Stockholm University

Living as a commodity

Law, exploitation and the trade on human lives

Daniel Augusto Pinheiro Astone

Doctoral Thesis in Legal Science, specialisation Public International Law
at Stockholm University, Sweden 2024

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Law, exploitation and the trade on human lives

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Abstract

This dissertation investigates the role of the law in affording the conditions of possibility for exploitation to install and reproduce itself in the context of contemporary capitalism. It engages with the dialectical incompossibility of some of the key normative assumptions embedded in the law and the economy vis-à-vis their phenomenological consequences. With support from Niklas Luhmann's systems theory, the dissertation relies on two main examples – patents on essential medicines and labour exploitation – to examine the tension between expropriation and accumulation. It advances the novel concept of "ablegality" as a register for the remainder that every phenomenological-hermeneutic operation will inevitably generate as the potentiality that accompanies all phenomenological reduction. The principal contribution made through this dissertation lies in articulating the role of the invisibilised side of legal operations as drivers for exploitation and, ultimately, for injustice to manifest legally.

Keywords: *exploitation, systems theory, ablegality, irresponsibility, critical theory.*

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'Déjeme decirle, a riesgo de parecer ridículo, que el revolucionario verdadero está guiado por grandes sentimientos de amor. Es imposible pensar en un revolucionario auténtico sin esta cualidad.' *Che*

Contents

Acknowledgements

I had a very privileged upbringing. My grandparents on my mother's side were school teachers. Grandma was absolutely brilliant at mathematics and an austere motherly figure who nonetheless showed love and appreciation in every single small gesture. She helped me with homework, taught me how to cook, and smuggled extra fried eggs during lunch that to this day I feel compelled to keep secret. I felt like my grandma's accomplice; such a nice feeling to have. My grandfather was a teacher who became a lawyer later in his life, probably the most unsuccessful lawyer in Brazil, as he simply could not work the commercial side of the job. His best line was about a prosecutor whom he claimed wanted to kill his client, but he had another good one about a colour blind witness who forgot that she was not supposed to say that the car was red. His career as a lawyer didn't matter to me at all, as he was the most intelligent person in the world, even though I had no clue at that point about the disproportionate load my grandma had to carry to keep the family together. Grandma passed away in 2000, and grandpa went with me to the Brazilian bar ceremony to deliver my licence in 2009 before passing away the year after. He spent his final year healthy as ever, enjoying life back in his small hometown. On his very last day, he went fishing with two of his sons and had his favourite dish with his favourite brother. Not a bad way to go at all.

A very good memory I have from that last year was when grandpa asked me do to a random job in the court for him, now that I had my licence alive and kicking. He prepared the document with my name first and his name second, and there was a dried teardrop in the corner of the paper. I'm lucky that I am far enough from the keyboard right now, because teardrops don't seem to dry as well in electronic devices. His brilliance and insightfulness always impressed me enormously, and during many critical moments of my doctoral studies, I wish I could have had him around to talk and retribute all of my inspiration. Grandma taught me maths, grandpa taught me how to read through cigarette boxes and fishing magazines. I learned how to cheat the magazines by memorising the shape of the fish instead of the letters and he pretended he didn't notice. They

both taught me to incessantly ask questions, many questions. He also developed in me a certain kind of love for philosophy, as all the fantastic stories he used to tell me were deeply imbued with real questions and contradictions. Importantly, they taught me that love is expressed through an infinitude of small gestures of generosity and care. It is a process, not an event. I cannot overstate how much all of this shaped my mindset as a researcher, but this is the least important thing I am thinking about at the moment.

On my father's side, grandpa was a window dresser who became a lifelong union leader. The first memory I have of him in this regard was right after a strike he took part against mandatory work on Sundays and public holidays. It was the first time I saw him angry, telling the story to my dad in a way that I cannot recollect in detail. What I do recollect is how angry he was, which for me was unimaginable for such a loving figure. Shop workers do have to work on Sundays and holidays nowadays but he (and us for the most part) would never, ever buy stuff in those days. One thing that marked me deeply is how much he cared about others, especially the poor. He had some sort of gift for communicating and showing appreciation. This is remarkable but contradictory nonetheless, as he wasn't the best father and even less the perfect husband, but this was completely beyond my grasp while growing up. He passed away in 2007 after a long year of in and outs. I suffered a big blow from that.

Grandma had a rough life. She lost her mother soon after birth and her father to suicide a few years later. She was raised by her own grandma, a domestic worker who made just enough to pay the rent for the small room where they lived – a room owned by her employer. Her grandma had to work from six in the morning so that breakfast would be served in time, and would finish well past ten in the evening as the kitchen had to be cleaned spotless after dinner. All of this she did until the age of eighty-two, when my own grandma had managed to earn just enough to "retire" her.

For many years, my grandma had helped her in the job whenever not attending professional school or her own work duties, first as a wood gatherer at the age of seven then as a sewer some years later. To this day, she remembers having to clean the corners in the stairs with a toothbrush every week because her grandma could no longer lie down for so long. As a teenager, my grandma was abused by a neighbour once and ended up assaulted by the rapist's mother, who said that she behaved like a prostitute anyway. In fact, my grandma was friends with the prostitutes in the local brothel because they treated her well and protected her while her grandma

was away. Someone "disappeared" her dog soon after that. I know about all this now, as an adult, but my perception as a child was all just love and fun. I remember that I was always puzzled by the fact that my grandma wasn't as educated as my other grandparents but this didn't matter. I do feel bad, very bad, for being dismissive on a few occasions when she couldn't help me with my homework whenever I was at her house after school. She was just so happy, and every now and then I realise how resilient she has had to be to hold no grit for such a sour childhood.

This is all very sweet, yes, but things must come full circle. The fact that she has been able to cope with so much speaks highly of her character. But the fact that she *has had* to cope is absolutely unforgivable. She was abused, disrespected and exploited, and this remains unaccounted for. My doctoral dissertation – in fact, my drive to work as a scholar in the first place – comes from the direct, profound and immanent inquietude caused by the conflict between the loving and stimulating upbringing I had on the one hand, and the realisation that she has suffered so much injustice on the other. With the addition of some nice words and fancy references, this could pretty much become the core of my methodology section.

Yet drive does not accomplish much on its own. So many remarkable people have put an absurd amount of effort into making this happen. Much is often said about originality in the scope of doctoral dissertations while in reality this is all about collective effort. I am profoundly grateful for those who took the time to share ideas, experience and put some sense in all this, else I would still be mumbling a half-baked, kind of Marxist critique worth a few rounds of beer at best. There is no one else to start with other than Pål Wrange, my supervisor and the single main supporter of my ideas despite so many wild rides and dead ends I reached throughout the years. Pål is sound, reliable and generous. He is a brilliant intellectual who has been engaging with my research regardless of the weird intellectual choices and the occasional differences we had in terms of scope and emphasis here and there. I have never felt insecure about reaching out to him when in need of intellectual, emotional and political advice, and he has no idea how rewarding it has been to see his Swedish smile in reaction to my small victories and achievements.

Emilios Christodoulidis joined as an assistant supervisor halfway through but unknowingly had been part of this research well before our first email exchange. Emilios is a source of wisdom and the main reference I have when it comes to the combination of profound knowledge and proper, radical critical thinking. He has hardly a notion of how much his work influences my own, from instances as subtle as when he discusses

symmetry in the introduction of his *Redress of Law*. In fact, *Redress* was decisive in guiding so much of my research, but it was a class I attended at the University of Glasgow in 2018 which steered my ideas towards what I ended up doing. I asked him about competing narratives on the justification of property, which he answered in an incredibly eloquent way, summed up with a statement that never faded: at some point, you will have to make a choice, and you are the only one who can make that choice. So I made my choice.

Antonina Bakardjieva was the very first person I reached out to at Stockholm University as a prospective applicant, and since 2019 stepped in as either my main or assistant supervisor. She disagrees with most of my intellectual choices (this is an exaggeration but it is good to add some drama) but she has never, ever discouraged or downplayed my efforts. Importantly, her pragmatic stance has always served as a balance to gauge the reach of my arguments. Her scepticism towards Marx, Luhmann and the way I use them throughout my work has been teaching me how to speak to a wider audience, and veer away from the temptation of preaching only to the converted. For her, it had never really mattered that she didn't agree with this or that claim, as it was on me to make sure that they could hold their ground. I am also grateful for the support I received from Frantzeska Papadopoulou, my supervisor during my time with the Intellectual Property Law group, before transitioning to Public International Law.

Other scholars either played or have been playing an important role both in my dissertation and my prospective career as a legal scholar. Since joining the Institute for Global Law and Policy at Harvard Law School in September 2023, I have been in frequent contact with David Kennedy. I am very, very sceptical about Harvard's (and US's) scholarship but found in David someone incredibly generous and insightful. The way he can read my texts between the lines, play with the words and challenge my ideas is as impressive as it is useful. I am also deeply grateful for the support David has been giving me to further develop my career as a scholar and, hopefully, to settle in academia within a few years.

Earlier this year, Sabine Frerichs brought a breadth of fresh air to my work. She found unwritten messages and possibilities in my writing and helped to make them flourish. As the opponent during my final seminar, she engaged so incisively and insightfully with my dissertation that I feel it will take me much more than a few rounds of revision to do justice to the extent of the contribution she made. More than pointing out that this or that part is incorrect, she has made me think and think again about the

bigger picture. Tuomas Mylly, the opponent during the mid-seminar, equally helped me to untie some knots in a version of the dissertation that started from a reading of the intellectual property system as a continuation of slavery all the way to very rough drafts on Luhmann, Foucault and a critique of law and economics without any time to breath in between. It was a mess that he carefully navigated and helped me with. These ideas are definitely still around but hopefully, now they will make some sense. I am also thankful for the comments, ideas and conversations held with Scott Veitch, Ole Hammerslev, Poul Kjaer, Martti Koskeniemi, Anne Orford, Akbar Rasulov, Marco Goldoni, Jarna Petman, Daniel Markovits, Katak Malla, Mats Deland, Love Rönnelid, Marcos Feres, Diogo Coutinho and Mario Schapiro.

I must also acknowledge the unprecedented support from my colleagues at the public international law group. As pupils of this canon of the law of the sea, Said Mahmoudi, they offered me safe harbour and gave me all the guidance and opportunities I could expect despite my utter ignorance of international law proper. I do see varying levels of the influence of international law wherever I look at the structural conditions of exploitation and inequality so I can only hope that this work makes a contribution, even if a far-fetched one, to their fields of expertise. I thank Mark Klamberg on behalf of them, while also using this to extend a special thanks to Mark for his unwavering support and encouragement in spite of the differences we have in terms of political stances. This has never, ever affected the way he took good care of me over the years.

Then comes the friends, and how one finds them. At some point in 2020, I thought it would be an excellent idea to get rid of my small room to save on rent. I bought a 1974 Albin Vega moored about a hundred kilometres away from Stockholm (about 60 miles, David). It would be a long day on the water so I asked around to see if anyone would like to join. The only problem, I told them, was that I had never been on a sailboat in my life and so far had only read books about it. Some of them laughed, all of them showed up. Some of them in casual clothes, one of them dressed for a proper champagne-style yacht party. Thirteen hours of zig-zag later, we managed to radio a small marina and moor for the night. It seems this is not common practice, but the harbour captain took us in anyway and charged me nothing when she saw how many people could fit in that small boat. Hevi Dawody, Fabricio Fortese, Elica Ghavidel and Andreas Knutsson were all accomplices here, especially Andreas, who came back the day after to resume the last leg of the trip through the Mälaren locks towards the Baltic. William Underwood and Marie

Jarnesand joined weeks later for one of many day trips, while Sally Longworth was wise enough to keep their feet dry. Mariana Fakih and Ylva Lennartsson-Hartmann I knew after the boat was in the dry, on sale due to my irregular schedule between Sweden and Brazil during Covid. The years in Stockholm also brought Niousha Nademi, Emelie Thell, Branka Marusic, Nikola Hajdin, Caroline Åvall and Petter Danckwardt. These are brilliant scholars and remarkable friends, and I am just so lucky to have met you all.

The IGLP has also been excellent in this regard. Zeina Jallad became a good friend, and on an equal level of importance, she opened my eyes to Palestine. Coming from the Brazilian left, I have always had sympathy for the Palestinian struggle, but understanding the depth of the abuse, oppression and hypocrisy that has been so profoundly affecting generation after generation of Palestinians left a mark on my intellectual framework that I could put on par with the most overused references in my dissertation. It is genocide – or much worse, as Zeina argues, it is the Nakba that never ended – and if the law cannot recognise that, it is because there are deeply ingrained features guaranteeing that such a loaded category can be deployed only according to well-known interests within specific contexts. This was what came to my mind when I recently re-read Scott Veitch quoting Arendt at the beginning of *Law and Irresponsibility*, writing that he was after the law's banality of evil. The sheer impotence we experience in the face of ongoing genocide, not only with textbook but new, more absurd, more cynical and increasingly more arrogant manifestations of genocidal intent live-streamed for all eyes to see speaks highly of a legal system that oppresses by design. If anything, it seems that the martyrdom of the Palestinians has been creating momentum, especially among peoples of the South. It is too much to talk of hope, yet hopefully, there is something going on.

Other IGLPers, as David likes to call us, have been making my time in the US a pleasure. Yifeng Chen, Adriane de Sanctis (a fellow Brazilian), Arnulf Lorca, Brenda Kombo, Anaïs Mattez, Fabien Muller, and Nader Andrawos are always around for talks, ideas and an imprudent amount of coffee. Kristen Verdeaux and Seamus Darby are our very own guardian angels here, taking such good care of us despite the insistent emails of a certain someone who is always worried about losing his visa. I remain sceptical but it seems indeed that Harvard has some potential. Not because of the institution and the profound interference of capital in academia, but because of the people.

My appreciation also goes to my lovely housemates in the US, Feyza Çukurova, Claudia Lang and Gita Feiler. Feyza convinced me that Turkey can actually outcook Italy (but not Brazil, sorry Feyza!), while Claudia and Gita have had to hear so many versions of my last writings that I should probably cook them some sort of German delicacy, if there is such a thing. Thank you, Gita, for making me feel really old by thinking that Taylor Swift was a guy. Speaking of hearing and reading drafts, many drafts, Lou Caffagni, my close friend back in Brazil for over thirty years and an enlightened philosopher, helped me to unpack Luhmann with a generosity that is hard to match. Thank you, Lou. The same goes to Abrahão (because we are both called Daniel), also my close friend, also for thirty years, who had insisted often that he wanted to read my stuff. He can sell ice to an Eskimo, there is no question about that, yet he has to be spared from Luhmann. Abrahão and I were joined later on by Rafael Motta, who has faced so many ups and downs and yet, keeps pushing. Thank you both for being such great friends for all these years.

