

The financial crisis in constitutional perspective – The dark side of functional differentiation
 Edited by Poul F Kjaer, Gunther Teubner and Alberto Febbrajo
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Standing out from the now relatively abundant literature dedicated to the financial crisis which burst in 2008, “The financial crisis in constitutional perspective – The dark side of functional differentiation” pioneers the exploration of its constitutional implications by accounting for the results of a conference held at the Goethe University of Frankfurt am Main in March 2010, which are recollected in fourteen inspiring contributions.

Throughout the manuscripts a scrupulous, sociologically informed legal analysis is carried out on the causes, dynamics, and reactions to the crisis, contextualized within the general structural transformations characterizing contemporary society. Most notably, the research on the constitutional aspects of the crisis is also conducted with a view to suggesting concrete changes to the constitutional set-up of contemporary society.

The idea that the crisis cannot be reduced to a mere failure of risk perception and management for which individual and collective actors within and outside of financial organizations are responsible constitutes (albeit without lessening the relevance of individual responsibility) the real core of this volume.

However, the real plus of “The financial crisis in constitutional perspective – The dark side of functional differentiation” probably lies in approaching the crisis from the point of view of deep structural transformations, which become the most significant symptom of this phenomenon (and do not constitute the phenomenon itself).

In this wake, the volume outlines how the massive accelerations characterising contemporary society transformations (coupled with a previously unseen level of globalization) have been asymmetrical in nature, so that the economic system has outpaced its legal and political counterparts. The far reaching con-

stitutional implications of the 2008 crisis therefore lies in the future capability of legal and political systems to influence economic reproduction processes.

The book wonders how the crisis can be analysed in terms of systems theory. As pointed out by Poul F Kjaer in his introduction: “*Should the dynamics leading to the crisis be identified as being constituted by the “blind” and “self-destructive” evolution of the economic system, or should they, instead, be found in more general tendencies of societal de-differentiation? Or did the crisis serve as a symptom of the inability of both the political and the legal systems to steer and regulate societal development, an inability that might have been deepened through increased asymmetries in the level of the globalisation of different functional systems leading to an unstainable “de-coupling” of the global markets from the wider societal context? Alternatively, the crisis can be understood as a failure of risk perception and management for which the individual and collective actors, both within and outside of financial organisations, bear responsibility*”¹. A memorable (and encouraging) attempt to provide an answer to such questions can be found in this extraordinarily stimulating collection of contributions.

Most of these share the presumption that the causes of the crisis are not to be found in a reflection of individual and organisational misbehaviours, or to be identified as a consequence of a shifting power balance between territorially organised states. On the contrary, the crisis is the mirror of crucial transformations of the basic structures of society: a side effect of the continuously increasing functional differentiation, which takes place at a constantly faster pace. The asymmetry of this development (with the economic system advancing “further” and more rapidly than other functional systems) led to the pathological effects which we are all witnessing.

Another strong focal point of the volume is that the crisis makes it pertinent to analyse both the role and the capability of states as the “saviour of last resort” as well as to seek an increased understanding of the reasons for the obvious failure of the self-regulative efforts of the financial system. In addition, the capability of social movements to act as a vehicle of change as well as the possible role of transnational legal and political structures is explored upon the basis of a constitutional perspective.

The book is divided into three main sections.

The first section of the volume analyses the financial crisis in a systemic perspective. In particular, in the first contribution, Gunther Teubner wonders if

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1 See Introduction by Poul F Kjaer, page XV.

there is such a thing as “collective addiction”. If it exists as non-individual purely communicative compulsions to growth, then, the greed of individual bankers would not be the main problem. Specific social addiction mechanisms that cause such impersonal addiction phenomena would be the real issue. The concept of systemic addiction provides a novel approach to how social systems approach catastrophes and transform themselves at the moment of the disaster, not through the intervention of political actors, but autonomously and within the bounds of their own systemic logic. A constitutional moment emerges when “*a catastrophe begins and societal forces for change are mobilised of such intensity that the “inner constitution” of the economy transforms itself under their pressure*”. Plain money reform is one of several examples that illustrate a capillary constitutionalisation of the global economy, the effect of which could not be achieved through either the national or transnational interventions of the world of states.

Teubner’s contribution (coupled with that of Rudolf Stichwech on the general theory of function system crises) is followed by the second section of the book, which focuses on the dynamics of the crisis. Three contributions deal with the breakdown of expectations as a central cause and characteristics of the 2008 financial crisis, followed by three papers that share the view that the financial crisis should be understood as a symptom of a fundamental crisis in the society.

Section three then focuses on the already observable, as well as the possible, reactions to the crisis.

