

## The Dead End of the “Social Turn”: Social Cooperation as the Foundation of Legitimacy\*

The question of the legitimacy of an existing political order is not only raised by legal theorists. It can be found at the center of almost every political philosophy. While the state is the predominant form of political order in present-day societies, in *democratic* societies the state can be understood as the *political form of society*. That said, the question of a political order’s legitimacy is ultimately a question of the legitimacy of the way the society is organized, not the least of which is its mode of producing and reproducing itself. This does not necessarily mean that, while discussing the legitimacy of a political order or the state, questions related to a society’s mode of production will be raised explicitly. As legal theorist *Otto Kirchheimer* stated in his famous essay on “Legality and Legitimacy” as early as 1932, in parliamentary democracies, “the legitimacy of their political order consists solely of their legality.”<sup>1</sup> The concept of legality, according to *Kirchheimer*, is not focused on “the lawful *emergence*, but, first and foremost, [on] the lawful *exercise* of power.”<sup>2</sup>

While there will always be lively discussions on what a “lawful exercise of power” means, things will surely heat up when the lawful *emergence* of an existing political order becomes part of the question. An understanding of legitimacy that is based on legality alone, a *formal* understanding of legality, as *Kirchheimer* puts it, meaning that every governmental and administrative act and decision has to comply with the rule of law and the constitution<sup>3</sup> as it was decreed according to the decision made by the majority of the people, is an understanding that saves a lot of thoughts concerning the legitimacy of the social order and its corresponding political order, the state. However, if one seriously addresses the question of the *lawful emergence* of power that *Kirchheimer* mentioned in such a subordinate way, one will have to go further in one’s reflections. The question of lawful emergence of power is one that leads beyond the circular argument of legitimacy through legality. It ultimately leads to the constitutional conditions of the social order itself.

In his essay *Legitimacy, The Social Turn, and Constitutional Review*,<sup>4</sup> Frank I. Michelman raises the question of *why and how* a country’s constitution could be thought of as a platform for the legitimization of the state, a function he defines as “indispensable.”<sup>5</sup> While he does not fundamentally question the social order itself he considers, among other aspects, “socioeconomic rights as essential components of any legitimati-

\* PhD, Leibniz University, Hannover, 2014, Research Fellow at the Centre Interdisciplinaire d’Etude des Religions et de la Laïcité (CIERL), Université libre de Bruxelles.

1 Otto Kirchheimer, *Legalität Und Legitimität*, in *POLITISCHE HERRSCHAFT. FÜNF BEITRÄGE ZUR LEHRE VOM STAAT* 7, 13 (1967).

2 *Id.* (emphasis added).

3 *Id.* at 9.

4 Frank I. Michelman, *Legitimacy, The Social Turn And Constitutional Review: What Political Liberalism Suggests*, in this volume, 183-205.

5 *Id.* at 185.

on-worthy constitution” (the “social turn” of which *Michelman* speaks).<sup>6</sup> This concept serves, in a way, as a case study in his explanations of “weak-form” judicial constitutional review. Socioeconomic rights are his example for the implementation “of requirements on the state” into constitutional law “whose fulfillment (or not) will not, in the main, be crisply decidable by applications of trans-political legal norms through technically legal discourses.”<sup>7</sup> The main problem he raises in this regard is the *judicialization* of socioeconomic rights, a judicialization that threatens to “carry the judiciary so blatantly across a border between law and politics.”<sup>8</sup> Even more, the discussion concerning the legitimacy of a regime could dramatically escalate when the answer to the question of legitimization by constitution depends on when, how, and if at all the rather abstract idea of a reasonable and sufficient social minimum for everybody can be considered fulfilled. From this perspective, weak-form judicial review could be a method of turning down the heat in this discussion and, following the idea of weak-form judicial review, it could lead to a more cooperative, responsible approach to the question of the proceduralization of socioeconomic rights.

*Michelman*, therefore, reflects on the constitution not as a foundation but as a *medium for legitimacy* of the state as the subject of political order. According to him, the *basis* for a possible legitimacy of a political regime – at least for political-liberal thought, with which he identifies – lies within a specific concept of *social cooperation*.<sup>9</sup> He builds his whole argument around this specific notion of cooperation. In this text, I would like to call this foundation for his further thoughts – that is, his understanding of social cooperation – into question. But, first, let us briefly summarize how he develops his concept of cooperation.

This concept, *Michelman* suggests, is embedded in political-liberal thought that “starts out from a construction (or idealization) of a political society as a large-scale scheme and practice of co-operation.”<sup>10</sup> In this “construction” or “idealization,” *Michelman* underscores that “‘Cooperation’ is the germinal notion”.<sup>11</sup> While *Michelman* acknowledges that, in this conception, all cooperators are “individualized agents” with distinct demands and projects, he also claims that these individualized agents have an understanding of – and act according to – principles “of due regard for others likewise endowed and situated.”<sup>12</sup> In short: *Michelman* claims that these individualized agents are associated by “reciprocity of recognition” – to him, the “essence of any possible liberalism.”<sup>13</sup>

*Michelman* invites us to consider “a population of would-be social cooperators” endowed with this reciprocal recognition and concludes: “It seems there would arise within this population a common concern for *fairness* in the basic terms of social cooperation amongst them.”<sup>14</sup> But what does *fairness* in this context mean? *Michelman* writes that

---

6 *Id.* at 186.

7 *Id.* at 187.

8 *Id.* at 188.

9 *See id.* at 186, 189.

10 *Id.* at 188.

11 *Id.* (no emphasis added above).