I have also to thank the admin staff at the Department of Law back in Stockholm. I recently (yesterday, specifically) submitted an application to the Swedish Research Council in response to a call for international postdoctoral grants. Some colleagues suggested that I pick Swedish institutions other than Stockholm University to save on overhead and consequently increase my salary. All I have is my salary, so this is of course something that demands some consideration. Still, two factors were decisive. First, I want to honour all the effort Pål Wrange put into my development and stick around until he kicks me out. Second, since it is an international postdoc, the fact that I can count on the support of the staff at the Department in case I succeed matters a great deal, and this cannot be taken lightly. Ida Söderberg Tah, Vladimir Vešović, Sari Wrange, Daniel Larsson, Madeleine Sandberg, Christina Elissaiopoulou, Clara Hallen and Karolina Alveryd and many others who certainly worked in the background to make my life run so smoothly are all incredible people who contributed to this more than they can imagine. I also extend this gratitude to Gustaf Sjöberg, Jaan Paju and Jane Reichel, faculty with administrative duties who have always been there for us.

Lastly, it is impossible to put into words how indebted I am to my parents, my sister and my brother. My eyes have dried out at this point so it is not too hard to write about them, and we will meet again in about one month. My mom is turning sixty and has no idea that my sister and I are going back home for her surprise birthday party. My father and my brother have been testing the limits of how much we can joke about this without

blowing the cover and it's just so fun to watch. I left Brazil at the beginning of 2017. During the first few years, it was very hard to see them ageing while being away. Well, maybe not my mother, because my mother doesn't age. Someone should tell her that. But despite the distance, we have never been so close. It takes a lot of effort to keep in touch and travel back home whenever there is a chance but love is all about that, effort. They taught me a lot about hard work and care, and I approached my work with that in mind. My sister and my brother are my closest friends. Sometimes I worry about how grumpy my sister can be but that's my daily reminder about how similar we are, and it has been wonderful to see my younger brother growing up into a man full of commitment and confidence. I am very proud of my family. I value them above everything else and I hope they can see this reflected in my work.

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Grandma cannot recognise me at this point. I will prepare her a nice caponata, although for her it is just so bad that I cut the aubergines the wrong way. She remembers this recipe very well and we talk about it whenever we meet. It will be a very special caponata with a side of soft bread in a way that she can chew. I will put more effort into that caponata than I did for this dissertation for the past five years, so she will know that it was all for her.

Vó, escrevi pra você.

Cambridge (with my heart in São Paulo), 21 February 2024

D. P.A

Swedish summary – Svensk sammanfattning

LEVA SOM EN VARA: LAG, EXPLOATERING OCH HANDEL MED MÄNSKLIGA LIV

Denna avhandling undersöker lagens roll i att möjliggöra för exploatering att etablera sig och föröka sig i kontexten av samtida kapitalism. Den behandlar den dialektiska inkommensurabiliteten hos några av de centrala normativa antaganden som är inbäddade i lagen och ekonomin gentemot deras fenomenologiska konsekvenser. Med stöd av Niklas Luhmanns systemteori använder avhandlingen sig av två huvudsakliga exempel - patent på livsviktiga läkemedel och arbetsutnyttjande - för att undersöka spänningen mellan expropriering och ackumulering. Den introducerar det nya begreppet "ablegality" som ett register för det resterande som varje fenomenologisk-hermeneutisk operation oundvikligen kommer att generera som potentialen som följer med all fenomenologisk reduktion. Det främsta bidraget som görs genom denna avhandling ligger i att artikulera den osynliga sidan av lagliga operationer som drivkrafter för exploatering och, slutligen, för orättvisor att manifestera sig lagligt.

Nyckelord: exploatering, systemteori, ablegality, ansvarslöshet, kritisk teori

Introduction

Se eu conversasse com Deus
Iria lhe perguntar:
Por que é que sofremos tanto
Quando viemos pra cá?
Que dívida é essa
Que a gente tem que morrer pra pagar?

Perguntaria também
Como é que ele é feito
Que não dorme, que não come
E assim vive satisfeito.
Por que foi que ele não fez
A gente do mesmo jeito?

Por que existem uns felizes
E outros que sofrem tanto?
Nascemos do mesmo jeito,
Moramos no mesmo canto.
Quem foi temperar o choro
E acabou salgando o pranto?[1]

It is hard to do justice to its poetry by translating 'O mal e o sofrimento'. If it were at all to be translated, an endeavour so deeply fraught with partiality, would Leandro Gomes de Barros concur with the message conveyed in the new text? In this Brazilian masterpiece of the genre *literatura de cordel*, the author inquires of God what sort of original debt there is that compels those who suffer to pay with their lives. There is also a reference to a contradiction, that of the paradox of inequality

[1] *O mal e o sofrimento*, authored by Leandro Gomes de Barros (1865-1918). No formal source was found other than oral tradition and respective transcripts.

among equals: why is it that some of us are happy while others suffer so much if we are all equal in the first place?

The meaning of the last few verses, unfortunately, cannot be fully captured by this improvised translation. But this is precisely the point. The act of communicating into a target language that is outside the domain of the poet is flawed per se, particularly when it comes to pivotal circumstances such as the translation of experience.[2] Translations have to negotiate the expressive limitations that characterise language – any language – and adapt accordingly to communicate the semantic and aesthetic complexity of poetry. This problem – the imperfect translation of experience into different forms of communication, particularly in the case of *legal* communications – lies at the core of this dissertation. It will be shown to contribute to explaining the transfiguration of the human into the barren container of the commodity, along with the reductionism that this process entails.

The poem introduces the doctoral dissertation from two standpoints. First, it juxtaposes the presumption of equality against the immanent contradiction of the unequal distribution of suffering. If we are all presumed to be equal, suffering *cannot* be so intensely biased towards the most vulnerable and importantly, consistently remain so. To the extent that equality describes a legal status that is shared by all, it might be that the law has been faltering when asked to instrumentalise this normative expectation accordingly, demanding that we probe equality as an issue of performance. Conversely, if equality is taken as an aspiration, the tension between aspiration and experience will demand accountability: it is a standing promise subsumed to historically specific operations of the legal system which will remain unaddressed, or even worse, be increasingly veered away from. If this is the case, the promise of equality will no longer unfold as a common goal. It will become a fallacy.

Second, the poem enunciates the challenges faced by translation as an allegory that finds echoes in law. These echoes resonate imperfectly, although profoundly, not least when the distinction between lived facts and legal facts is called into question. In this sense, this dissertation addresses the process of exploitation in its many forms, from the perspective of a legal theory that is eminently communicative. Importantly, the dissertation focuses on the structural problems posed by the language of the law and emphasises instances where communication falters, while remaining discharged of the burden of fixing it.

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[2] Ivan Junqueira, 'Is Poetry Untranslatable?', *Estudos Avançados* 26 (December 2012): 9–14, https://doi.org/10.1590/S0103-40142012000300002.

It will be seen, with Luhmann, that the cognitive limitation of language as a medium for communication is a feature, not a flaw. In this sense, throughout this chapeau and in the following articles, the dissertation targets the ways in which these limits are articulated, distributed, and which role they have in informing the patterned reproduction of exploitation and inequality in a manner that is perceivable at least since the formal abolition of slavery – and arguably long before that. Exploitation harms, and it harms by subtracting unwarrantedly from another. Who and by whom – an exchange process so dear to legal scholarship as much as to political economy – is absolutely unsurprising, yet it is not so simple to understand how this process might stand for such a long time while rendering legality unaffected.

Hence, the central objective pursued here is to understand how the law grants the conditions of possibility for the conjoined operation of exploitation and commodification to endure *legally*, challenging a normative expectation that would otherwise render these operations curtailed by law. As will be discussed further in the methodology section below, the approach adopted here is dialectical, as its point of departure rests in the immanent contradiction between the legal promise of justice and the lived experience of injustice.[3] To do so, it engages primarily with the concept of contingency borrowed from Niklas Luhmann's systems theory, and Veitch's thorough debate on law and irresponsibility, proposing their articulation through the novel – and nonetheless tentative – notion of *ablegality*. As will be seen shortly, the analysis borrows from concrete examples – patents on essential medicines and labour exploitation – to further explore how contingency operates productively to sustain conditions of exploitation all the while solidifying assumptions around equality and inclusion.

In the scope of Luhmann's theory, communication can be succinctly defined as the process through which symbols are exchanged within a system. These symbols act as conveyors of meaning and serve as the core descriptive mechanism of a system's operation, self-reproduction and interaction with its environment. As with imperfect translations in general, this so-called exchange of symbols within a system will always be cognitively contingent, in the sense that communication cannot fully capture the meaning it purportedly conveys. Some elements of meaning will be invariably lost, although *which* ones is not something that can be

[3] Emilios Christodoulidis, *The Redress of Law: Globalisation, Constitutionalism and Market Capture*, Global Law Series (Cambridge New York, NY Port Melbourne New Delhi Singapore: Cambridge University Press, 2021).

easily presumed. One could rely on prescriptive readings and use whatever the law says to infer what it is that the law does, but Luhmann sharply diverges from this. His method is unavoidable, in that it *requires* us to assess what is communicated by assuming the role of an observer of communications in lieu of rules in the abstract. Hence, the cognitive contingency of legal communications, by way of necessity, can only be assessed empirically: the law *is* what the law *does*. This key aspect of Luhmann's theory – the cognitive contingency of every and all communications – will be extensively deployed to understand the problematic nature of law's registering of human experience, particularly when it comes to the experience of suffering.[4]

But Luhmann, while certainly helpful, falls short in providing sufficient tools to assess the problem of legalised suffering in a way that is capable of transcending the boundaries set by legality. Contingency might reveal how harms might remain legally invisible despite being so closely intertwined with the law, yet, if anything, such suffering would still be deemed *legal*. Through Veitch however, it becomes possible to inquire if suffering *is* invisible or if it is rather *invisibilised*. For this reason, this thesis builds on Veitch's theory of law's role in organising its *irresponsibility*, first by taking it as a guiding normative framework, and second by seeking to further articulate its operation.[5]

For now, the key idea worth noting is that the organisation of irresponsibility, according to Veitch, is absolutely central to the organisation of the capitalist system. It allows for certain harms to be committed with sheer impunity while relentlessly punishing others. One example, as symbolic as it is tangible, is the legally compliant possibility of withholding food in the face of starvation all the while criminalising petty theft. It is the same law that violently enforces property rights and provides for the pacific – rather forcefully pacified – possibility of sheer accumulation, despite a host of evidence tying inequality with the root

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[4] Niklas Luhmann, *Introduction to Systems Theory*, ed. Dirk Baecker, trans. Peter Gilgen (Cambridge, UK ; Malden, MA: Polity, 2013); Niklas Luhmann, *Theory of Society*, Cultural Memory in the Present (Stanford, California: Stanford University Press, 2012); Niklas Luhmann, *Law as a Social System*, trans. Klaus A. Ziegert, 1st published in pbk. 2008, Oxford Socio-Legal Studies (Oxford ; New York: Oxford University Press, 2008); Niklas Luhmann, *Die Wirtschaft der Gesellschaft*, 8. Auflage, Suhrkamp Taschenbuch Wissenschaft 1152 (Frankfurt am Main: Suhrkamp Verlag, 1988).

[5] Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering*, 1st ed (New York, NY: Routledge-Cavendish, 2007); Scott Veitch, *Obligations: New Trajectories in Law*, New Trajectories in Law (Milton Park, Abingdon, Oxon ; New York, NY: Routledge, 2021).

causes of decreasing living standards that feed so-called criminal behaviour. Veitch also highlights that much attention has been paid to the legal assignment of responsibility over events and consequences, although less so when it comes to the equally legal attribution of irresponsibility, features that could be taken as equally constitutive of the status quo yet significantly skewed in terms of corresponding scholarship. Contributing to address this issue, all three articles will engage with irresponsibility in different ways and, as with systems theory, there is an overview of its key aspects in the last section of this introductory text.

The synergistic relationship between the cognitive contingency of law and irresponsibility is highlighted when the focus is drawn on the general trend in positive law of, on the one hand, attributing specific responsibility for specific events, and on the other, generally disavowing responsibility for diffuse events. If there is no way of tracing discrete responsibility within a cobweb of human interaction and prescribing legal consequences accordingly, irresponsibility will normally obtain. Contingency, as an expression of the cognitive limitation of law, is rather intuitive in this regard. No matter its configuration, it is a given that the law will not be able to perfectly foresee events and prospectively take into account their complexity, nor will it be able to prescribe solutions to all of the conflicts that are yet to come. But this only describes the concept of contingency in a cursory manner, putting the cognitive burden on the agent devising legal norms rather than examining its structural pervasiveness. It is not this or that law which is cognitively contingent, inefficient or poorly designed. Rather, cognitive contingency affects the legal system *as a system*, and as much as any and all social systems. As such, cognitive contingency will be shown to mould certain features of the legal system which are intimately involved with sustaining the possibility for impunitive exploitation. These operations play a decisive role as one of the elements of a structure of irresponsibility that is, by way of necessity, legal.

Granted, even though the root of irresponsibility *is* legal, exploitation is not necessarily so. Harm has been for a long time registered in terms first and foremost of an *economic* harm, being estimated and compensated as such. The very nature of harm is all too often calibrated through a cost-benefit analysis, having perhaps one of its most outrageous examples in the perverse misnomer of collateral damage. Dissociating conduct and outcome, however, finds parallels at the systemic level as well. Any given social event will be understood by social systems, e.g. the legal and economic systems, respectively in terms of its legal *or* economic aspects,

although never in terms of its unity.[6] Exploitation might have multilayered repercussions, irritating – as Luhmann would conceptualise it – different systems differently. Still, it will be insisted that the legal possibility of harming unwarrantedly has a foundational role in structuring the conditions of possibility for exploitation not only to happen, but distinctively to *productively endure* in the context of capitalism.

As such, cognitive contingency will capture certain aspects of a given event as much as it will omit others, creating a gap between events in general and their legal or economic depiction. But it is a mistake to imagine this gap as an erasure. It should be more adequately conceptualised as an expression of cognitive contingency as 'meaning selection constraint'.[7] This cannot be emphasised enough: that which is not registered as a result of cognitive contingency *does not* disappear, rather it remains dormant. Indispensably, that which it constrains is not a given. This is to say, cognitive contingency by itself does not cause or enable exploitation proper, as its grasp could be otherwise. Cognitive contingency, it will be argued, is not an unavoidable problem that will permanently impair the pursuit of justice, nor is it part of some evil master plan.[8] Rather, its historical specificity emerges as a mode of interpretation, reproduced from within the legal system, shaped by a history of legal narratives which are often in dispute. After all, as Althusser explains, ideology is reiterated practice,[9] sheltering at least some hope that law as *praxis* could eventually resist the patterned reproduction of suffering, inequality and ultimately of injustice.

