well-being that are not traded on markets), the socialist calculation critique (which proposes means other than price for rational decision making applied to markets), and the critique of unequal exchange, the focus of the chapter, which homes in on structural conditions that benefit rich states at the expense of poorer states in international relations. The critique of unequal exchange has coalesced around ecological terms, which puts Schlaudt's chapter in close conversation with Dehm as well as Marzal, but there is also correspondence with Quentin's and Schwöbel-Patel's chapters, for observing the ways in which international economic relations systematically benefit powerful states. But rather than focus on overtly coercive neocolonial practices, e.g., by institutional or military interventions, the critique of unequal exchange focuses on the everyday function of the price mechanism as legally constituted in international exchange. In this sense, focusing on the consequences of everyday market practices, Schlaudt's contribution also maintains its connection with Chadwick's chapter. In everyday operation, the price mechanism recognizes only some value-productive processes in modes of production. Among other things, natural processes are not typically recognized as labour, and so states that enter the market with goods produced in part by natural processes are relatively disadvantaged by the value that their price will represent in practice. In short: "nature" does work to produce "natural" goods, but the extent of that work that is not facilitated by human application is not reflected in the price.

This creates a clear asymmetry, evident in the so-called "resource curse", whereby poorer states saddled with extractive industries are systematically disadvantaged in exchanges with richer ones. Not only are natural processes not recognized in the price mechanism, but neither are the environmental costs of consumption, doubly disadvantaging states in the Global South that produce resources for consumption in the Global North – here showing connection again with the debate taken up by Quentin. Crucially, Schlaudt makes clear the relationship of unequal exchange to a cosmology in which the market is a normative construct, legally backed by an idealistic notion of consent. So long as participants to a market are formally assumed to be able to refuse to transact, then the prices generated at market may in turn be assumed to be adequate and, indeed, fair. It is this cosmology that explains the rigged game in Schlaudt's title: the market is the phantasmic product of a belief system that privileges select values, formally supported under law (as the rules of the game), and operates to the consistent advantage of select classes and select states. After establishing the critique of market practices, he uses alternative accounting principles identified with "emergy" (a shortening of "embodied energy", based on "ratios of energy embodied in the goods [relative to] amounts of money spent for the production of the goods") to demonstrate the deeply inequitable character of exchange according to mainstream market practices.[84] Schlaudt ends by pointing to alternative ways (including alternative cosmologies and legal constitutions) to identify value, for instance the UN's Human Development Index. In so doing, he also captures a goal for this project as a whole: not solely to explicate the shortcomings of legally constituted value practices today, but to point to the possibilities for new ones.

In addition to the chapters in this volume, we have also invited reflections, mentioned above in section A. Each "reflector" has offered brief comments on the basis of a unique selection of chapters. Jessie Hohmann's reflection thoughtfully explores the emotional potential of debates over value and value production, in evidence in the chapters and at points in our workshops. John D. Haskell reflects on the limits of academic inquiries into things like value, especially as structured by the institutions of academic production. Sofia Stolk, in a more expansive register, considers the additional role of imagination in the world-making work of value as constituted (in part) by law. We appreciate these reflections not least because they allow us to see our project from an informed outside. Here, in our introduction, we have offered our conclusions of an often-unruly project. Our conclusions are limited and foundational. To acknowledge the generative unruliness of everything and everyone that has brought us to our conclusions, and to acknowledge the importance of the multiplicity of projects and perspectives committed to unsettling the value practices that lead inexorably to violence, harm and immiseration, we close this volume with observations offered by valued colleagues and fellow travellers.

84 Schlaudt in this volume, at 281.