12 *Id.*

13 *Id.*

14 *Id.* at 189.

modern liberals “can hardly help but presuppose a largely market-based economy,” but, as he suggests paving the way for the discussion of socioeconomic rights, how can we expect our fellow co-operators to submit to societal structures like free-market and a democratic-majoritarian lawmaking system “without also *committing our society*, from the start, to run itself in ways aimed at securing to everyone the conditions anyone would require to be or become a competent participant in them”?<sup>15</sup> *Fairness* in terms of social co-operation by individualized agents who reciprocally recognize each other as inter-dependent social collaborators, according to *Michelman*, therefore implies a common commitment to *social justice*.<sup>16</sup> Corresponding to this societal commitment would be the idea of constitutionalized socioeconomic rights: a “social minimum” and guarantee of “basic needs” as *Michelman*, referring to Rawls, puts it:

*defined as a package of material goods and services up to the levels required for a person’s capability to ‘take part in society as [a] citizen[],’ and ‘to understand and to fruitfully exercise’ his or her capacities as a self-actuating person.*<sup>17</sup>

While these ideas sound very sympathetic, the question is whether the basis for this social commitment *Michelman* refers to can be broadly expected in societies with a market-based economy. *Michelman* argues that, in liberal democratic societies, people he rightly specifies as individualized agents *cooperate* and that while doing so, they reciprocally recognize each other; they are, therefore, *consciously* cooperating. Based on this common consciousness, they are able to develop a certain understanding for social fairness that could lead to the implementation of a mode of social justice that is materialized in the guarantee of a social minimum that ultimately enables each individual to fruitfully develop his or her capacities and capabilities as a self-actuating, socially-participating person. On the next pages, I will argue against *Michelman*’s specific understanding of cooperation. More specifically, the following discussion will challenge his assumption that the citizens organized in a society are *conscious* of the mode of cooperation that binds them together in society, a consciousness that creates the common concern and mutual recognition among people so vital for his further argument.<sup>18</sup> I base my argument on the concept of social cooperation as analyzed by *Karl Marx*. In doing so, I will offer a critique of the political liberal perspective on social justice, that *Michelman* elaborates in his essay in this volume, and more specifically of the reduction of social justice to the question of the distribution of social wealth that is implied in this political liberal perspective. I will also explain why, from the *Marxian* perspective that I will be developing, a more incisive understanding of social justice – which envisages the full development of individuals as mutually recognized and recognizing subjects of their social cooperation, is not likely to happen under these circumstances.

As early as in his *Economic Manuscript of 1861-63*, a preliminary work to his magnum opus, *Capital*, Marx emphasized that in a capitalist society social cooperation for its members is neither:

15 *Id.* (emphasis added).

16 *Id.*

17 *Id.* at 190.

18 See *id.* at 189.

*a relation into which they put themselves... [n]or is it a relation which belongs to them; instead, they now belong to it, and the relation itself appears as a relation of capital to them. It is not their reciprocal association, but rather a unity which rules over them, and of which the vehicle and director is capital itself.... Their interconnection and their unity lies not in themselves but in capital.<sup>19</sup>*

Marx argued that people in a society based on a market economy are *necessarily* lacking the reciprocal recognition as collaborators that *Michelman* takes for granted. Instead of consciously cooperating they are in fact *cooperated* in a process not transparent to them: “Their own association in labour – cooperation – is in fact a power alien to them, it is the power of capital which confronts the isolated workers.”<sup>20</sup>

Like *Michelman*, Marx considered the individual in a market-based economy to be an individualized agent, but contrary to the former, Marx tried to explain why the individual *remains* individualized up to the incapacity to understand his or her central role in the creation and reproduction of the society – according to Marx, society is *not* something in which the individual consciously participates – rather, society is something that happens to the individual. To emphasize the unconsciousness with which the individual participates in this social process, Marx used the term “agglomeration” to describe the unconscious social process from the individual perspective: Individualized agents “find that they are agglomerated. The cooperation which arises from this agglomeration is for them just as much *an effect of capital* as the agglomeration itself.”<sup>21</sup> If the social process of cooperation remains unconscious and alien to the individualized agents, it is incomprehensible how a common commitment to social justice could rise up within them, a commitment that, according to *Michelman*, is based on conscious cooperation and mutual recognition. The individualized agent continues to be an isolated social monad who cannot interconnect with his or her fellow social individualized agents.

That rough outline of Marx’s *Economic Manuscript* presents an important aspect of his critique. As we will soon see, it is a central point in his analysis of what he calls the fetishism of capitalist society as well as in his analysis of social justice through equal distribution of social wealth. It took Marx several attempts before he was able to formulate the fully elaborated critique of the “fetishism of commodities” and its social consequences presented in *Capital*.

His basic argument went as follows: Clearly, a market-based economy produces commodities that are not primarily produced to be used by the producer him- or herself, but to exchange them on the market in return for other commodities or money. To be able to exchange the commodities, they all have to be reduced to one quality: their quantitative aspect – that is, the magnitude of their *value*. According to Marx, that is exactly where the fetishism of a commodity-producing society emerges; with the *sub-*

19 Karl Marx, *Economic Manuscript of 1861-63: A Contribution to the Critique of Political Economy*, in KARL MARX & FREDRICK ENGELS, COLLECTED WORKS, Volume 30, 261 (Victor Schnittke & Andrei Skvarsky eds, Ben Fowkes trans., 1988).

20 *Id.*

21 *Id.* (emphasis added).