Hence, from the standpoint of systems theory, contingency impairs every communication in such a manner as to selectively constrain meaning which will be further communicated, all the while marking a meaning remainder that will not. It is to say that contingency operates as a difference between intended communication and realised communication, or between the unity of the meaning it presumes and the partiality it delivers. It is, after all, symbolised as a case of imperfect translation. In the scope of the two legal problems studied in the articles that follow – patents on essential medicine and labour exploitation – legal contingency encloses

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[6] Niklas Luhmann, *Introduction to Systems Theory*, ed. Dirk Baecker, trans. Peter Gilgen (Cambridge, UK ; Malden, MA: Polity, 2013), 3.

[7] Niklas Luhmann, *Theory of Society*, Cultural Memory in the Present (Stanford, California: Stanford University Press, 2012), 25.

[8] Veitch, *Law and Irresponsibility*, 73.

[9] Louis Althusser, 'Ideology and Ideological State Apparatuses (Notes towards an Investigation)', in *Lenin and Philosophy, and Other Essays*, trans. Benjamin Robert Brewster (New York: Monthly Review Press, 2001), 85–126.

some elements from the environment where the legal system is inserted, which are then subsequently treated according to legal operations. But what of the aspects that escaped the legal selection?

Luhmann's theory provides an extensive engagement with matters of positive selection, i.e. the elements actually taken into consideration by communications, and a full discussion of the main features at stake is provided in one of the articles, in addition to a brief introduction in the final section of this chapeau. Yet what his theory does not consider with equivalent depth is the fate of the elements which are left out of the contingent selection. It goes without saying that legal facts are not necessarily perfect equivalents to "real world" facts, in the sense that some filtering necessarily occurs to render the complexity of social life somewhat manageable. Still, I contend that there are relevant aspects not taken into consideration due to layers of legal contingency which nonetheless remain liable to subsequent legal effects. Importantly, these legal events are not necessarily independent from the original gesture of meaning selection, but rather a continuation that apparently enjoys some sort of silent interruption before being subsequently rejoined to the realm of legal cognition.

Specifically, it will be argued that exploitation is only possible if the continuum of accumulation and expropriation in the context of capitalism is forcefully desynchronised. In other words, that the expropriatory nature of capital accumulated in exploitative conditions be silenced and precariously – yet productively – restored by the legal system whenever the process of accumulation is completed. In this way, expropriation has its illegality restored once exploitation "stops". From a systems-theory perspective then, this dissertation focuses mainly on the neglected domain of legal operations, by looking into the unselected side of cognitive contingency which nevertheless lends itself to legality despite standing temporarily unacknowledged by the legal system.

When systems theory is read in conjunction with Veitch's theory of law and irresponsibility, my critique is advanced in terms of identifying specific configurations of contingency in instances where causal responsibility could be attributed, yet it escapes the legal register. As such, apart from the profound normative engagement with the tension between responsibility and its negation, Veitch points towards a distributive pattern of factual and operational selectivity. Such selectivity implies a layer of abstraction that allows for Luhmann's notion of contingency to contribute to further understanding, yet with a historical specificity that Veitch renders inescapable. In other words, the point where contingency severs

communication from its original meaning is not a given. It is a framework resulting from historical conditions that Veitch retrieves and calls into consideration.

Admittedly, it is absolutely false to imagine Luhmann as ahistorical. On the contrary, his evolutionary approach results in a theory that is substantively embedded in history. However, reflecting his well-known conservative approach, the historical trajectory of social systems is much less a matter of an inbuilt normativity or social consensus and much more a result of natural selection. Systems that are more capable of dealing with complexity vis-à-vis the environment in which they are inserted – which are nonetheless inhabited by systems other than law – will tend to succeed in asserting their relative functional differentiation and likely endure in the long term.[10]

Veitch calls into question the distributive consequences of the legal system by articulating a critique of the immanent tension the law carries between justice and legality proper. Since the current configuration of the legal system is not due to necessity but the result of transient prevalence, the interpretive framework offered by irresponsibility reveals a potential political dispute that is reflexively engaged with the legal system.[11] It offers a perspective contestation that is concurrently both jurisprudential and transcendental, demanding accountability for political promises consubstantiated in the legal form that consistently remain foreign when it comes to their fulfilment. As a consequence, problematising Luhmann's approach to the legal system in terms of the historical specificity derived from Veitch's irresponsibility warrants at least some hope that the law might still retain the potential of lending itself towards redress.

As a product of history, the current legal arrangement of irresponsibility has roots extending at least as far as the colonial era and can likely be framed as a feature of the perverse legacy of slavery. Taking into consideration the backdrop of the Enlightenment and its paradigm of reason, it is illuminating to recall the "day after" the formal abolition of slavery in the British Empire, where former enslaved persons were set nominally free but witnessed substantive reparation accruing exclusively

[10] Niklas Luhmann, *Law as a Social System*, trans. Klaus A. Ziegert, 1st published in pbk. 2008, Oxford Socio-Legal Studies (Oxford ; New York: Oxford University Press, 2008), 382.

[11] Emilios Christodoulidis, *Law and Reflexive Politics* (Dordrecht: Springer Science+Business Media, 2001).

to former enslavers.[12] Remarkably, although unsurprisingly, the struggle for freedom was resolved much more in terms of the recognition of property rights and observance of the rule of law which incidentally favoured enslavers. The trampled rights of enslaved persons, despite the flamboyant narrative of justice and fundamental rights, were not rights in the first place. In some *jurisdictions*, the enslaved were not even people. There was no right to recuperate, an interruption that was – and is – above all considered *legal*.

Abolition, a legal act advanced on behalf of emancipation, evinced deeply rooted biases that allowed for the profits of slavery to become permanently embedded in the social stratum, contributing to a power configuration that constantly reaffirms itself in a movement aptly captured by Harvey under the notion of *accumulation by dispossession*.[13] In this case, the very act that abolished slavery also implied the legalisation, so to speak, of whatever gains slavers made out of the centuries-long market of human beings.

As these articles will demonstrate, similar patterns can be found elsewhere. The argument will be further illustrated by two themes, namely patents on essential medicines and the legal resolution of disputes on issues of labour exploitation. Their commonality rests on the fact that legal acts assembled to afford a solution for a problematic paradigm – lack of treatments and disobedience of labour law, respectively – are bi-dimensional. In resolving the immediate problem of formal slavery, abolition ultimately coerced a multitude of dispossessed persons into joining the nascent labour market of an industrialising England. As then-slaves turned into wage labourers, these persons were nominally free due to their newly inaugurated legal status but structurally dependent as a consequence of the political alienation and economic deprivation actualised by a set of carefully crafted legal acts.[14] Yet their predicament was not necessarily written down as such, at least not explicitly so.[15]

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[12] Nicholas Draper, *The Price of Emancipation: Slave-Ownership, Compensation and British Society at the End of Slavery*, 1. paperback edition (with corrections), Cambridge Studies in Economic History (Cambridge: Cambridge University Press, 2013); Marcus Rediker, *The Slave Ship: A Human History* (London: John Murray, 2008).

[13] David Harvey, 'The "New" Imperialism: Accumulation by Dispossession', *Socialist Register* 40 (2004), https://socialistregister.com/index.php/srv/article/view/5811.

[14] Draper, *The Price of Emancipation*, 114.

[15] Catherine Hall et al., *Legacies of British Slave-Ownership: Colonial Slavery and the Formation of Victorian Britain*, First Paperback edition (Cambridge: Cambridge University Press, 2016); Rediker, *The Slave Ship*.

By the same token, the first case analysed in the scope of this dissertation offers another glimpse into the bi-dimensionality of law. It considers, on the one hand, the monopolistic nature of patents and, on the other, the fact that intellectual property rights subsume knowledge to market rules. Although debatable on many grounds,[16] for the sake of this argument, it suffices to assume that intellectual property could foster innovation. Importantly, it does this *efficiently*, due to market actors who properly interpret price signals and respond accordingly, as means of reading and evaluating the insurmountable complexity of surveying individual choices. Even if all of these assumptions are accurate, the result is still objectionable: those who cannot afford medicines are doomed to perish. Within this framework, the human aspect is rendered worthless; the human is reduced to whatever means of exchange he or she owns that can speak on his or her behalf. By enclosing knowledge in the guise of fostering innovation, the law established distributive parameters with tragically tangible – albeit unwritten – consequences.

The same metaphor can be seen in the problem of undue worker exploitation, explored in the third article. This problem emerges from the same aesthetic of an unfulfilled promise once the concrete outcomes of labour disputes are brought into focus, demonstrating that even the best intentions of an enlightened court of law might still fall short of a meaningful solution to an issue that the court itself is likely a part of. The article offers an attentive engagement with the interplay between contingency and irresponsibility, addressing temporal, substantive and strategic aspects that might render labour courts (or the Supreme Court of the United Kingdom in that case) involuntary, albeit necessary, accomplices of structural exploitation.

Several layers are addressed in the article and a summary is offered in the subsequent section. Yet somewhat unsurprisingly, the main finding brings this problem dramatically close to the narrative of abolition. By resolving the immediate issue of the inobservance of minimum labour

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16 Yochai Benkler, *The Penguin and the Leviathan: The Triumph of Cooperation over Self-Interest*, 1st ed (New York: Crown Business, 2011); Michele Boldrin and David K. Levine, 'What's Intellectual Property Good For?', *Revue Économique* 64, no. 1 (2013): 29–53; Michele Boldrin and David K. Levine, *Intellectual Property*, 2014, https://doi.org/10.1002/9781118900772.etrds0189; James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven: Yale University Press, 2008); Amy Kapczynski, 'Order without Intellectual Property Law: Open Science in Influenza', *Cornell Law Review* 102 (2016): 1539–1648; Mariana Mazzucato, *The Entrepreneurial State: Debunking Public vs. Private Sector Myths*, Revised edition, Anthem Frontiers of Global Political Economy (London ; New York: Anthem Press, 2014).

standards, courts embed whatever residual profits remain, all the while legitimising the practice of illegal exploitation, not least by interdicting the possibility of reassessment. As such, it will be shown that the legal system, via its courts of law, creates, renews and protects the ability to exploit workers *illegally*, as means of obtaining a precarious but decisive competitive advantage, to the extent that illegality is merely a transitory status, subject to a conversion into legality – for a price. In other words, it will be seen that, in deciding the legal status of a given labour dispute, courts render the illegal *legal*, a result achieved in spite of the outcome in that particular dispute.

As these examples suggest, this thesis will also confront what could be seen as a feat of legal ingenuity, which is the ability to frame the solution for underlying problems in economic rather than legal terms. In both cases, the language through which the bulk of the core issues are resolved – medicines bought and disputes settled – is money, at least in general terms. Money will be probed as a measure which has not only dubious but relentlessly detrimental consequences in achieving the normative goals of the law. Ultimately, expressing justice *through* money could impair even the objective from within the hypothetical remit of money, which is to serve as an efficient means for exchanges to take place between asymmetric assets.

This critique of the semantic limitation of the language of money – the specific configuration of its cognitive contingency – does not amount to advocating for a more nuanced form of money as a means for exchanges or dispute resolution in general. Rather, the issue with money, or with instances of economic reductionism of experience more generally, is twofold. First, it implies that legal disputes could be subsumed to the exchange form. These disputes might be resolved voluntarily – if this is at all possible in a state of bare necessity – for instance, when someone in need of a patented drug meets a willing seller. However, they might also be resolved coercively, as in most cases when courts are compelled to decide on a given dispute. Whatever obligation results from these instances will be normally measurable in economic terms and subscribe to a specific configuration of reciprocity. The mutual obligations that emerge from an exchange are evidently related to the legal attribution of responsibility, but for now this will be set aside.

The second issue with money, as an expression of the economic reductionism of disputes, relates to the temporal specificity of the *event* resolution in the face of the *process* referred to as its cause. This differentiation comes not only from their asynchronous distribution but

also from their intrinsic characteristics. The process of dispossession is pervasive, tangible and perennial, whereas resolution is, most often, no more than an expectation. We might perceive money, or the infrastructure provided by the economic system more generally, as an adequate mechanism to estimate the outcomes of future events in terms of present value. When it comes to the future, this option might still unfold as a choice, in the sense that one might accept money awards in lieu of whatever the future might produce, consequently embedding risk assessment in the scope of a time-deferred value formation.

As an instance of valuation, i.e. an act of bringing to the present value features that are dispersed throughout time, money is revealed as yet another imperfect and rather reductionist medium to communicate meaning, in the sense that it is nonetheless impaired by cognitive contingency in its own terms. Valuation in the present still implies that expectations be commodified, yet it is fairly uncontroversial that at least *some* choice remains. After all, one can at least walk away from an exchange and still keep either money or goods in stock. However, whenever money awards are retrospective, what resembles an option reveals itself as co-option. That which one experiences as a result of suffering, deprivation and exploitation will be attributed a number. This economic award will likely be determined by a third party, such as the patent holder, the courts or "the market". In this paradigmatic gesture of economic reductionism, all that remains is a ransom. It is still a matter of "take it or leave it", as before, although the second option demands leaving with nothing but the experience of suffering. Human experience, in particular the experience of suffering and disrespect, is subsumed to the language of money. Once again, this process can be described as an imperfect translation, and again a historically specific one, which is loaded with a dangerously productive effect that fosters renewed cycles of capital accumulation.

This issue is further addressed in the articles. At any rate, the key message is that, to the extent that exploitation in its many forms is essentially a historical process – that is to say, not an essentialism – its infrastructure is eminently legal, even though economically measured. In fact, the very notion that exploitation is in part experienced on economic grounds will be shown to represent the level of perfection achieved by legality in granting its conditions of possibility, to the extent that it is not even – at least normally – called into question. In other words, the primacy of the distributive dimension over its constitutive counterpart suggests that the legal attributes of exploitation are so deeply embedded that it is

easy to take them for granted, ultimately obscuring one of the root causes of injustice proper.

Hence, challenging this argument pushes the economic experience of injustice into a second-order dimension of legality. In these terms, unfair and otherwise exploitative exchanges are not necessarily the result of bad economic distributions, rather they are the consequence of a legal infrastructure that has been informing, protecting and reproducing a certain distributive pattern that is profoundly damaging and unjust, and which is only incidentally measured in economic terms. Blaming "the economy" dislocates from the tangible experience of legality the burden it carries in sustaining a system that is fraught with injustice all the while externalising its systemic hegemony in the production of justice, as though a self-proclaimed ethos could stand against the test of history. To be sure, one pays bills with money and not with law, yet bills can only be paid with money because of law.

As such, the experience of exploitation builds on conditions of possibility that emanate from the concealment of law's protagonism in harms evinced by processes that are *superficially* economic but first and foremost legal. Granted, deprivation is experienced primarily at the economic level and as such, is everything but superficial. However, an attentive focus on the source of unequal distribution might reveal allocations that are profoundly informed by law, by notions of property and contract, entitlement and inheritance, and the range of normative justifications that are legally embedded and importantly, enforced.

The argument developed in this dissertation does not go as far as to expose the ways in which the economy insulates its own normativities behind the technocratic label of economic *science* against the plasticity of a *political* economy. The former advances a rational assessment of society that naturalises – i.e. anoints with the spirit of natural laws – the hegemony of the market,[17] whereas what is pursued here are sites of contestation. As such, my argument devotes itself to demonstrating that legal and economic operations, observed through the framework of systems theory, are fraught with contingency as a means to filter social complexity and render it manageable under a very specific historical configuration. This is to say, while contingency is in principle a general feature of all and every social system, the grasp of contingency that we experience in capitalism is not a given, rather a contestable social construct that must be engaged with as such.

[17] Christodoulidis, *The Redress of Law*.

In the articles that follow, the systemic – and, above all, legal – possibility of institutionalised injustice that stems from exploitation will be consistently reconnected with Scott Veitch's theory of irresponsibility.[18] One could read Veitch to frame irresponsibility as an intuition as much as an indispensable requisite of the capitalist mode of production. It is tangible and pervasive, yet fuzzy and hard to articulate without falling into oblivion. Along the lines of its pervasiveness, Veitch intertwines this theoretical engagement with irresponsibility with a series of instances and cases that could be powerfully summarised in Simone Weil's cry:

> Whenever a man cries inwardly, "Why am I being hurt?" harm is being done to him. He is often mistaken when he tries to define the harm, and why and by whom it is being inflicted on him. But the cry itself is infallible.[19]

Irresponsibility can unfold plainly as the possibility of opting out unwarrantedly, as will be illustrated in the first article through an excerpt from 'The ones who walk away from Omelas',[20] Ursula Le Guin's narrative about Omelas, a privileged society enjoying a utopia of prosperity and civilisation. Omelas' inhabitants, upon learning that their living standards are fuelled by harsh abuses committed against a young human-thing, must decide between wilful ignorance or walking away, irreversibly distancing themselves from Omelas. In the latter case, the human-thing, an image so timely when we see state-sponsored terror waged against so-called human-animals, would no longer be *their* problem. On another note, irresponsibility can also unfold as a structuring process for the entrenchment of exploitation, as recounted in the second article through a brief anecdote from Ribeiro's *O povo brasileiro*.[21] Describing labour relations in colonial Brazil, Ribeiro illustrates the *engenhos de cana de açúcar* as *moinhos de gastar gente* – sugar cane mills depicted as "mills of grinding people" – due to the terrible work conditions that relied on enslaved persons as commodities consumed in the process of fostering economic

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[18] Veitch, *Law and Irresponsibility*.

[19] Simone Weil apud Emilios Christodoulidis, 'Dogma, or the Deep Rootedness of Obligation', in *Law, Obligation, Community*, ed. Daniel Matthews and Scott Veitch, Critical Studies in Jurisprudence (Milton Park, Abingdon, Oxon ; New York, NY: Routledge, Taylor & Francis Group, 2018), 8.

[20] Ursula K. Le Guin, 'The Ones Who Walk Away From Omelas', in *The Wind's Twelve Quarters: Stories* (New York: Perennial, 2004), 254–62.

[21] Darcy Ribeiro, *O Povo Brasileiro: A Formação e o Sentido Do Brasil*, Estudos de Antropologia Da Civilização (São Paulo, Brazil: Companhia das Letras, 1995).

prosperity. Despite the incontestable legacy of slavery, whatever harm was caused to enslaved persons was – and in a sense, has been – repugnantly excluded from the grasp of responsibility due to race, religion and whatever arbitrary frame of reference law aptly deployed to support the colonial project commanded by capitalist accumulation.

In Le Guin, the controversy of irresponsibility is laid out in terms of indifference. Righteous citizens were able to "walk away" while poignantly keeping Omelas' foundational injustice untouched. In Ribeiro, irresponsibility manifests itself between the forceful and indisputable exploitation of enslaved human beings alongside the long-term social embeddedness of the corresponding relations of production, far surpassing the temporal specificity of the acts deemed irresponsible. In other words, the legal embeddedness of irresponsibility contributes to the reproduction and perpetuation – *autopoietically*, it will be seen – of seemingly long-gone habits of exploitation.

As such, in the third (and final) article, instances of shrill acknowledgement, like the possibility of simply walking away suggested by Le Guin, and the relentless yet seemingly inescapable contemporary reminiscence of slavery narrated by Ribeiro, will be conjoined in an analysis of the exploitation of vulnerable workers in the scope of the so-called gig economy. There, the expectation of deliverance that would otherwise come from the judicial system will be negated by a mode of legal reasoning that is impaired by contingency in such a way as to annul the possibility of the structural interruption of exploitation. As inferred in the article, the legal process operates against such an interruption, by cosmetically treating exploitation and insulating its root causes from thorough legal analysis. The legal assessment of labour disputes in cases such as these will be shown to inform, obscure and reproduce exploitation, whilst maintaining the claim of delivering justice unaffected.

It will come as no surprise that the metaphor of the tragedy appears often, and at different stages of this dissertation. The current framing of contingency in the legal system reveals a fissure – a dialectical fissure, as will be seen in the section on methodology – between expectation and its phenomenology, corrupting the ever impending catharsis of justice. Laid out against the canvas of irresponsibility, it detaches justice from its application, the application of the law, to sustain a contradiction that can no longer be revealed as such. Accordingly, the nature of the legal contradiction pursued here is paradoxical: the contradiction is that there is no contradiction. The self-referentiality of the legal system impedes the realisation of legal outcomes as just or unjust, to the extent that legal

outcomes can only be declared legal or illegal, declarations that derive their normative force from the legal system's presumption of justice. *Lex justitia sit*, one could say, or let the law be justice. Presuming justice through law without dialectally confronting this presumption with its corresponding phenomenology is as tragic as it is perverse.

As Veitch insists, even though we would likely expect irresponsibility to emerge from instances where the law falters, its tragedy lies in the realisation that harm is removed from the scope of accountability once it is subsumed to a neatly crafted legal infrastructure. It is law working *accordingly*. Still, an incomplete tragedy remains, informed by a legal infrastructure, historical as it is, that delivers injustice *on behalf of* justice. Yet the hope for catharsis endures, though constantly interrupted, as a particular kind of resistance that emanates from the very nature of the dialectical dimension contingency has in relation to irresponsibility:

> The inscription of the aspiration into the mediocrity of the mediating language of rights confronts the promise of obligation, community, solidarity, with the inadequacy of that 'mediation'. Not continuity but tension – or even, to use a more loaded term, contradiction – installs itself there between dignity promised and indignity delivered; between the promise of responsibility and the denial of fragility; between the promise of solidarity and the delivery of 'shrill' contention and claim of right. And where there is contradiction, redress can find traction.[22]

To address these issues, this chapeau is organised as follows. Section 1 addresses the methodology. Section 2 provides a description of the articles and briefly introduces key concepts either developed or deployed throughout the dissertation. Section 3 engages specifically with the rationale for this targeted engagement with exploitation, addressing also the normative assumptions involved in this task. Section 4 positions the Marxian notion of accumulation in the context of the legal infrastructure of exploitation. Section 5 deals with ablegality alongside Scott Veitch's theory of irresponsibility, suggesting possible convergences between the two.

[22] Christodoulidis, *The Redress of Law*, 125.

1. Methodology

Because this piece is primarily conceptual, a fair share of the methodological decisions made in relation to it have been substantively intertwined with the theoretical discussions advanced throughout, in particular when it comes to describing its shortcomings and limitations. These are expressed mostly in relation to assumptions that simultaneously lead to a specific set of fragilities, which are then addressed as needed. As with *any* piece of legal research, here, assumptions abound. To deal with this issue, they have been justified accordingly, even though there might be deeply rooted ones which have unwarrantedly crept in. To be clear, falseability was a core concern throughout and this has been made explicit where appropriate. Consequently, this section is slightly streamlined, allowing for a targeted discussion of the broad approach – dialectics – and the overall logistics of the research effort.

The single most important methodological orientation adopted here is dialectical. This is based on the stressing out of irreconcilable contradictions that occur in different levels. First, as made explicit in the excerpt from Christodoulidis above, it presses onto the contradiction installed 'between dignity promised and indignity delivered'[23] as one of the foundational problems for the perverse cycle of misrecognition.[24] This articulation evinces the conceptual detachment of 'phenomena from the form in which they are immediately given'.[25] Expressing a profound dissatisfaction with the announcement of a promise against the sheer contradiction of its experience, the dialectical approach reclaims the specificity that characterises those forms to transcend its historical contingency.

In this sense, exploitation is a problem rooted in the very core of the liberal promise, serving at once to justify the many gestures of renunciation that underlie the reverence paid to the rule of law, while simultaneously realising itself as the material outcome of oppression. It is a problem that remains unsolvable *by design*, which suggests the positioning of exploitation as one of the conditions of possibility for capitalist accumulation per se. The immanence that characterises this problem is unavoidable. It is as much internal as it is irreconcilable, rendering the

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[23] Christodoulidis, 125.

[24] Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, 1st MIT Press ed, Studies in Contemporary German Social Thought (Cambridge, Mass: MIT Press, 1996).

[25] György Lukács, *History and Class Consciousness: Studies in Marxist Dialects*, trans. Rodney Livingstone, Nachdr. (Cambridge, Mass: MIT Press, 2013), 8.

resolution of an immanent contradiction necessarily transcendental, in that it disturbs its own conditions of possibility in a way that is irrecuperable.[26] As Lukács explains, '[t]his twofold character, the simultaneous recognition and transcendence of immediate appearances is precisely the dialectical nexus.'[27]

The second level is dialectical in a more stylised way. It engages with the incompossibility of the law and the economy. This is to say, whilst accepting that the assumptions held either by the legal or the economic systems might be internally consistent, that their contradiction becomes evident once both systems are observed in conjunction. The canvas is still the contradiction between promise and experience, providing context for the dialectical thrust of this dissertation: it lies in the overdetermined phenomenology of exploitation vis-à-vis the concerted schema provided by both the legal *and* the economic systems in a way that surpasses their individual legal *or* economic – i.e. their individual – normative frames.

The importance of Althusser's overdetermination in this analysis cannot be stressed enough. It is not simply the localised contradiction of exploitation at the material level that renders the problem of exploitation simultaneously unavoidable and irrecuperable. Rather, it is the embracing of a multitude of factors in relation to that contradiction, factors well beyond the epistemological boundaries of law and economics, which extend towards its ideology and corresponding phenomenology.[28] As such, this engagement with overdetermination in relation to the contradiction posed by exploitation at the normative level propels this dissertation beyond the confines of legal discourse, yet it does so *because* of those sharply limited confines. Within the dialectical framework, overdetermination requires an engagement eminently transcendental in relation to the epistemological threshold brought up by history.

Nonetheless, it is important to underline here that Luhmann's systems theory is potentially at odds with Marxian scholarship, in particular the dialectical aspiration towards synthesis embraced by those working in the latter. In its many trends, including the Hegelian-inspired dialectical materialism of Marx, dialectics flourish the moment differences are reconciled, although not necessarily resolved or overcome, but rather actualised under historically specific conditions. Luhmann, in this sense, is

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[26] Emilios Christodoulidis, 'Critical Theory and the Law: Reflections on Origins, Trajectories and Conjunctures', in *Research Handbook on Critical Legal Theory*, ed. Emilios Christodoulidis, Ruth Dukes, and Marco Goldoni (Cheltenham, UK: Edward Elgar, 2019), 25.
[27] Lukács, *History and Class Consciousness*, 8.
[28] Louis Althusser, *For Marx*, New ed, Radical Thinkers (London ; New York: Verso, 2005), 112–13.

everything but dialectical, as he advances a theory that is first and foremost based on distinctions, not reconciliations of any kind. Critically, as distinctions are a foundational aspect of Luhmann's analysis, a normative drive towards synthesis and its confounding nature is removed from the spectrum. If anything, any dialectical synthesis could still be said to distinguish itself from something else, something that would have been possible under a different set of system- or environment-specific circumstances.

Yet Luhmann offers an incredibly nuanced, dense and well thought-out framework to analyse the operation of social systems through the lens of communications. Importantly, Luhmann also engaged extensively with the conjoint operation of social systems, asserting both their independence – through features such as autopoiesis and functional differentiation – and interaction – through the conceptualisation of the environment, irritations and structural couplings. The last sections of this chapeau introduce the core ideas borrowed from systems theory, and a longer engagement with its foundational elements is available in the second article discussing the tentative concept of ablegality.

While this dissertation is eminently conceptual, it is supported by concrete examples, namely patents on essential medicines and labour exploitation. After all, while dialectics compels the encounter between the material and the theoretical, systems theory requires one to observe observations *as they happen*. Still, it would go too far to refer to those examples as case studies. Rather, they illustrate, but do not necessarily inform, findings which are drawn mostly from conceptual engagement. Quite naturally, this highlights the inductive drive of the dissertation, resulting in conclusions that are exploratory rather than categorical.

As such, the dissertation proceeds based on the assumption that expropriation is, at least in principle, illegal.[29] This is extensively engaged with in the last sections of this chapeau, and the core idea at this point is to stress that the act of taking away *requires* compensation – by virtue of history, not necessity. Equally, it will be argued below that accumulation through exploitation implies, *necessarily*, expropriation. As such, accumulation in such cases will be rendered illegal. Yet, we know quite well that the accumulation of capital *is not* illegal. Not only this, but also that capital itself – not labour – is widely vested with legal protections against many forms of interference perceived as expropriatory. How can it be, then, that accumulation might take place legally all the while rendering illegal the processes which originated it? Could Rosa

[29] Luhmann, *Law as a Social System*, 392.

Luxemburg's impossibility – the impossibility of accumulation under strictly capitalist settings[30] – be circumvented, and if so, how?

Ablegality, an original concept developed from the perspective of systems theory, targets this conundrum. However, before delving further into the structure of the articles, it is important to stress the fragility of the concept of ablegality. It is, after all, a provisional concept advanced as an intellectual exercise which will hopefully prove useful at least as such; this is to say, if not as a credible explanatory framework, at least as an exercise. At the risk of breaking this fragile fourth wall of academic writing, this is the main weakness of this dissertation: the core of its critique is founded in a concept that is still in the making, and claiming otherwise, as much effort as has been put into studying it thus far, would be plainly wrong. If anything, it is a concept that begs further stress testing. What is not so precarious, however, is the pervasiveness of the problem it is aimed at. For all its faults, ablegality is a conscious attempt at understanding how exploitation, along with its material register of suffering and expropriation, remains embedded so deeply in social life without disturbing a liberal framing of law that would otherwise profoundly reject the harm caused by exploitative practices.