*stance of value* being labour, and the magnitude of value being labour time,<sup>22</sup> “[t]he equality of all sorts of human labour is expressed objectively by their products all being equally values,”<sup>23</sup> and with the commodities that the individualized agents produce being exchanged on the market according to their value, “the mutual relations of the producers, within which the social character of their labour affirms itself, take the form of a *social relation between the products*” exchanged.<sup>24</sup> According to Marx, the *social aspect* of the reproduction of society appears to happen *only on the market*, in a process not transparent to the individualized agents, but instead based on the comparability of their individual work, by a reduction of “their individual private labour to the standard of homogeneous human labour”.<sup>25</sup>

*As a general rule, articles of utility become commodities, only because they are products of the labour of private individuals or groups of individuals who carry on their work independently of each other. The sum total of the labour of all these private individuals forms the aggregate labour of society. Since the producers do not come into social contact with each other until they exchange their products, the specific social character of each producer's labour does not show itself except in the act of exchange. In other words, the labour of the individual asserts itself as a part of the labour of society, only by means of the relations which the act of exchange establishes directly between the products, and indirectly, through them, between the producers. To the latter, therefore, the relations connecting the labour of one individual with that of the rest appear, not as direct social relations between individuals at work, but as what they really are, material relations between persons and social relations between things.*<sup>26</sup>

In other words, the individualized agents are deprived of the insight that they contribute and how they contribute in the social cooperation and reproduction of the society in which they participate: they *do not consciously participate* in this process – instead, necessarily, they work and think as individualized agents, because the social character of their labour “appears to them as an objective character stamped upon the product of that labour.”<sup>27</sup>

But, we have to keep in mind that there is also a very special commodity among the many commodities to be bought and sold in a market-based economy. This commodity, as Marx emphasized, is *human labour* itself. Individualized agents do not only go to the market to sell products they produced with their own individual labour. Often enough,

22 Marx specified that it is the *average* labor time we are talking about:

The labour time socially necessary is that required to produce an article under the normal conditions of production, and with the average degree of skill and intensity prevalent at the time.... We see then that that which determines the magnitude of the value of any article is the amount of labour socially necessary, or the labour time socially necessary for its production.

KARL MARX,, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY, Volume 1, 28 (Mark Harris ed., 2010) (Frederick Engels ed., Samuel Moore & Edward Aveling trans., 1887).

23 *Id.* at 46.

24 *Id.* (emphasis added).

25 *Id.* at 50.

26 *Id.* at 47.

27 *Id.* at 46.

the commodity that people sell is simply their own labour-power. Labour-power is the commodity they have to offer and they conduct themselves accordingly vis-à-vis their potential labour-power. “The capitalist buys labour-power in order to use it; and labour-power in use is labour itself. The purchaser of labour-power consumes it by setting the seller of it to work.”<sup>28</sup> It seems to be an obvious thing; just as in any other commercial transaction, the seller and the purchaser of labour-power specify the terms of their trade agreement in a contract, in this case the labour contract. The seller offers his or her labour-power for a certain amount of time per month, the purchaser guarantees a wage and probably some further remuneration in return. While the purchaser of the labour-power normally also places the work-place and the means of production at the seller’s disposal, the seller of the labour-power logically has to work a certain amount of hours until the equivalent of the wage he or she earns, as well as of the means of production he or she expends, is produced. Beyond this equivalent, the surplus-labour and, thus, the *production of surplus-value* for the benefit of the purchaser of the labour-power begins.

Many leftists consider this benefit, the production and appropriation of surplus-value by the purchaser of labour-power, by the “capitalist”, as unfair and unjust. However, from a legal perspective, that is not true, because the surplus-value that is produced in the production process has never been an element in the labour contract. *Quod non est in actis non est in mundo*. Thus, the surplus value is *de jure* in the possession of the purchaser of labour-power. That is why the argument of an *unjust distribution of a society’s wealth* – apart from the moral or ethical power it may have – is simply wrong.

Having analyzed this, Marx’s critical concept of a capitalist production and reproduction of society focusses on something else, on the fetishized form of social co-operation. From the previous excursion into his theory, we can recall that Marx had already emphasized in his *Economic Manuscript* that in societies based on a capitalistic mode of production, social cooperation does not appear to the individualized agents as a relation *they actively create and that belongs to them*; they experience this relation in a *reified form*, as if *they* belong to it, their social relation through cooperation appears to them as a relation of capital itself. Instead of being conscious of themselves as the *subjects* of the social process, they perceive themselves as *its objects*.

In *Capital*, Marx further elaborates on this thought – on these fetishized social relations – referring to the fact that in capitalistic societies, labour-power can be sold as a commodity. Generally speaking, as Marx stated, “[w]hen numerous labourers work together side by side, whether in one and the same process, or in different but connected processes, they are said to co-operate, or to work in co-operation.”<sup>29</sup> But, we have to keep in mind that they do not come together to *collaborate* in the first place, but to *earn money* and, therefore, sell their labour-power to the purchaser and owner of the means of production. “Being independent of each other, the labourers are isolated persons, *who enter into relations with the capitalist, but not with one another*.<sup>30</sup> The cooperation itself “begins only with the labour-process, but [the labourers] have then ceased to belong to themselves. On entering that process, they become incorporated with capi-

28 *Id.* at 124.

29 *Id.* at 225.

30 *Id.* at 228 (emphasis added).

tal,”<sup>31</sup> they themselves now being a means of production among a whole variety of them, living and non-living. The individualized agents cooperate, but “[a]s cooperators, as members of a working organism, they are but special modes of existence of capital.”<sup>32</sup>

So according to Marx, in a market-based economy, contrary to what Michelman suggests collaborators do not *consciously* cooperate; they do *not* cooperate because they *decide to do so*. Nor do they have a lot of influence on the forms or on the processes of cooperation, as those are organized according to the necessities of commodity production, which inherently requires (and no, it is not individual greed) the maximization of profit.

Therefore, and even more importantly for our argument, the individualized agents are not able to consciously experience the “special productive power”<sup>33</sup> they collectively develop with their collaboration. “[T]he productive power of social labour,”<sup>34</sup> a power whose effect:

*could either not be produced at all by isolated individual labour, or it could only be produced by a great expenditure of time, or on a very dwarfed scale. Not only have we here an increase in the productive power of the individual, by means of co-operation, but the creation of a new power, namely, the collective power of masses.*<sup>35</sup>

Marx convincingly describes the effects of cooperation – effects that rightfully can be considered revolutionary; however, the collaborators find themselves deprived of both the fruits of their cooperation as well as any actual conscious creation of that cooperation. The revolutionary – and industrially and productively revolutionizing – effect is all to the benefit of the accumulation of capital:

*the productive power developed by the labourer when working in co-operation, is the productive power of capital. This power is developed gratuitously, whenever the workmen are placed under given conditions, and it is capital that places them under such conditions. Because this power costs capital nothing, and because, on the other hand, the labourer himself does not develop it before his labour belongs to capital, it appears as a power with which capital is endowed by Nature a productive power that is immanent in capital.*<sup>36</sup>

Under these circumstances, when members of society systematically cooperate with others, they unfortunately do not strip “off the fetters of [their] individuality”,<sup>37</sup> at least not to develop “the capabilities of [their] species” as Marx suggested in *Capital*.<sup>38</sup> In a society based on a capitalist mode of production, they are deprived of the opportunity “to understand and to fruitfully exercise” their capacities as self-actuating persons.<sup>39</sup> Instead of losing the “fetters of individuality” in a gratifying way and in a way so that they

31 *Id.*

32 *Id.*

33 *Id.* at 226.

34 *Id.*

35 *Id.* at 225.

36 *Id.* at 228.

37 *Id.* at 226.

38 *Id.*

39 Michelman, this volume, 190.

outgrow their own limited self, the members of society get stripped of their individuality so that they are reduced to being tools, to being one of the means of production, bent into shape according to the requirements of production, a process that leaves the individual with physical and psychological damage that we all know are discussed in relation to working conditions.<sup>40</sup>

This is the dramatic result of the specific form of social cooperation in market-based economies. What the members of society – it is important to emphasize here that we are speaking of *all* members of society – are deprived of is nothing less than what could be called, according to Marx, the utopian potential that is implied in cooperating consciously and systematically,<sup>41</sup> a potential for all members of society to unfold and fruitfully develop their *individual and combined* capacities, “the capabilities of [their] species,”<sup>42</sup> a potential to create and shape their social relations, as well as the mode of reproducing the society itself according to their needs instead of according to the depersonalized drumbeat of the requirements of a capitalist mode of production.

Thus, members of society are deprived of precisely the potential that *Michelman* wants to help them develop by constitutionally granting them a reasonable and sufficient social minimum. In contrast to *Michelman*’s hopes, in a market-based mode of production and reproduction of society, the social productive power of cooperation is *not consciously experienced* by the members of society as a collective power they actively create and participate in; people experience this power and the whole social process as alien to them, as a process of which they are not the subjects, but to which they are subjected. Again, this is a process from which all members of society suffer, regardless of the certainly important fact that the social situation of some people is much more comfortable than that of the rest. It is not as if “the capitalist” *steals* the aforementioned potential from the worker. We are not talking about betrayal, we are talking about a complex social relationship in which all members necessarily and unconsciously participate and help to reproduce.

From the perspective of *legality*, there is nothing illicit in this process. As has been emphasized before, both sides fulfill a contract that settles upon the exchange of labour-power in return for an agreed wage. But, a conscious form of social cooperation, accompanied by reciprocal recognition of the individualized agents is not established. The subjects of the social process, having sold their labour-power such that it no longer

40 In his preliminary draft of *Capital*, entitled *Grundrisse der Kritik der politischen Ökonomie* (*Outlines of the Critique of Political Economy*), Marx had already argued against: the insipidity of the view that free competition is the ultimate development of human freedom; and that the negation of free competition [equals the] negation of individual freedom and of social production founded on individual freedom. It is nothing more than free development on a limited basis – the basis of the rule of capital. This kind of individual freedom is therefore at the same time the most complete suspension of all individual freedom, and the most complete subjugation of individuality under social conditions which assume the form of objective powers, even of overpowering objects – of things independent of the relations among individuals themselves.

MARX, OUTLINES OF THE CRITIQUE OF POLITICAL ECONOMY, 582 (Andy Blunden, e-book ed., Martin Nicolaus trans for Penguin edition, 2002) (1973) available at [https://www.marxists.org/archive/marx/works/download/Marx\\_Grundrisse.pdf](https://www.marxists.org/archive/marx/works/download/Marx_Grundrisse.pdf) (last retrieved 17 April 2015).

41 Cf. MARX, *supra* note 24, at 226.

42 *Id.*

belongs to them, perceive themselves as objects and mere appendages of this reified social cooperation.