2. Description of the articles

In the scope of this dissertation, the critique of the tension between justice promised and injustice delivered is developed over the course of three steps, all of which stem from experimentations with the theory developed in *Law and Irresponsibility*, where Scott Veitch lays bare the law's own 'banality of evil'.[31] For Veitch, irresponsibility for harms, not necessarily dependent on scale but mostly in terms of mass harms, does not necessarily result from deficient assignments of legal responsibility sufficiently connecting cause and effect, as if impunity for those harms were merely a consequence of flawed legal rules. On the contrary, for Veitch, both dimensions – responsibility *and* irresponsibility – are organised in such a way as to allow for certain events to remain unfettered despite the harm they might have caused. Veitch makes reference to several of such instances, ranging from the violation of human rights and

[30] Rosa Luxemburg, *The Complete Works of Rosa Luxemburg*, ed. Peter Hudis and Paul Le-Blanc, vol. 2 (London: Verso, 2015), 444–45.
[31] Veitch, *Law and Irresponsibility*, 5.

exploitation to environmental damage and nuclear warfare.[32] His argument highlights the pervasiveness of a mode of legal reasoning that has been aptly shielding responsibility from the instances where it would matter most. As he puts it, '[i]n all of this, the *asymmetry* between suffering and responsibility for its production has become entrenched, it has become routinised and so expected'.[33]

The normalisation of irresponsibility, concurrently exposed and challenged by Veitch, provides the guiding narrative that ties the articles together. As such, the first of the three research steps produced the article *Scarcity, property rights, irresponsibility: how intellectual property deals with neglected tropical diseases*, published by Law and Critique in 2022.[34] It focused on a list, curated by the World Health Organization, containing twenty diseases (at the time of writing) that affect anything between one and three billion people worldwide. Despite being so pervasive, treatment for those diseases has been chronically underfunded.

In particular, the article targets the legal and economic elements that impose a state of scarcity on knowledge production, effectively creating a market for knowledge where otherwise there would be none. Still, as with any market, it comes at a cost; as with the wide majority of markets, a hefty cost that is based on human lives. Since knowledge is by definition a non-rivalrous and non-excludable good, in the sense that the enjoyment of that "good" by one person does not prevent another from doing the same and does not reduce the imaginary "stock" of knowledge, law artificially imposes barriers to the enjoyment of knowledge through the form of intellectual property rights, which are first and foremost *property* rights.

While it is fairly trivial to derive economic value from such an arrangement – those in need have no alternative other than procuring patented medicine to alleviate suffering – the article offers a nuanced reading of the source for said value, namely the ransom-like hierarchy created between a handful of suppliers and a multitude of consumers around goods that *became*, because they are not *necessarily* so, inherently monopolistic. As argued there, to the extent that intellectual property rights are generally exercised as a monopoly and that demand elasticity tends towards zero the more serious a health condition is, the price someone would be willing to pay for an essential medicine would

[32] Veitch, 1.
[33] Veitch, 7.
[34] Daniel Pinheiro Astone, 'Scarcity, Property Rights, Irresponsibility: How Intellectual Property Deals with Neglected Tropical Diseases', *Law and Critique*, 25 June 2022, https://doi.org/10.1007/s10978-022-09324-3.

ultimately equate to the value of one's own life, with the absolutely non-trivial reminder that this price will be established on the basis of some sort of average that excludes the better part of the world's poorest.

The first article also deploys the thrust of Veitch's irresponsibility to scrutinise not necessarily the ways in which the intellectual property mechanism operates but importantly, why it is at all possible that it does so in such a troubling manner. This points towards the original disconnection provoked by law in terms of an appropriation of value – the value of human lives – which is repurposed as prices – drug prices. As such, the main argument developed in the article relates to the consequences of said *appropriation* of value, which would generally trigger reciprocation, for example in the form of an obligation to provide treatments as a consequence of the right to enclose knowledge through monopolistic intellectual property rights. To the extent that reciprocation is void, irresponsibility obtains: the exercise of intellectual property rights over essential medicines ultimately extracts the value of human lives and offers it back as potential alleviation, now in the form of patents marked under market prices.

The second research step resulted in the article *Ablegality: a primer on systems theory as a critical legal framework*, currently presented as a pre-submission draft. There, I sought to develop a theory to account for the paradox between legality and illegality identified in the problem of exploitation. This was illustrated, for instance, by challenging the claim that the private property rights afforded to a drug patent can be said to "create" value, emphasising the dynamics of value creation (or more precisely reallocation) as a consequence of the redistribution of private property rights that are rendered legal even though founded on the potential illegality that follows from circumstances of expropriation.

The argument was mainly supported by Luhmann's articulation of law and economics as two systems that are epistemologically independent albeit tightly coupled, relying strongly on the notion of cognitive contingency as a mode of meaning selection constraint, as already mentioned above and discussed in further detail in the section below. The main argument was developed in terms of the recuperation of the legal protagonism in what could otherwise resemble economic (i.e. distributive) injustice due to its inherently contractual nature.

These ideas are intertwined with the key findings of the first article, specifically through the original act of disconnection observed in the legally mediated transition between the appropriation of value and its return as prices. This circumstance positioned the operation of the legal

mechanisms of irresponsibility as conditions for the inscription of economic value to essential medicine patents, namely as mechanisms that at once enable the disavowal of responsibility and, importantly, that render the consequences of such transformation legally untraceable. The distinction matters, as it is not simply the harm done from A to B that is declared legally acceptable; rather, harm is anonymised (yet experienced) in such a way that unveiling the hypothetical acts undertaken by either A, B, or whoever else becomes pointless, due to the absence of legally perceived causality. As a result, the claim of value "creation" was countered by arguing that what is at stake is not value that is created but concretely an expression of harm-derived value that follows from a process of systematic expropriation.

Luhmann is categorical when it comes to codes, explaining that their output is always binary, e.g. legal/illegal. Still, looking further into intricate legal operations such as those covered in the articles, there seems to be a remainder of legality which escapes the register of that binary distinction. For instance, even though the creation of a patent is a process modulated in terms of legality, the fact that its economic value obtains from those who experience the need for medicine is not necessarily legal or illegal. Granted, there is no question that, at least in principle, it is legal to deny access to a patent to someone unable to pay, even if this signifies imposing harm of some kind. Still, there is no teleological justification for that suffering. That is to say, patents were not awarded to make suffer, yet they do. Such suffering, which not coincidentally informs the scarcity that drives patented drug prices, is rooted in the legal system even though it lacks an explicit hermeneutical reference to it.

As such, in a more canonical systems theory jargon, the ablegal captures the surpluses of meaning derived from the contingent nature of legal-economic communications. In other words, it captures the nature of purported economic value as a consequence of the gap that remains between the harm suffered and responsibility awarded which is then reallocated via contracts. This could shed light on the relative increase in economic value caused by artificial scarcity as an extraction of value from human lives, i.e. by the maintenance of a state of suffering that is tantamount to the value captured through drug scarcity.

Even though the articulation of the problem was significantly grounded on systems theory, there was a deviation from Luhmann to conceptualize the contract as an instrument for reallocating property rights which operates in excess of his sharp distinction between legal/illegal, functioning specifically as a form for the structural coupling between the

legal and the economic systems. This theoretical frame is extensively engaged in the second article, navigating through these concepts and situating them accordingly in Luhmann's oeuvre. Importantly, that article also advanced the novel concept of ablegality, referring to instances where legality is absent rather than nonexistent, with the goal of providing a conceptual placeholder to deal with a byproduct of cognitive contingency. Specifically, ablegality deals with the remainder of Luhmann's legal coding operations, one of his most fundamental models,[35] registering said remainder as an object liable to express itself phenomenologically. In other words, it deals with a dimension of legality that is rendered invisible yet far from intangible. Ablegality is also discussed in depth in the last section of this chapeau, although slightly discharged from the bulk of systems theory readings.

The third step of my research is devoted to a detailed examination of the legal mechanics of exploitation in the context of labour. This step in particular grew larger than anticipated, and thus far has been managed in the following way. To narrow down the analysis to fit the required scope and length of an article, it deals with the role of court awards in labour litigation as a core driver for the reproduction of the conditions of exploitation. At the time of writing, it is under peer review by the Journal of Law and Political Economy, submitted under the title *The legal tragedy of exploitation: irresponsibility and the complicity of law*. It focuses on the struggle of Uber drivers and Deliveroo riders against the respective companies, resolved by the Supreme Court of the United Kingdom. In the first case, Uber drivers were declared workers for purposes of UK law due to evidence of subordination, whereas Deliveroo riders were not, particularly due to a seldomly used (as per the court) clause which allowed riders to freely choose a substitute for deliveries assigned to them.

The analysis developed in the article engages with the disproportional accumulation of profit enabled by the structural possibility of relying on undue exploitation, which is defined as profits that result from the misclassification of their worker statuses and inobservance of rights provided by labour law. "Disproportionate" and "undue" must not be taken for granted here, as they refer specifically to rates of profit and exploitation practices that occur beyond standards that would otherwise be deemed legal, despite the harmful effects these might still have from the point of view of the exploited. As such, the article develops not as an

[35] The subsequent section offers a brief explanation of systems theory in general and its relevance for the dissertation.

apology to legality, but rather an investigation of the process that tames illegality and renders illegal profits ultimately *legal*.

While maintaining the focus on the problematic relationship between harm, accountability and the so-called value it engenders, the primary objective was to sketch a theory capable of explaining the legal possibility for the reproduction of exploitation to occur in such a patterned manner. The hypothesis was that the extraordinary profits extracted from conditions of undue exploitation (i.e. exploitation in excess of what is legally allowed and/or socially sustainable) function as leverage in favour of the exploiter, resulting in a competitive advantage that benefits from the cognitive limits of the law (i.e. its contingency) to stabilise those profits as if they were legal in the first place.

As detailed in the article, such profits, both actual and potential, effectively hedge against the liability that the process of exploitation entails and consequently annul any deterrent effect a labour dispute might have had. On the one hand, then, exploitation unfolds as a self-reinforcing process, in that liability increases over time but has its harmful effects curtailed by exponentially increasing extraordinary profits. On the other, as supported by the literature, whenever the set of choices available to workers and their families is impaired (e.g. due to dispossession, migrant or refugee status, family circumstances, etc.), the leverage exploiters have is enhanced. This allows for the restatement of the obvious, in that the most vulnerable in society are disproportionately more exposed to the deleterious consequences of exploitation, all the while pointing to some important underlying reasons for this.

The significance of this theme lies in the disparity between the nuanced phenomenology of exploitation and the rather reductionist legal-economic mechanism that recurrently hedges exploitation against subsequent accountability. In other words, the law distinctively measures exploitation in economic terms and remedies accordingly, e.g. after comparing actual wages versus the legally enshrined standard. However, the law simultaneously disavows a set of other features brought on by exploitation, summarised here as a competitive advantage, specifically to avoid parting ways too sharply with the economic jargon often imported into legal reasoning. Because of this very particular distribution of responsibility, those who rely on undue exploitation, and even exploitation more generally, will be in a position to rely on exploitation *further* as time goes on. The issues that remain unaddressed, as argued there, sustain certain conditions of possibility for such a patterned structure to remain.

In essence, this problem foregrounds the disparity between harm as endured by the subject and harm as interpreted by law. As such, it echoes a pattern identified in the first article. The complex range of subjective harms endured by different persons end up (once again) circumscribed by the language of money, actualising the heavily biassed assumption that it suffices to measure the phenomenology of suffering in economic terms. It is to say that, upon confirmation, the exploiter distinctively *pays* the exploited, thus negating, with Christodoulidis,[36] the possibility of redress vis-à-vis the complexity that the experience of exploitation presupposes.

Hence, the article (i) demonstrates that the risk of exploitation generally pays off, especially when it comes to the most vulnerable. This is further supported by extant literature, offering substantial evidence of the imbalance between exploitation caused and exploitation sued for, which incidentally gets worse the poorer the exploited is. As the idea of "imbalance" suggests, overcoming this problem would come close to the standard prescription that could be derived from its underlying legal-economic terms, where what is at stake is the efficiency mismatch between legal claim and legal award. Still, I insist that the efficient solution – to economically even out harm with compensation – largely misses the point, as financial reparations ultimately disregard the complex experience of the exploited.

Against efficiency-centred approaches, it is assumed in the article that people are not only economically but socially, emotionally and mentally divested in the process of being exploited. In short, that the phenomenology of exploitation far exceeds the interpretive framework of law, which tends to assess exploitation merely from a quantitative standpoint. This is exacerbated by the fact that legally recognised exploitation (e.g. exploitation sued for) alienates the exploited further by compensating post facto, and essentially on economic grounds. It also signifies that exploitative labour could distinctly transition from illegality to legality, contingent upon a mode of economic compensation that is negotiated precisely, as will be seen, through the layer of ablegality.

This claim, albeit laid out simplistically here, illustrates that there is more to the substantive mismatch between the fluid *process* of exploitation and the time-specific *event* of court resolution than meets the eye. As such, it is possible to argue that (ii) the legally actualised experience of exploitation is in itself alienating and profoundly disrespectful. In conclusion, it is advanced in the article that the living features of the exploited were unduly extracted and precariously paid back, as in (i), while

[36] Christodoulidis, *The Redress of Law*.

the act of paying back is per se alienating, as in (ii). Consequently, the legal resolution of disputes tackling exploitation realises itself as an event that alienates people *further* while simultaneously insulating the process of value extraction from subsequent scrutiny, not less through mechanisms such as claim preclusion, *res judicata*, precedent and so forth.

The legal resolution of disputes, then, will be shown to operate as a caesura, an ephemeral glimpse of legality that obscures the humane contradiction and legitimises the distributive outcome of the perennial process of exploitation. It suggests that the structure of dispute resolution in labour litigation directly contributes to the reproduction of the vulnerability that impairs those who are exploited the most, yet remains shielded behind narratives of legality and justice that not only falter, but ultimately conceal the breadth and depth of the problem of exploitation.

3. The issue with exploitation

As is widely known, exploitation has been extensively studied in the context of critiques of political economy throughout the years. The main conceptualisation adopted throughout this dissertation, at least as a point of departure, is quite obviously borrowed from Marx. In Marxian theory, exploitation occurs when capitalists pay workers a wage that is less than the value of the goods and services they produce through their labour. Labour power, i.e. the workers' capacity to perform labour, is treated as a commodity that workers are compelled to sell to capitalists in exchange for wages. They are *compelled* by virtue of the separation between labour and capital, rendering workers dispossessed and having no means to provide for themselves without recourse to the labour market. When capitalists pay workers a wage that only covers the cost of reproducing labour power – enough for workers to tend for their basic needs and nothing more – while appropriating the surplus value generated by workers' labour as profit, exploitation obtains.[37]

This canon is supplemented with an important definition provided by Feminist theory. Exploitation emerges in terms of gendered power relations within capitalism, encompassing the ways in which women's labour, both within and outside the formal economy, is undervalued, underpaid and otherwise appropriated by others. This is particularly noticeable in the scope of unpaid domestic work and care work, but also

[37] Karl Marx, *Capital: A Critique of Political Economy. Vol. 1*, Historical Reprint (Ancient Wisdom Publications, 2019).

in terms of gendered divisions of labour in more standard forms of employment.[38] Based on this, one could even derive an approach to register the worker not as a self-standing individual, but rather as a social aggregate that compels the individual, the family, its surroundings, the unrealised opportunities for unionisation, leisure, rest and education as victims of exploitation. It is as much a matter of "value" extracted as it is of social life proper.