But, what does this specific nature of social relationships mean from the perspective of *legitimacy* and a resilient concept of social justice? As *Otto Kirchheimer* observed, the whole process outlined here is in full compliance with the rule of law, and if we were to accept that the legitimacy of a political order consists solely in its legality,<sup>43</sup> we would not have to go any further with our argument. However, the philosophers of the Frankfort School, *Kirchheimer* included, took a different path. They understood the implications of *Marx*’s critical concept of social cooperation for any concept of social justice and political legitimacy that would not limit its scrutiny to the system of distribution, but would include within its scope of inquiry also the sphere of production and, within this sphere, the specific form of social cooperation. In 1943, *Max Horkheimer*, director of the Institute for Social Research at the time, even tried to organize a large research project on the question of legitimacy. The research was to be conducted by the then-exiled Institute.<sup>44</sup> In January 1943, *Horkheimer* wrote a letter to *Henryk Grossmann*, an economist associated with the relocated US-based Institute for Social Research, emphasizing the importance of understanding the “*dialectic of legitimacy* with regard to the *ownership structures*” of society.<sup>45</sup> By addressing the ownership structure of society, he envisioned a “critique of the reality of the free and fair exchange” in market-based economies,<sup>46</sup> to criticize concepts of social justice that are, as is *Michelman*’s concept, based on an understanding of society from the perspective of the sphere of distribution alone.

Following *Marx*’s argument, *Horkheimer* considered the ownership structure of capitalist societies as characterized by private property and the *divorce of the producers from the means of production* (regardless of whether these means are the property of the state or of private legal subjects) to be central preconditions for economies based on the production and exchange of commodities and, importantly, on the opportunity to *sell labour-power*. As did *Marx*, *Horkheimer* stressed that this divorce is a precondition for capitalist reproduction of societies, a divorce that *Marx* described as a historically violent process which created the wage-labourer as a free subject in a double sense: free from

43 Cf. *Kirchheimer*, *supra* note 2, at 13.

44 Due to personnel reasons and differences concerning the topic itself, the research project was never carried out. See *THORSTEN FUCHSHUBER*, MAX HORKHEIMER’S RACKET THEORY. RECONSTRUCTION AND RELEVANCE OF A THEORY ON AUTHORITY (unpublished PhD thesis).

45 Max Horkheimer, *Letter Dated 20 January 1943*, in MAX HORKHEIMER, GESAMMELTE SCHriften, BAND 17: BRIEFWECHSEL 1941-1948, 399 (1996) (emphasis added).

46 *Id.*

serfdom, but also devoid of all means of subsistence – devoid of all means but one – his or her labour-power which he or she was now free to sell.<sup>47</sup>

In criticizing liberal theorists, Marx described this divorcing process as “so-called primitive accumulation.”<sup>48</sup> Horkheimer emphasized that the *results* of the “so-called primitive accumulation” – the divorce of the producers from the means of production – are necessarily reproduced every day. They are reproduced because as we have seen, in market-based economies, people *remain* deprived of the opportunity to consciously experience and exercise the special productive power they create with their collaboration.

That deprivation, based on society’s property and production relations, led *Horkheimer* to the question of a “*dialectic of legitimacy*.”<sup>49</sup> While he conceded that there is nothing in the capitalist mode of production itself that does not comply with the concept of “legality”, by examining the nature of the dialectic of legitimacy, he polemically pointed out the paradox embodied in the notion of legality. The concept of “legality”, he argued, embodied *illegal* aspects.<sup>50</sup> Thus, for *Horkheimer*, it was crucial to understand the “unity of production and distribution,”<sup>51</sup> as it was already emphasized by *Marx*,<sup>52</sup> because only then one leaves the circular argumentation of legality behind and permeates to the constitutional conditions of the social order itself.

From the perspective of the sphere of distribution, as from the legal perspective (in fact both the sphere of distribution and the legal sphere can be considered as aspects of the sphere of circulation), the specific mode of social cooperation (as well as the specific physical and psychical circumstances for the co-operators) is not taken into consideration. Only by considering the unity of distribution and production can one understand why a *concept of social justice* cannot ignore the fact that people in societies based on a capitalist mode of production are systematically deprived of the ability to develop essential capacities instead of being deprived *only* of basic needs.

47 Marx describes this dramatically in *Capital*:

Hence, the historical movement which changes the producers into wage-workers, appears, on the one hand, as their emancipation from serfdom and from the fetters of the guilds, and this side alone exists for our bourgeois historians. But, on the other hand, these new freedmen became sellers of themselves only after they had been robbed of all their own means of production, and of all the guarantees of existence afforded by the old feudal arrangements. And the history of this, their expropriation, is written in the annals of mankind in letters of blood and fire.

MARX, *supra* note 24, at 501.

48 *Id.*

49 Horkheimer, *supra* note 47, at 399 (emphasis added).

50 Max Horkheimer, *Die Rackets Und Der Geist*, in MAX HORKHEIMER, GESAMMELTE SCHRIFTEN, BAND 12: NACHGELASSENE SCHRIFTEN 1931-1949, 290 (1985) (“Since there is a concept of legality, it bears the traces of the illegal.” (author trans.)).

51 Horkheimer, *supra* note 47, at 399.

52 The latter argued polemically that the sphere of distribution and circulation, “within whose boundaries the sale and purchase of labour-power goes on, is in fact a very Eden of the innate rights of man.” MARX, *supra* note 24, at 121. It is a sphere where freedom rules, “because both buyer and seller of a commodity, *say of labour-power* [he sarcastically added, as if he were mentioning *that particular commodity* by accident] are constrained only by their own free will. They contract as free agents, and the agreement they come to, is but the form in which they give legal expression to their common will.” *Id.*

Recognition that deprivation cannot be overcome through a more or less adequate distribution of social wealth, requires one to face the question of the social consequences of this specific form or formation of social wealth. *Marx*’s answer to this question is well known: with the *accumulation of commodities* being the form in which social wealth in market-based economies appears,<sup>53</sup> social wealth in these societies is not accumulated to serve the ends and purposes of the societies themselves. Social wealth merely serves the purposes of the process of accumulation of capital. It follows the inherent logic of the capitalist mode of production that *Marx* described at length in *Capital*: to endlessly produce more commodities, to produce them more effectively with as little labour-power added as possible, to be able to sell them cheaper in order to be able to compete on the market, and to be able to invest even more in the rationalization of production in order to be even more competitive. The social wealth in capitalist societies – according to this inherent logic – is produced to one end only, namely, its accumulation. Only *en passant* is it produced to also satisfy the needs of the people that constitute these societies. This is the simple reason why an overproduction of goods – with the sole purpose of hopefully someday being sold as commodities – and constant scarcity and poverty go together so well. Social justice is simply not implied in the abstract logic of the capitalist form of social wealth.