Within the scope of the third article, yet another conceptualisation was employed to frame the notion of competitive advantage that might be achieved by companies which rely on the undue (i.e. illegal) exploitation of workers. In neoclassical economics, exploitation is often viewed through the lens of market transactions. Exploitation occurs when one party gains an unfair advantage over another in a voluntary exchange, typically by extracting surplus value or utility from the transaction. This can include the exercise of monopoly power, information asymmetry or unequal bargaining power.[39] The article relies on these arguments to suggest that court awards overlook the depth of the leverage provided by worker exploitation at the level of the firm, affording companies an infrastructure for price setting that predates market prices despite being founded on an illegality – the illegal status of exploited workers.

The concept of exploitation became particularly prominent in the final years of writing this dissertation, although its traces have existed since the beginning. Such a broad concept runs the risk of being cheaply deployed, demanding due care to avoid its banalisation. In this sense, the focus here has remained, on the one hand, on the notion of exploitation and the mutually reinforcing relationship it has with Marx's concept of primitive accumulation,[40] and on the other, on the law of the falling tendency of the rate of profit, which is circumstantially countered by, amongst other factors, increased rates of exploitation and unemployment.[41] These problems brought the theoretical framework of the dissertation closer to dependency theory, which engages exploitation as the unequal economic relationship trend observed between core and peripheral countries in the global capitalist system. Core countries exploit peripheral countries through mechanisms such as unequal exchange terms of trade, and the

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[38] Marilyn Waring, *If Women Counted: A New Feminist Economics* (San Francisco: Harper, 1990).
[39] Jean Tirole, *The Theory of Industrial Organization* (Cambridge, Mass: MIT Press, 1988).
[40] Marx, *Capital*, 2019, pt. VIII.
[41] Karl Marx, *Capital: A Critique of Political Economy. Vol. 3*, ed. Friedrich Engels, trans. Ben Fowkes and David Fernbach (London: Penguin Books in association with New Left Review, 1981), pt. III.

extraction of surplus value from peripheral economies by multinational corporations and financial institutions which exercise disproportionate influence in host countries due to different forms of monopoly power at the transnational level.[42]

Yet it was Marini's Dialectics of Dependency and his concept of superexploitation which triggered a particular interest in studying the general idea of exploitation in contexts other than Marx's original engagement with labour.[43] Marini's principal finding lies in identifying patterns of transnational hierarchy, based, for instance, on the highly asymmetrical protection of foreign direct investment and the monopolistic nature of intellectual property. As one would expect, especially due to writing from the perspective of the South and witnessing bouts of modernisation in a significant part of Latin America and South East Asia, Marini still places a significant emphasis on labour. However, his engagement with frameworks of a higher order, such as patterns of world trade and property protection in the context of a globalised, contemporary world, created the space for an engagement with elements other than the immediate relations of production.

For Marini, the burden that transnational legal privileges places on peripheral countries – codified as rates of exploitation or value extraction – leads to the superexploitation of workers, since they must generate enough surplus value so that it can be appropriated by local elites as well as by capital owners located in central countries, in ways that significantly impair the worker's living standards.[44] As a tradition grounded primarily in sociology, it is no surprise that dependency theorists have been examining the occurrence of superexploitation generally with an emphasis on concrete outcomes rather than theoretical constructs.[45] As such, superexploitation emerges as the tangible form of an excess of exploitation

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[42] André Gunder Frank, *Capitalism and Underdevelopment in Latin America: Historical Studies of Chile and Brazil* (New York London: Monthly Review Press, 2009).

[43] Ruy Mauro Marini, *Dialéctica de la dependencia*, 11a reimp (México: Era, 1991); The book was recently translated. See Ruy Mauro Marini, *The Dialectics of Dependency*, ed. Amanda Latimer and Jaime Osorio (New York: Monthly Review Press, 2022).

[44] Marini, *Dialéctica de la dependencia*; Ruy Mauro Marini, *Proceso y tendencias de la globalización capitalista y otros textos (Antología)* (Prometeo Libros Editorial, 2007).

[45] Virginia Maria Fontes, *O Brasil e o capital-imperialismo: teoria e história*, Pensamento crítico 15 (Rio de Janeiro: Ministério da Saúde, Fundação Oswaldo Cruz, Escola Politécnica de Saúde Joaquim Venâncio : Editora UFRJ, 2010); Amanda Latimer, 'Super-Exploitation, the Race to the Bottom, and the Missing International', in *The Palgrave Encyclopedia of Imperialism and Anti-Imperialism*, ed. Immanuel Ness and Zak Cope (Cham: Springer International Publishing, 2021), 2546–61, https://doi.org/10.1007/978-3-030-29901-9_273; Theotonio Dos Santos, *Teoria da Dependência: Balanço e Perspectivas*, 1ª edição (Insular, 2018).

that surpasses the limit where it – exploitation – would still happen "sustainably".

The notion of sustainability here is not necessarily trivial. As seen above, exploitation in its standard form presupposes the appropriation of surplus-value by the capitalist class. This is a basic feature of capitalism, widely studied as a condition for the reproduction of the system. Still, in qualitative terms, exploitation would ordinarily translate into wage levels that allow workers to fulfil their basic needs and foster the reproduction of the working class as such – as *workers* first and foremost – without taking into account social mobility in either direction. Superexploitation, on the other hand, entails a level of overwork and/or underpayment that results in the deprivation of the means to fulfil those needs and consequently impairs the reproduction of the working class. Yet it can still be sustained (albeit no longer "sustainably") provided there is an influx of new workers willing to labour in increasingly worse conditions. This group has been aptly captured by the notion of surplus populations – those still outside the reserve army of labour[46] – as people who are so deprived of the means of subsistence that they do not even have someone to exploit them.[47] The material consequences of deprivation, which are generally measured in terms of wage levels, could lead, for instance, to the return of elderly people to the labour market, child labour, multiple work shifts, etc. These are all invariably tangible factors exerting downward pressure on future generations and progressively widening the social gap.[48]

This diagnostic is well-established and solidly grounded in empirical data, but it begs interrogation. The interconnectedness of the superexploited worker and capital accumulation is evident, yet there is nothing overtly legal tying them together other than layers of property rights moving value away from the periphery towards the centre of capitalism. Does law have anything constitutive to do with this, and if so, how does it work? To be clear, it is outside the scope of the dissertation to demonstrate, or even imply, that the workers described in the third article – the so-called gig economy workers – are superexploited instead of being "just" exploited. Still, dependency theory does not draw a sharp line between workers who are exploited and their superexploited counterparts, rather describing the latter as subject to a similar, yet

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[46] David Harvey, *A Companion to Marx's Capital*, Complete edition (London: Verso, 2018), 736.

[47] 'Under capitalism the only thing worse than being exploited is not being exploited'. Michael Denning, 'Wageless Life', in *Wageless Life* (De Gruyter Oldenbourg, 2016), 79, https://doi.org/10.1515/9783110437201-011; apud Christodoulidis, *The Redress of Law*.

[48] Marini, *Dialéctica de la dependencia*.

enlarged, exploitative impetus. In other words, superexploitation does not evolve into a different form of exploitation; rather, it evinces its superlative manifestation. It is also temporary, as living standards deteriorate and ultimately stabilise in a precarious state, entrenching the material effects of inequality in progressively worse conditions. Importantly, even this superlative status remains, at least in principle, within the boundaries of legality. Specifically, exploitation *and* superexploitation are not necessarily illegal.

If this reading is plausible, a deeper look into exploitation in terms of its legality could contribute to understanding its dynamics in scenarios where impoverishment and deprivation are reasonably stable. Stability here does not refer to circumstances of so-called general equilibrium or other aliases for presumed efficient allocations. Rather, it refers to a state where there could have been a normative expectation for change on legal grounds, for instance, through the irritation of the legal system by numerous instances of discrete expropriation. The legal dimension of exploitation, in this sense, is deemed *legally*, not necessarily economically, stable. It is an expression of legal tolerance where rejection would have been at least plausible. This contradiction – a dialectical contradiction – allows for the further questioning of how this process unfolds. It is dialectical precisely because its internal logic can be assessed independently, i.e. in terms of its legal *or* economic consistency. However, a glimpse of its underlying phenomenological tension emerges when the problematic experience of being materially dispossessed is confronted with legal indifference. This is to say, a problem emerges when the stability of exploitation is confronted with its legal *and* economic normative consistencies *at the same time*.

Here is an example. In the case of general exploitation, the existence of *some* legal operation is explicit, as value changes hands. There exists a market exchange: labour for wages and vice versa. However, there is no reciprocation, since value extracted in the context of exploitation, by definition, does not entail responsibility for adequate compensation. This exchange is legally open to being skewed, not discretely but structurally. In other words, it is not this or that labour-based exchange that might be registered as exploitative, all the while remaining part of an aggregate trend towards some sort of egalitarian equilibrium, as would be the case of commodities occasionally priced below their market value. Swapping like for unlike, the resemblance here transforms into a contrast. One party *has* to be exploited for capital accumulation to obtain.

As such, even though what is in sight is an imbalanced exchange, legality is in principle unfettered. As will be seen in the following section, the reason for this is fairly trivial, as the law does not register exploitation either as legal or illegal. Or, borrowing from Veitch, '[w]hat registers in law as a wrong? This question has a deceptively simple answer: what registers in the law as a wrong is a breach of the law'.[49] From a legal standpoint, then, an exploitative transaction is apparently completed once value changes hands. Legality could be seen as briefly interrupted to allow for this skewed exchange to take place, all the while faltering when the equivalence of such an exchange is considered. Such an interruption is *apparent*, of course, since the phenomenology of such a dynamic is anything but apparent. "Why" accumulation without reciprocation is possible is a quasi-tautological given: it is possible because it is not illegal. "How" this is possible is still not clear, and Veitch's analysis of law and its organised *irresponsibility* points to a promising way forward.[50]

Hence, to address this issue from a theoretical point of view, it is necessary to delve into the functional elements that make up the legal infrastructure of exploitation. As before, this is accomplished mainly with support from the systems theory of Niklas Luhmann, although there is little question that he would sharply refute the deployment of his theory in the search for structures or patterns of any kind. For Luhmann, an adequate understanding of social dynamics is achieved by a second-order observation of communications rather than formulations in terms of structures, actors and other subjective entities that are common elsewhere but certainly *not* in systems theory, where their relevance as explanatory features is in fact rejected.[51]

For this reason, the investigation of the legal functions involved in the process of exploitation builds on discrete observations of specific instances of social exchanges – or as in Luhmann, by observing communications. In this particular, perhaps even stylised context, the preliminary concept of *ablegality* is advanced as a means to register the precarious interruption of legality that renders exploitation legal. The next section introduces the concept of ablegality – developed in the scope of the second article – and the key notions of systems theory that helped to frame it.

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[49] Veitch, *Law and Irresponsibility*, 92.
[50] Veitch, *Law and Irresponsibility*; Veitch, *Obligations*.
[51] Luhmann, *Introduction to Systems Theory*, 242-244.

4. Primitive or perennial accumulation?

It is necessary then, to lay out a baseline for legality proper in the context of capitalism to ground a critique based on the concept of ablegality. Apart from generally accepted features, such as the rule of law, due process, contracts and a set of rights that are more or less undisputed in their most fundamental forms – freedom, equality, etc. – the problem with legality here is founded on a normative assessment. Specifically, it assumes that the law in capitalism rejects expropriation. In other words, that the law criminalises, regulates and exceptionalises accordingly the act of taking away unwarrantedly.[52] If and only if this assumption is plausible, ablegality might prove useful to understand the legal dynamics of exploitation.

Even though this concept is developed within the framework of systems theory, its underlying intuition came from a reading of Rosa Luxemburg's discussion of primitive accumulation. In the excerpt below, accumulation is closely connected to a violent process of boundary setting, by forcefully incorporating new realms of the social into the much narrower realm of commodity exchange.

> Accumulation is impossible in an exclusively capitalist setting. From the very first moment of capitalism's existence, it was accompanied by the drive toward expansion and encroachment upon noncapitalist social strata and into noncapitalist lands, the ruin of handicraft production and of the peasantry, the proletarianization of the middle strata, colonial policy, and the export of capital. Only through continual expansion into new domains of production and new lands has the existence and development of capitalism ever been possible. But this worldwide drive for expansion constantly leads to a clash between capital and the noncapitalist forms of society. Hence force and violence, war, and revolution – in short, catastrophe, which has been the characteristic "life element" of capitalism from start to finish.
>
> Capital accumulation proceeds and extends itself at the expense of noncapitalist social strata and noncapitalist regions. It violates and subjugates them, tears them apart and tramples them underfoot at a more and more accelerated pace. The overall trend and end result of this process is the exclusive world domination of capitalist production. Once this is achieved, Marx's schema comes into effect:

[52] Luhmann, *Law as a Social System*, 251.

> at that point, accumulation – that is, the further expansion of capital – becomes impossible. (...)[53]

It is worth mentioning that expropriation, as much as dispossession, is a loaded term. Both concepts could imply the existence of previous property or possession that is subsequently taken away. Authors have taken issue with this imprecision by evoking its conservative status; namely, by making explicit the contradiction of adopting the very categories of being as the object of critique as a source for its normative justification. Nichols, for instance, frames the notion of dispossession as a recursive claim, in the sense that the hypothetical recognition of previous possession exists only to allow for its subsequent reassignment.[54] In other words, there is no need for previous property claims as such, as their assertion serves only the purpose of justifying the incorporation *as property* of a given social entity. Taken to its extreme, deploying the category of property to assess social phenomena that precede it could resemble a reversal of Marxian *survivals*,[55] a resemblance not of the past that informs the experience of the present, but precisely its opposite. This being said, the usage of both expropriation and dispossession here is slightly more liberal, as it aims to remain in conversation with the established literature and maintain its focus on the problem of the legal stability of the modes of incorporating property at large. It is indeed a conceptual imprecision, yet hopefully an excusable one.

Hence, assuming that the law in fact rejects the ordinary possibility of expropriation poses difficulties in the effort to explain the legal dynamic of the 'expansion and encroachment' of capital described by Luxemburg. The point of accumulation is to have more today than one had yesterday. In the case of exchange-based accumulation, it would imply paying a low price vis-à-vis a commodity's worth. Similarly, in the case of accumulation of capital by virtue of some sort of generation of value – which for Marxian scholars means the realisation of labour power and the subsequent conversion of labour into capital – it would imply paying wages below labour's worth. In both cases, someone has to lose for someone else to accumulate. Hence, in a world where expropriation is at least in principle forbidden, accumulation remains at odds with legality.