Now, one could say that – compared to the days of *Marx* – history has since demonstrated that most people organized in societies based on a free-market economy did *not* only get their share of social wealth by mere coincidence. Instead, they struggled for it, and the whole history of social conflicts and achievements since the late 19<sup>th</sup> century proves that workers and other social groups have the capability to self-organize and, thus, of *conscious* social co-operation. For *Habermas* and others, this not only indicated that communicative reason was much less affected by the process of commodification than *Marx* thought, it also prompted them to ask whether *Marx*’s theoretical assumptions did not render his analysis of society inadequate. *Marx* unduly reduced all social processes to functions of labour relations, asserted *Habermas*.<sup>54</sup> It is not possible to enter into an incisive discussion of the problems that arise from *Habermas*’ criticism of *Marx*’s concept of social labour. Such a discussion could have begun by showing that *Habermas*’ critique of *Marx* completely ignores *Marx*’s concepts of mediality and reflexivity – key concepts that *Marx* himself used to show that labour, as a social category, cannot be reduced to the immediate process of production. They clearly reflected a clear regard in *Marx*’s work for the interdependence of production and other social spheres and their reciprocal conditionality. Again, we cannot go into all of this here. However, we can begin to challenge some of the evidence on which the *Habermasian* critique of *Marx* might want to rely in order to state the case for a communicative subjectivity not corrupted by commodification.

Should one, for example, wish to extoll the pinnacles of trade union organization as modes of communicative action, one should also keep in mind incontestable evidence that the individualized agents organized into trade unions tend to be reduced to objects in those organizations as well. This legitimate criticism of such developments was raised both inside and outside of the labour movement, and not only in the US, where this

53 MARX, *supra* note 24, at 26.

54 Cf. JÜRGEN HABERMAS, KNOWLEDGE AND HUMAN INTERESTS (Jeremy J. Shapiro trans., 1971).

criticism was shared and disseminated by both liberal and conservative critics of union power and the *New Deal*, as early as in the wake of the “National Labour Relations Act” (Wagner Act) of 1935.<sup>55</sup> These developments remind one of the fact that solidarity within the labour force is merely the “negative unity of being oppressed”,<sup>56</sup> a unity that is quite a ways away from the unifying experience of non-coercive interaction founded on communication which is free from domination. The coercive conditions of labour lead to the fact that the individualized agents, even in their solidarity, are agglomerated as social monads instead of consciously cooperating – and in fact their cooperation mainly serves one end: to be able to successfully compete in the global contest to sell their labour-power – under acceptable conditions and in return for the highest possible wage. Cooperation, as can be observed within the solidarity of the labour movement is, therefore, still cooperation in an objectified, commodified form.

This applies to other forms of freedom that we tend to praise as victories of communicative reason and social struggle, such as increased freedom at the workspace, be it at the production site, office, or in service. We can observe flexible working schedules, team work, increased responsibility to develop one’s creativity – and a lot of jobs no longer even require one’s physical presence at the office. Work organization models, like the Results Only Work Environment (ROWE), seem to address the owners of labour-power as creative, thinking, and responsible people, according them a power of judgment and autonomy that is far beyond that of the workers who are provided with only monotonous tasks and are under constant supervision and control. According to *Thomas Malone*, an economist at the Massachusetts Institute of Technology, this development is driven by “our innate desire for freedom, creativity and flexibility, as well as by the request for economic efficiency.”<sup>57</sup>

*Malone*’s statement reminds us that freedom, at least in societies based on a capitalist mode of production, is a highly dialectical affair. And there are important arguments in favor of an analysis that sees the aforementioned freedom first and foremost as a freedom driven by the pressure to constantly raise productivity. What can be seen, for example, is increased pressure on employees to be constantly accessible for work-related issues. Work and private life have been getting more and more indistinguishable from one another and, for the average employee, work hours have been subtly extended over time, working conditions that were two decades ago observed primarily among top-level managers.

Increasingly, this new freedom, which one could be tempted to proclaim a success of communicative reason, reveals itself as a deeply commodified “pseudo-freedom.” A survey conducted by Bertelsmann-Stiftung in Germany and published in March 2015, for instance, demonstrates some of the rather unhealthy results that accompany the communicative, co-operative change of work organization strategy from “command and control” to “management by objectives”: Very often, the employees are unable to cope

<sup>55</sup> Cf. DAVID WITWER, SHADOW OF THE RACKETEER: SCANDAL IN ORGANIZED LABOUR (2009).

<sup>56</sup> Theodor W. Adorno, *Reflections on Class Theory*, in CAN ONE LIVE AFTER AUSCHWITZ? 93, 97 (Rolf Tiedemann ed., Rodney Livingston et al. trans., 2003).