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[53] Luxemburg, *The Complete Works of Rosa Luxemburg*, 2:444–45.
[54] Robert Nichols, 'Theft Is Property! The Recursive Logic of Dispossession', *Political Theory* 46, no. 1 (1 February 2018): 3–28, https://doi.org/10.1177/0090591717701709.
[55] Althusser, *For Marx*, 115.

On the other hand, Luhmann would likely disagree with the blanket assumption that this mode of appropriation *is* forbidden. Rather, he would invite us to investigate whether the existing operations of the legal system do in fact code as illegal the practices that could lead to expropriation. If they do not, the discussion of legality in those cases would be rendered pointless, even though the prohibition of expropriation could still be traced, for instance, to the realm of political aspirations or posited as a condition for the efficiency of allocation advanced throughout the economic system. What is legal or illegal, in the case of systems theory, is what *is* communicated (by virtue of a given coding) as legal or illegal, not what should have been.[56]

So, returning to the first sentence of Luxemburg's excerpt, 'accumulation is impossible in an exclusively capitalist setting', at least two outcomes are plausible. The first, as she describes, is for capitalism to advance towards new realms of non-capitalist strata, engendering new cycles of primitive accumulation. It describes a process of enlargement that, for Luxemburg, did not happen exclusively in the conceptual origin of capitalism but rather keeps repeating itself, in such a way that it might even broaden the scope of stricter versions of "economic" accumulation to reach into areas generally overlooked by classic Marxism, such as race and gender.[57]

The second outcome is conditional. If it is admitted that accumulation will only make sense if it enables the reproduction of newly incorporated capital – otherwise, it would not have been capital in the first place – Luxemburg's *impossibility* for accumulation under a capitalist framework must remain open. Impossibility in such a context would not amount to sheer denial, rather it would refer to a dimension of *incompossibility*, as an attenuated counterpart for the impossible that only obtains if given structures are *present*. If this is the case, there will be a perennial need for a dynamic resolution of the tension between accumulation, as one of the material consequences of exploitation, and expropriation, as the normative threshold of law under capitalism. This is to say that, by rendering Luxemburg's impossibility recursively open, this tension will become procedural rather than eventual.

The provisional answer for this conundrum lies in the tentative concept of ablegality. The *ab-* prefix has a purpose, as it denotes absence.

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[56] Luhmann, *Law as a Social System*, 174–75.

[57] John McMahon, Siddhant Issar, and Rachel H. Brown, 'Rosa Luxemburg and the Primitive Accumulation of Whiteness' (Rowman & Littlefield Publishers, 2021), https://soar.suny.edu/handle/20.500.12648/1717.

Importantly, it does not amount to negation. Ablegality refers to a brief and precarious, albeit productive, interruption of legality and deals with an issue of temporal and substantive specificities: the problem of having an event which is legal and illegal at the same time. Accumulation is legal, expropriation is illegal, and both function recursively. Ablegality admits a coexistence otherwise denied – rendered impossible – between the binary sides of the legal code, opening up the possibility for its modulation.

5. Ablegality and irresponsibility

Assuming – or hoping, I should say – that these preceding notes were able to render a critical engagement with systems theory at least remotely enticing, the following pages focus on situating ablegality in Luhmann and further articulating it with Veitch's theory of irresponsibility. While an extended engagement with systems theory is already offered in the second article, the overview offered below should necessarily be taken with a grain of salt. Ablegality is a concept in the making and may well prove to be utterly inconsistent. As such, the argument here serves mainly the purpose of charting the intellectual route that led to the issue with the social embeddedness of exploitation and if at all relevant, of presenting preliminary grounds for its falseability.

A further word of caution. As a piece heavily indebted to the Latin American traditions of Marxian analysis, there is here a fairly generous usage of terms such as "structure" and the like. Wording so foreign to Luhmann's thinking must be read with due caution. In this sense, terminology such as structures, mechanisms and the like have generally been deployed as a semantic container rather than categorically. Perhaps the reference to such entities throughout this dissertation is a remnant of reading Marxian scholarship, or perhaps it comes from Foucault and his analyses on *dispositifs*. Foucauldian notions, which were present in different stages of this doctoral dissertation, do indeed seem to aptly capture some of the consequences of the functional features sought in the legal and economic systems yet less so when it comes to understanding their interoperability. For what it is worth, references to structure, infrastructure and mechanisms throughout the dissertation refer to transient assemblages of rules and operations within a particular context that is all but deterministic; they shall be read, for the most part, as signifiers rather than concepts proper.

The choice to rely on systems theory, then, is based on the level of abstraction it affords to the analysis of social systems, offering clearly defined modes of interaction between systems, their epistemological limits and importantly, the ways in which the difference between meaning (as source) and communication (as representation) is construed.[58] As discussed in depth in the second article, all communications 'can be conceived as the synthesis of information, utterance and understanding'[59] and are doubly marked by cognitive contingency. Importantly, contingency in Luhmann is cautiously adopted, referring to the scaled yet necessary cognitive limitation that characterises every stage of a communication. This renders all social interactions cognitively contingent both in terms of the capacity of the utterant to express meaning through information and also the ability of the recipient to understand it. This positions cognitive contingency as the necessary cohort of communications and explains the constant need for social systems to adapt, expressing their functional differentiation in terms of a system's capacity to handle complexity.

It is important to stress that systems are formed on the basis of a *functional*, and not arbitrary, differentiation, which also explains why Luhmann rejects the concept of national societies, focusing instead on society as a whole, which might, or might not, be further compartmentalised if complexity and systemic adaptations make it so.[60] Luhmann's is an evolutionary approach, where the most adaptable system outcompetes others through the adequate handling of complexity. Systems that prevail will demonstrate a level of maturity that comes accompanied by an increase in the capacity of self-observation, self-description and self-reproduction (or autopoiesis).[61] Consequently, within the scope of this dissertation, the law and the economy are not separate systems because of certain biases or political decisions in this or that direction, but rather because they have reached a sufficient level of functional differentiation vis-à-vis other systems.

Although consisting of functionally differentiated and autopoietic entities, systems are of course context-dependent and respond to external stimuli, which might be registered as irritations *if the systems can perceive them as such*.[62] For no other reason, Luhmann asserts that social systems are

[58] Luhmann, *Introduction to Systems Theory*, 25-28.
[59] Luhmann, 53.
[60] Luhmann, 3-5.
[61] Luhmann, 52.
[62] Luhmann, 88-89.

operationally closed but cognitively open, in the sense that their autopoietic nature does not equate to outright alienation. He refers to the broad background of a given system as its environment, and events that might be relevant for a particular system are perceived from the inside out by means of structural couplings.[63] In other words, whenever the legal system requires input from its environment (which includes other systems), it does so through a specific form – structural coupling – that communicates certain aspects of meaning deemed relevant to law but concurrently filters whatever aspect is unnecessary, since it could potentially overwhelm the legal (or any other) system with excessive complexity. This is to say, it is not all input that is internalised by a social system, as much as it is not any event that irritates it. This caveat translates into the fact that events of critical importance in one system maywell be utterly ignored by another. As will be seen in the article, the Luhmannian notion of cognitive contingency, explained as the difference that remains between intended meaning and its communicative representation, is fundamental to understanding how it is possible for irresponsibility to operate alongside a network of fundamental rights that would otherwise sharply negate this diagnostic.

As Luhmann explains, the nature of double contingency in communications results in a double-sided demarcation of meaning.[64] On the one hand, meaning that will be further communicated is secured, i.e. registered and specified, but unstable, since it will be further transformed in the process of being communicated, normally by the attribution of a code (e.g. legal/illegal, or have/have-not). This is extensively discussed by Luhmann, yet the main focus of the problem analysed here is on the other side, towards the unsecured (and because of that, stable) aspect of meaning, an aspect that is distinctively underanalysed in his oeuvre. To be clear, whatever is selected is unstable because then, and only then, it is liable to further transformations in the scope of the communicative process. On the other hand, the unselected counterpart remains stable precisely because it has been utterly ignored by the legal (or any other) system.[65]

Within the broad case of exploitation, selection constraints – or, as further detailed in the second article, cognitive limitations – might play a decisive role. In essence, it would interfere with the normative incompatibility between the rejection of expropriation, on the one hand,

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[63] Luhmann, 84-86.
[64] Luhmann, *Theory of Society*, 25.
[65] Luhmann, *Law as a Social System*, 209.

and the concrete manifestation of accumulation, on the other. Specifically, it seems to do so in two distinct yet complementary ways. First, as illustrated by Nichols,[66] the cognitive limitation of the law might manifest as an ex post recognition of property claims, i.e. a recognition that manifests only at the moment property is alienated.[67] This is observable in instances such as the self-declared radical claim that the British Crown held over aboriginal territories it occupied in the context of colonialism, where the fiction of *terra nullius*, abhorrently selective in its cognitive scope and consequently contingent under systems theory terms, filled a discursive role in obscuring the necessary expropriation entailed by the nascent possibility of accumulation. The same phenomenon is present in the medicine patent example examined in the first article, where the economic dimension of human health is recognised only at the moment of its alienation, i.e. recursively valuated and registered as patent prices.

Still, the first role of cognitive contingency remains closely connected to instances of primitive accumulation. In part, it could imply that accumulation is in fact circumscribed to the opportunities effected by the occasional enlargement of capitalist grasp. However, it would not necessarily inform the perennial nature of exploitation other than grounding its bare necessity on the original deprivation imposed on the multitude of non-capitalists that form the basis of a capitalist society. Specifically, even if the impetus of exploitation could still be explained by the original alienation between workers and the means of production, as in Marx, it would not shed light on how remarkably stable this is vis-à-vis Western standards of legality other than utterly subsuming the law to the economy – which, for Luhmann, is a gross mistake.[68]

Hence, instead of arguing for the superiority of this or that theoretical framing, the second case for contingency, as an expression of law's cognitive limitation in the context of exploitation, relates to the process that renders its – exploitation's – ongoing material outcomes legally stable. This case is examined further in the third article, which focuses on the already mentioned issue of the undue (i.e. illegal, or beyond legal limits) exploitation of workers labouring in the so-called gig economy. The article addresses three discrete operations of legal contingency in relation to labour – the assumption that workers have freedom to contract, the limited scope of labour-related liability in relation to its structural

[66] Robert Nichols, *Theft Is Property!: Dispossession and Critical Theory*, Radical Américas (Durham, NC: Duke University Press, 2020).
[67] Nichols, 'Theft Is Property! The Recursive Logic of Dispossession'.
[68] Luhmann, *Law as a Social System*, 390.

repercussions, and the management of complexity as input and output of a court's decision making process – to argue essentially that the temporal and substantive mismatch between the *process* exploitation and the *event* court award is productive.

As such, it allows for the illegality involved in the systematic disrespect of labour rights to be set aside, i.e. for the duration of the judicial procedure, all the while allowing for newly accumulated capital to be freely circulated and reproduced. Since courts will normally address the rather linear violations of labour law rather than the exponential structure of accumulated capital, even an award that looks favourably on workers will be rendered cognitively short-sighted. Importantly, it will be so not because of the short-sightedness of judges, lawyers or unions, but rather due to the cognitive limitation that is characteristic of the legal system. From a systems theory perspective, this consubstantiates what Moeller dubbed as Luhmann's sociological insult, 'the insight into the limits of social steering',[69] grounded on scepticism towards the role of the human agent while advancing the protagonism of communication as a unit of analysis for the social.[70] Invariably, whenever the issue at play is communication, contingency obtains.

As such, ablegality emerged from experimentations with speculative questions such as "what informs the scope of contingency?" and "how to identify the difference between meaning in the abstract and meaning communicated?", leading to a concern that has guided much of this dissertation: how is it at all possible that aspects not dealt with in the scope of legal interpretation can still be affected by legality? In this case, would irresponsibility ultimately represent the law's own *collateral damage* – assuming harm is indeed unintended – as a necessary cohort of legality in action?

The answer to the second question is almost certainly no. After all, selected groups of people have been steadily profiting from legally stabilised harms registered in the scope of exploitation, placing the very notion of harm in dispute. On the other hand, the preceding question matters – how can legality interfere with aspects not considered in its own operations? – not least since it indicates a departure from Luhmann's theory. A strict reading of systems theory would suggest that whatever was left out during the contingent operation that selectively transformed meaning into communication no longer pertains to a particular system's

[69] Hans-Georg Moeller, *The Radical Luhmann* (New York: Columbia University Press, 2012), 105.
[70] Moeller, 23–24.

realm of interpretation. As such, only that which can be codified as either legal or illegal matters for the legal system; whatever remains does so as a consequence of its systemic irrelevance.

Yet the two instances of cognitive contingency discussed in this dissertation reveal that legality does sustain effects that exceed the scope of its original selection. In the case of essential medicine patents discussed in the first article, the legally imposed scarcity of scientific knowledge that would otherwise be freely available occurs at the expense of the health and well-being of billions of people – harm that is left unaccounted for – even though the consequent economic value effected by scarcity is strongly regulated and insulated in the legal form of property. On labour exploitation, the main topic addressed in the third article, any residual profit which remains from the process of illegally exploiting workers will be incorporated as capital by the exploiter once the issue is resolved by a court of law, regardless of the fact that the origin of the profit is still harm endured by someone other than those who keep those profits. The paradox, in this case, lies precisely in the circumstance that the ruling that declares exploitation illegal simultaneously establishes the grounds for its profits to become legal.

How is it possible, then, that economic value originating from realms ignored by legality can subsequently be incorporated as legally-compliant value? Throughout the development of this dissertation, the working hypothesis has been that certain aspects which are omitted at the moment when meaning is turned into communication – in other words, aspects that form the remainder of cognitive contingency – are not ignored by legality as such, rather they remain inert, shielded by their ability to *not have* the legal code attributed to them *yet*. Systems theory does seem to suffice in explaining the dogmatic awarding of legality, even though the dynamic of the obscure counterpart of legal communication does not seem to be adequately accounted for. This hints at the existence of another form of legal register that endures, even if dormant, and which can be recuperated once whatever legal operation occurring at the "surface level", so to say, is exhausted. It is as if those dormant legal-to-be aspects were recuperated by some sort of legal trigger, such as an original land title, a court award or a patented drug offered in the market.

However, as Christodoulidis alerts us to,[71] there is no such thing as a meta-code in Luhmann, rendering ablegality an unsolvable problem. As such, my critique cannot be grounded entirely on Luhmann's work, even though it stands profoundly indebted to it. Rather, it develops from a

[71] In person, so my word will have to suffice.

productive divergence that seeks to understand the lack of an explanatory framework for a feature that is so pervasive in the legal-economic operations extensively covered in his writings, such as the forms of property and contract.[72] For these reasons, the notion of ablegality was formulated in the second article to register that which remains from legal codes that can still be reincorporated by legality in a subsequent stage. As such, ablegality is a placeholder, on the one hand, for the byproduct of Luhmann's coding operations that could not be described accordingly. On the other, it is a placeholder for features that will be soon recuperated by legal operations, seemingly coming from nowhere and, as such, normatively justifiable against the overall rejection the legal system has towards expropriation. Importantly, since it marks such an important divergence with systems theory, it is a placeholder ready to stand corrected, although necessary here at least to account for less obvious aspects of legal operations that nonetheless have pervasive consequences.

With this corrective in place, the effort of engaging with ablegality as the obscure counterpart of legality has the specific goal of operationalising Veitch's theory of irresponsibility. It was purposefully not addressed as *a*-legality, thus negating legality,[73] but *ab*-legality, denoting absence, although a type of absence that is anything but marginal. As the first article will show – with the reminder that the concept of ablegality was not yet developed at the time of writing – features registered in the realm of the ablegal are not necessarily addressed by law but are most definitely the result of legal operations. For instance, enclosing scientific knowledge pertaining to drug patents is in principle legal, even though the suffering such an enclosure entails remains unaddressed – explicitly – by law.

Still, said suffering provokes a demand for medicines that will act as highly regulated containers for that enclosed knowledge. Those who suffer are free, as free as their economic means allow, to purchase alleviation, an act once again profoundly regulated by law. At absolutely no point was it said that suffering was legal, yet it is a byproduct of openly legal operations that will ultimately return at a later stage in the form of appropriated value, expressed as market prices. Concurrently, the maintenance of the state of suffering caused by the lack of medicines is equally ignored by law, denoting an absolute lack of reciprocation as a consequence of the

[72] Niklas Luhmann, *Die Wirtschaft der Gesellschaft*, 8. Auflage, Suhrkamp Taschenbuch Wissenschaft 1152 (Frankfurt am Main: Suhrkamp Verlag, 1988); Luhmann, *Law as a Social System*.

[73] Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of a-Legality* (Oxford: Oxford University Press, 2014); Emilios Christodoulidis, 'Lindahl's Phenomenology of Legality', *Etica & Politica / Ethics & Politics* XVI, no. 2 (2014): 940–55.

enclosure of knowledge that the patent system requires. Suffering is no longer a problem rooted in law: at this point, it is measured entirely in terms of money. Consequently, patent holders are free to *not* part ways with their property and impunitively showcase one of the most brutal forms of the exercise of property rights, as the Covid pandemic has tragically reminded us. Granted, legality does not assert a "right to make suffer" in those circumstances, yet it enables almost every aspect that will render the exercise of this anti-right *possible*.

Hence, the legality of suffering is not void. It is absent, and temporarily so. It returns at a later stage, evincing its full force, boldly demanding the protection of fundamental rights under the sanctity of the rule of law. It unfolds as dogma, as a matter of faith and belief that departs from a more fundamental notion of reciprocation between rights awarded on the one hand and obligations expected in return on the other.[74] The autopoiesis of Luhmann's legal system conveniently disavows the antinomy posed by the tension between the promise of justice and the vivid, unavoidable experience of injustice. This is to say, the legal system gets away with *not* actualising this tension in legally comprehensible terms. Yet its phenomenology is unavoidable.

Irresponsibility then, albeit politically oriented, is legally perfected. It is first and foremost a legal feature, not a legal flaw. Conflicts between instances of irresponsibility and the self-evident side of legality – the attribution of the values legal/illegal for a stylised set of facts – can still be resolved "in the open", disputed at the normative level. The perversity of the ablegal is that it renders its underlying normativity obscured, as a feat of legal dissimulation. As such, I argue that the threshold between responsibility and irresponsibility does not necessarily overlap with the one between legal and illegal. The overlap may well happen on occasion, i.e. as a series of legal rules that render legal responsibility objectively unattainable. However, at least in the two themes studied in this dissertation, irresponsibility flourishes specifically when operating in tandem with ablegality. It suggests that it is not necessarily a deficit of legality – of either the qualitative or quantitative scope of legal norms and interpretation – that could pose a challenge to the struggles where irresponsibility matters most, but rather the nature of fundamental legal formulae which circularly create, foster and reaffirm opportunities for suffering to remain unaccountable in spite of their inescapable phenomenology.

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[74] Christodoulidis, 'Dogma, or the Deep Rootedness of Obligation'.

Epilogue

The honest conclusion is that this dissertation comes to an end by posing more questions than answers. There is no solution to be offered here after digging into instances of exploitation under the guidance of critical legal theory, and nor was this the goal.

However, there is expectation, and hope. The Covid pandemic reached us at the outset of the writing of this dissertation. At that point, the law that had been providing for the universal protection of the human right to health allowed for the insurmountable channelling of profit while withholding access to life-saving patents. The so-called international community failed when it had a unique opportunity to right this wrong, and the law was on duty to watch people die all the while shielding critical information behind commercial secrecy[75] and essential inputs behind monopoly power.[76]

There is no way to remedy the inestimable harm caused on behalf of private property, nor a foreseeable way to curtail the entrenchment of the obscene profits extracted by a select few in the context of global impoverishment. Hope, then, comes from laying the reality of capitalism's ever-new clothes bare. Capitalism is naked, as naked as ever, and capitalist apology alongside any meaningful gesture towards social justice is not simply naïve. It is offensive.

Leaving an introductory note that finds a tragic echo nowadays, Veitch investigated the interconnectedness between law and irresponsibility after 'Arendt's insight, by describing what is "terribly and terrifyingly normal" about modern law's capabilities in the commission and legitimation of human suffering'.[77] Veitch gave us this prescient reminder almost two decades ago, and remains as timely as ever in a historical moment where we witness a legal framework that is utterly powerless in the face of plausible genocide, all the while remaining absolutely central to instrumentalising the organised commitment of mass harms of all kinds.

Law operates from the river to the sea, and beyond, in a multidimensional frame that is easily ignored once its absurdities and

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[75] In the beginning of the Covid pandemic, the author filed a series of requests for information to survey under which terms the patents for Covid patents were being licenced but had no success in retrieving any of these agreements due to the freedom of information exception of commercial secrecy.

[76] 'Countries Obstructing COVID-19 Patent Waiver Must Allow Negotiations | MSF', accessed 9 April 2024, https://www.msf.org/countries-obstructing-covid-19-patent-waiver-must-allow-negotiations.

[77] Veitch, *Law and Irresponsibility*, 5.

contradictions become normalised at the level of reiterated practice. If this dissertation will prove itself worth anything, it will be because it succeeded in challenging such normalisation, certainly not to overcome it, but to contribute to keeping it unsettled.

References

Althusser, Louis. *For Marx*. New ed. Radical Thinkers. London ; New York: Verso, 2005.

——. 'Ideology and Ideological State Apparatuses (Notes towards an Investigation)'. In *Lenin and Philosophy, and Other Essays*, translated by Benjamin Robert Brewster, 85–126. New York: Monthly Review Press, 2001.

Astone, Daniel Pinheiro. 'Scarcity, Property Rights, Irresponsibility: How Intellectual Property Deals with Neglected Tropical Diseases'. *Law and Critique*, 25 June 2022. https://doi.org/10.1007/s10978-022-09324-3.

Benkler, Yochai. *The Penguin and the Leviathan: The Triumph of Cooperation over Self-Interest*. 1st ed. New York: Crown Business, 2011.

Boldrin, Michele, and David K. Levine. *Intellectual Property*, 2014. https://doi.org/10.1002/9781118900772.etrds0189.

——. 'What's Intellectual Property Good For?' *Revue Économique* 64, no. 1 (2013): 29–53.

Boyle, James. *The Public Domain: Enclosing the Commons of the Mind*. New Haven: Yale University Press, 2008.

Christodoulidis, Emilios. 'Critical Theory and the Law: Reflections on Origins, Trajectories and Conjunctures'. In *Research Handbook on Critical Legal Theory*, edited by Emilios Christodoulidis, Ruth Dukes, and Marco Goldoni, 25. Cheltenham, UK: Edward Elgar, 2019.

——. 'Dogma, or the Deep Rootedness of Obligation'. In *Law, Obligation, Community*, edited by Daniel Matthews and Scott Veitch, 3–17. Critical Studies in Jurisprudence. Milton Park, Abingdon, Oxon ; New York, NY: Routledge, Taylor & Francis Group, 2018.

——. *Law and Reflexive Politics*. Dordrecht: Springer Science+Business Media, 2001.

——. 'Lindahl's Phenomenology of Legality'. *Etica & Politica / Ethics & Politics* XVI, no. 2 (2014): 940–55.

——. *The Redress of Law: Globalisation, Constitutionalism and Market Capture*. Global Law Series. Cambridge New York, NY Port Melbourne New Delhi Singapore: Cambridge University Press, 2021.

'Countries Obstructing COVID-19 Patent Waiver Must Allow Negotiations | MSF'. Accessed 9 April 2024. https://www.msf.org/countries-obstructing-covid-19-patent-waiver-must-allow-negotiations.

Denning, Michael. 'Wageless Life'. In *Wageless Life*, 273–90. De Gruyter Oldenbourg, 2016. https://doi.org/10.1515/9783110437201-011.

Draper, Nicholas. *The Price of Emancipation: Slave-Ownership, Compensation and British Society at the End of Slavery*. 1. paperback edition (with corrections). Cambridge Studies in Economic History. Cambridge: Cambridge University Press, 2013.

Fontes, Virginia Maria. *O Brasil e o capital-imperialismo: teoria e história*. Pensamento crítico 15. Rio de Janeiro: Ministério da Saúde, Fundação Oswaldo Cruz, Escola Politécnica de Saúde Joaquim Venâncio : Editora UFRJ, 2010.

Frank, André Gunder. *Capitalism and Underdevelopment in Latin America: Historical Studies of Chile and Brazil*. New York London: Monthly Review Press, 2009.

Hall, Catherine, Nicholas Draper, Keith MacClelland, Katie Donington, and Rachel Lang. *Legacies of British Slave-Ownership: Colonial Slavery and the Formation of Victorian Britain*. First Paperback edition. Cambridge: Cambridge University Press, 2016.

Harvey, David. *A Companion to Marx's Capital*. Complete edition. London: Verso, 2018.

——. 'The "New" Imperialism: Accumulation by Dispossession'. *Socialist Register* 40 (2004). https://socialistregister.com/index.php/srv/article/view/5811.

Honneth, Axel. *The Struggle for Recognition: The Moral Grammar of Social Conflicts*. 1st MIT Press ed. Studies in Contemporary German Social Thought. Cambridge, Mass: MIT Press, 1996.

Junqueira, Ivan. 'Is Poetry Untranslatable?' *Estudos Avançados* 26 (December 2012): 9–14. https://doi.org/10.1590/S0103-40142012000300002.

Kapczynski, Amy. 'Order without Intellectual Property Law: Open Science in Influenza'. *Cornell Law Review* 102 (2016): 1539–1648.

Latimer, Amanda. 'Super-Exploitation, the Race to the Bottom, and the Missing International'. In *The Palgrave Encyclopedia of Imperialism and Anti-Imperialism*, edited by Immanuel Ness and Zak Cope, 2546–61.

Cham: Springer International Publishing, 2021. https://doi.org/10.1007/978-3-030-29901-9_273.

Le Guin, Ursula K. 'The Ones Who Walk Away From Omelas'. In *The Wind's Twelve Quarters: Stories*, 254–62. New York: Perennial, 2004.

Lindahl, Hans. *Fault Lines of Globalization: Legal Order and the Politics of a-Legality*. Oxford: Oxford University Press, 2014.

Luhmann, Niklas. *Die Wirtschaft der Gesellschaft*. 8. Auflage. Suhrkamp Taschenbuch Wissenschaft 1152. Frankfurt am Main: Suhrkamp Verlag, 1988.

——. *Introduction to Systems Theory*. Edited by Dirk Baecker. Translated by Peter Gilgen. Cambridge, UK ; Malden, MA: Polity, 2013.

——. *Law as a Social System*. Translated by Klaus A. Ziegert. 1st published in pbk. 2008. Oxford Socio-Legal Studies. Oxford ; New York: Oxford University Press, 2008.

——. *Theory of Society*. Cultural Memory in the Present. Stanford, California: Stanford University Press, 2012.

Lukács, György. *History and Class Consciousness: Studies in Marxist Dialects*. Translated by Rodney Livingstone. Nachdr. Cambridge, Mass: MIT Press, 2013.

Luxemburg, Rosa. *The Complete Works of Rosa Luxemburg*. Edited by Peter Hudis and Paul LeBlanc. Vol. 2. London: Verso, 2015.

Marini, Ruy Mauro. *Dialéctica de la dependencia*. 11a reimp. México: Era, 1991.

——. *Proceso y tendencias de la globalización capitalista y otros textos (Antología)*. Prometeo Libros Editorial, 2007.

——. *The Dialectics of Dependency*. Edited by Amanda Latimer and Jaime Osorio. New York: Monthly Review Press, 2022.

Marx, Karl. *Capital: A Critique of Political Economy. Vol. 1*. Historical Reprint. Ancient Wisdom Publications, 2019.

——. *Capital: A Critique of Political Economy. Vol. 3*. Edited by Friedrich Engels. Translated by Ben Fowkes and David Fernbach. London: Penguin Books in association with New Left Review, 1981.

Mazzucato, Mariana. *The Entrepreneurial State: Debunking Public vs. Private Sector Myths*. Revised edition. Anthem Frontiers of Global Political Economy. London ; New York: Anthem Press, 2014.

McMahon, John, Siddhant Issar, and Rachel H. Brown. 'Rosa Luxemburg and the Primitive Accumulation of Whiteness'. Rowman & Littlefield Publishers, 2021. https://soar.suny.edu/handle/20.500.12648/1717.

Moeller, Hans-Georg. *The Radical Luhmann*. New York: Columbia University Press, 2012.
Nichols, Robert. *Theft Is Property!: Dispossession and Critical Theory*. Radical Américas. Durham, NC: Duke University Press, 2020.
——. 'Theft Is Property! The Recursive Logic of Dispossession'. *Political Theory* 46, no. 1 (1 February 2018): 3–28. https://doi.org/10.1177/0090591717701709.
Rediker, Marcus. *The Slave Ship: A Human History*. London: John Murray, 2008.
Ribeiro, Darcy. *O Povo Brasileiro: A Formação e o Sentido Do Brasil*. Estudos de Antropologia Da Civilização. São Paulo, Brazil: Companhia das Letras, 1995.
Santos, Theotonio Dos. *Teoria da Dependência: Balanço e Perspectivas*. 1ª edição. Insular, 2018.
Tirole, Jean. *The Theory of Industrial Organization*. Cambridge, Mass: MIT Press, 1988.
Veitch, Scott. *Law and Irresponsibility: On the Legitimation of Human Suffering*. 1st ed. New York, NY: Routledge-Cavendish, 2007.
——. *Obligations: New Trajectories in Law*. New Trajectories in Law. Milton Park, Abingdon, Oxon ; New York, NY: Routledge, 2021.
Waring, Marilyn. *If Women Counted: A New Feminist Economics*. San Francisco: Harper, 1990.