<sup>57</sup> Steffan Heuer, *Große Freiheit*, in 5 BRAND EINS: WIRTSCHAFTSMAGAZIN (May 2007) at 104 (quoting a statement made in an interview with Mr. Malone) (author trans., available at <http://www.brandeins.de/archiv/2007/ideenwirtschaft/grosse-freiheit/>, last retrieved 20 April 2015).

with the stress of autonomy and individual responsibility that go along with work objectives that they explicitly or implicitly are expected to manage themselves. According to this study, every third employee in Germany considers him- or herself as unable to cope with the demands that go along with his or her job<sup>58</sup> – what is lost is a “sense of accomplishment.”<sup>59</sup> As a result, employees take severe risks with their health to reach goals that turn out to be unattainable: they work overtime, do without vacation, work despite being sick, and so on.<sup>60</sup> While the authors of the survey warn employers to provide their employees with a realistic set of targets, the scientists call for the workforce to spend their labour-power “responsibly” and warn them not to “over-identify” themselves with the companies for which they work.<sup>61</sup>

Unfortunately, for a lot of people, there is precisely this issue of over-identification – and out of necessity to a large part. The situation they have to cope with is not exactly similar to the *Habermasian* “ideal speech situation”, but rather to a coercive situation where, at the same time, a lot of people are unemployed. People do not only over-identify with the companies for which they work because they enjoy the freedom and autonomy they are granted: They “over-identify” because they live in constant fear that they will lose their job if they do not act accordingly. They therefore perceive themselves as a commodity that has to stay competitive – a perception that might have become even more intensified than in the case of previous generations, which were at least able to distinguish the working time for their employer from the rest of their day.

Teamwork, autonomy at the workplace, and flexible working times, all of which appear to be the result of meaningful cooperation and to be in the workforce’s favors; upon a second look, however, they unravel into highly commodified forms of social relations. The victims of this “freedom” experience these social relations in a reified form up to the time that they are no longer able to recognize the social character of the processes from which they suffer *at all*. Instead, they experience their social cooperation and its effects on them in purely individualized, pathological forms, as the rising number of job-related burnout and depression diseases clearly show.<sup>62</sup>

But, reduced prospects for the future, an insecure job situation, and deregulated working relationships are not only closely linked to “management by objectives.” They are also the result of the sheer market power of employers who, with employment rates being high, manage to turn stable work contracts with extended benefits and stability guarantees into short-term or zero-hour contracts which simply extract quantities of labour-power from the workers.<sup>63</sup> One might well be reminded of a remark made by legal theorist *Franz Neumann*, who, in 1937, emphasized the self-destructive “dialectic

58 Anja Chevalier and Gert Kaluza, *Psychosozialer Stress am Arbeitsplatz. Indirekte Unternehmenssteuerung, selbstgefährdendes Verhalten und die Folgen für die Gesundheit*, in 1,9 *GESUNDHEITSMONITOR*.(01/2015) at 1, 9 (author trans., available at [http://gesundheitsmonitor.de/uploads/ttx\\_itao\\_download/Gesundheitsmonitor\\_NL\\_01\\_2015\\_02.pdf](http://gesundheitsmonitor.de/uploads/ttx_itao_download/Gesundheitsmonitor_NL_01_2015_02.pdf), last retrieved 20 April 2015).

59 *Id.* at 3.

60 *Id.*

61 *Id.* at 10.

62 Cf. LEISTUNG UND ERSCHÖPFUNG: BURNOUT IN DER WETTBEWERBSGESELLSCHAFT (Sighard Neckel and Greta Wagner eds., 2013).

63 I would like to thank Johan van der Walt for bringing this aspect to my attention.

of the contractual logic,” because free and equal competition implies its own dissolution when it allows some competitors to grow much stronger than their co-competitors – a development that, as Neumann wrote, *damages the communicative, mediating effects of the legal form itself*.<sup>64</sup>

Under such circumstances, one could even imagine that a guaranteed social minimum – presumably very much against the intentions of most people who are in favor of it – could serve as a cynical camouflage for the bitter fruits of the form of cooperation that a free-market economy guarantees to the individualized agents, by indicating that anybody who does not want to enter this informal labour market under the offered labour conditions is always free to fall back on such social minimum.<sup>65</sup> *Michelman* seems to know, intuitively, that a guarantee of basic needs could very well have much more to do with the appeasement of social conflicts than with a promising concept of social justice and the legitimacy of a social or political order. The case for weak-form judiciable review that he presents to soften objections – the “standard worries” – against the judicialization and proceduralization of constitutionalized socioeconomic rights already signals further conflicts based on the systematic scarcity inherited in the capitalist mode of production. Judicialization of socioeconomic rights endangers the boundary between law and politics, argues *Michelman*, because it involves judiciaries in judicially irresolvable conflicts about what a *decent fulfillment of basic material needs* actually means under prevailing economic conditions. While one could construe these conflicts as an essential component of a dissension vital to open, democratic societies, one could also consider them as blatant power struggle between individuals and groups to appropriate for themselves the largest possible portion of society’s wealth. This struggle seems to be the inevitable result of the fact that the capitalist mode of production produces a form of wealth that confronts everyone with a constant sense of imminent deprivation. Indeed, under these circumstances even affluent people are burdened with a vague and constant feeling of menacing social deprivation. So, yes, “economic-distributive justice”<sup>66</sup> is not judicially manageable simply because economic justice, as mere distributive justice, does not exist. This is why I think that *Michelman’s* (distributive) “social turn,” concerning the legitimacy of a social order and its political form, leads to a dead end.

According to *Marx*, the mode of production would have to be changed in order to achieve social justice. More specifically, the divorce of the producers from the means of production would have to be transcended. *Marx’s* objective, in what could certainly be called a social revolution, starts with nothing more than that which *Michelman* takes for granted. What *Marx* envisages is indeed that people would begin to consciously cooperate instead of feeling subjected to a process of cooperation, that is, instead of experiencing their cooperation in a merely reified form. Only then might they turn into mutually-recognized and recognizing collaborators whose conscious cooperation serves the fulfillment of their basic material needs and, probably, quite a lot more. If this were to happen, individualized agents would turn in to *social individuals* and finally acquire the social capacities of which they have been, to date, deprived.

64 Franz Neumann, *Der Funktionswandel des Gesetzes im Recht der bürgerlichen Gesellschaft*, in VI.3 ZEITSCHRIFT FÜR SOZIALFORSCHUNG 564-565 (Max Horkheimer ed., 1937).

65 Again, I would like to thank Johan van der Walt for bringing this aspect to my attention.

66 *Michelman*, this volume, 191.

This perspective largely affects the concept of social justice itself, as in such circumstances, social justice would not be primarily characterized in terms of a right to material needs, but in terms of *disposable time*,<sup>67</sup> the most important precondition for a goal on which *Michelman* and *Marx* agree: “‘to understand and to fruitfully exercise’ his or her capacities as a self-actuating person,”<sup>68</sup> and “hence those of society”, as well.<sup>69</sup> So a *specific form of social cooperation* is indeed at the core of a concept of social justice that could solve the “dialectic of legitimacy” in favor of a legitimate social and political order.

The response to *Michelman* that I have developed above evidently shifts to a different terrain of argument than the one he develops in his essay in this volume. I surely claim no helpful let alone better insights into the problem of the politicization of adjudication to which the judicialisation of socio-economic rights give rise. I have, instead, tried to do something else. I have tried to show that the basis for *Michelman*’s argument for socioeconomic rights – his specific understanding of social cooperation of individualized agents associated by reciprocity of recognition – can be questioned fundamentally. I have done so with reference to *Marx*’s analysis and critique of the specific concept of social cooperation in market-based societies. I have tried to demonstrate in the first place that this kind of social cooperation prevents mutual recognition of the social cooperators. Collaborators in the capitalist mode of production do not consciously cooperate for they end up being the objects of social processes and no longer recognize themselves as its subjects. I have tried to illustrate, secondly, that a concept of legitimacy based on the pursuit of social justice through social minimum guarantees ignores the irreducible link

67 Marx said:

*<The creation of a large quantity of disposable time apart from necessary labour time for society generally and each of its members (i.e.[sic] room for the development of the individuals’ full productive forces, hence those of society also), this creation of not-labour time appears in the stage of capital, as of all earlier ones, as not-labour time, free time, for a few. What capital adds is that it increases the surplus labour time of the mass by all the means of art and science, because its wealth consists directly in the appropriation of surplus labour time; since value directly [sic] its purpose, not use value. It is thus, despite itself, instrumental in creating the means of social disposable time, in order to reduce labour time for the whole society to a diminishing minimum, and thus to free everyone’s time for their own development. But its tendency always, on the one side, to create disposable time, on the other, to convert it into surplus labour. If it succeeds too well at the first, then it suffers from surplus production, and then necessary labour is interrupted, because no surplus labour can be realized by capital. The more this contradiction develops, the more does it become evident that the growth of the forces of production can no longer be bound up with the appropriation of alien labour, but that the mass of workers must themselves appropriate their own surplus labour. Once they have done so – and disposable time thereby ceases to have an antithetical existence – then, on one side, necessary labour time will be measured by the needs of the social individual, and, on the other, the development of the power of social production will grow so rapidly that, even though production is now calculated for the wealth of all, disposable time will grow for all. For real wealth is the developed productive power of all individuals. The measure of wealth is then not any longer, in any way, labour time [as the quantitative aspect of the substance of the value of a commodity], but rather disposable time..>*

MARX, *supra* note 42, at 639-640.

68 Michelman, this volume, 190.

69 MARX, *supra* note 42, at 639.

between distribution and production in market-based societies. A significant concept of legitimacy and social justice has to take into consideration more than just the fact that many people are chronically deprived of basic materials needs. It also has to take into account the reality that members of society are deprived of the conscious experience of the productive power of their social labour. Only this experience, I have argued in the third place, can enable them to understand and exercise – collaboratively and fruitfully – their individual as well as their combined capabilities. In other words, only the recognition of their own productive power and social labour can turn individualized agents, who are simply members of an agglomeration, into social individuals. Lastly, I have proposed a concept of social justice that incorporates the fulfillment of basic material needs as a necessary but still insufficient condition. This concept of social justice, I argued, is based on disposable time. These arguments, however, do not preclude one from recognizing the merit of the demand for socioeconomic rights in the form of a decent social minimum under current conditions of production. For such a social minimum may in fact come to afford individualized agents the precious time<sup>70</sup> required for educating themselves and each other on why they are subjected to a social and political order and a social process that they, and only they – as its subjects – create collectively.

70 My colleague, Claus Baumann, recently highlighted the fact that “spare time” or “leisure time,” as we know it from societies with a capitalist mode of production, is something very different from the concept of “disposable time”:

The extension of leisure time... in no way provides the individuals per se with more space for the development of their capacities. Leisure time as reproduction of labour-power, therefore leisure time as time for the labourers to relax and regenerate, substantially happens by means [of commodities].

Claus Baumann, *Die Kunst der Avantgarde und ihr Verhältnis zum Klassenkampf*, in „... WENN DIE STUNDE ES ZULÄsst.“ ZUR TRADITIONALITÄT UND AKTUALITÄT KRITISCHER THEORIE, 327-328 (Malte Völk et al. eds., 2012). He further explains that, by being confronted again, in their leisure time, with the products they and their fellow collaborators produced, they will not gain any consciousness of the self-development process of which, during their labour-time – in the manner that has been explained above – they stay deprived. To be deprived of the development of one’s own capacities and to experience oneself as a social individual, results in the passivation of the individualized agents.