In particular, Alberto Febbrajo does so by looking at the regulatory responses to the failure of regulatory institutions. Febbrajo’s pre-supposition is that the management of a more-or-less profound crisis of legal regulation pre-supposes both the adequate cultural orientations of individuals and the ability of the legal system to redefine the structural and functional borders of law menaced by the absence, or reduced presence, of an essential social factor of intersystemic integration, such as the state. But the traditional state-centred reconstruction of social life has not yet been replaced by adequate alternatives. Consequently, transnational networks without central authorities try, through an intense dialogue particularly at constitutional level, to balance cultural specificities, in order to legitimise the emerging material constitutions, especially at the level of fundamental rights, and to support implicit references towards a still unclear vision of a pluralist “society of societies”.

Two contributions then deal with the individual and collective forms of reactions to the crisis, while the last two engage in analysing constitutional transformations as an effect and a response to the financial crisis. In that section, Poul Kjaer contextualises the financial crisis within larger constitutional transformations, introducing an understanding of crises as a reduction in the meaning production of social systems, which can be either internally or externally provoked. The emergence of constitutions and, more generally, constitutional structures can be understood as evolutionary responses to both forms of crisis. This is the case because they are double-edged structures which are simultaneously oriented towards the maintenance of internal order and stability within a given social entity at the same time as they frame the transfer of the meaning components between the social entities and their environments.

Thus, “*the 2008 financial crisis indicates “a failure of constitutional bonding”. When observed from an overall structural perspective, the reasons for this failure can be traced back to an increased discrepancy between the structural composition of world society and the constitutional structures in place. The crisis reflects a failure to respond to two simultaneous, inter-related and mutually reinforcing structural transformations. First, there is the increased globalisation of functional systems, which has led to massive dislocations in the relative centrality of the different national configurations for the reproductive processes of functional systems. Second, there is a structural transformation of the transnational layer of world society through a reduced reliance on the centre/periphery differentiation and an increased reliance on the functional differentiation. One of the many consequences of this development is the emergence of new forms of transnational law and politics. A new constitutional architecture which reflects these transformations is needed in order to ensure an adequate constitutional bonding of economic processes, as well as of other social processes*”².

To sum up, “The financial crisis in constitutional perspective – The dark side of functional differentiation” provides readers with an excellent and varied analysis of the financial crisis from an original and much unexplored standpoint, tackling a widely covered (and unfortunately still extremely topical) issue from a totally new perspective. The book does so in

² See Introduction by Poul F Kjaer, page XX and “Law and order within and beyond national configurations”, pp. 395 et seq.

a thorough and engaging way and one that benefits from significant sociological knowledge, becoming of interest to anyone wishing to understand more about theoretical and practical aspects of the constitutional dimension of the crisis which unfolded in 2008. It will be a valuable addition to the libraries of scholars, policy-makers, students and anyone interested in better understanding the financial crisis and the constitutional processes alike.

Corporate Finance Law. Principles and Policy,
 Edited by Louise Gullifer and Jennifer Payne
 Oxford: Hart Publishing, 2011,
 788 pp., £37.50, Paperback.

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Every decision made in a business has financial implications, and any decision that involves the use of money is a corporate finance decision. Therefore, corporate finance was and still is a vital field of research in the area of economy. Moreover, issues of corporate finance are not limited to researchers. At Business Schools around the world, corporate finance is a basic class for first year students. Lecturers have to choose reading materials from a large variety of excellent books, e.g. Stephen Ross, Randolph Westerfield & Jeffrey Jaffe, *Corporate Finance* (9th ed. 2009) and Richard Brealey, Stewart Myers & Franklin Allen, *Principles of Corporate Finance* (10th ed. 2010). Although legal issues of corporate finance are obviously of significant practical importance, academic analysis of the area of law has been neglected so far. Nowadays, legal issues in corporate finance are increasingly recognized, not only in research but also in teaching.

The recently published work of Louise Gullifer, Professor of Commercial Law at the University of Oxford School of Law, and Jennifer Payne, Reader in Corporate Finance Law at the University of Oxford School of Law, offers a coherent overview on almost all issues in the area of corporate finance on 788 pages. It consists of 14 chapters, ranging from legal capital and public offers of shares via takeovers

and private equity to ongoing regulations of debt and transferred debt.

The work is addressed to academics as well as students, policy-makers and practitioners. Although there are practical hints the authors do not intend to put readers in the position to carry out any practice in corporate finance, but to provide a useful theoretical background. Therefore, the work examines the substantive provisions of UK corporate finance law by considering the principles and policy behind it. The explanations focus on UK provisions and non-statutory law. Where necessary, Gullifer and Payne also refer to other legal regimes, e. g. in the area of disclosure requirements for prospectuses to the so-called Prospectus Directive (2003/71/EC). However, the book does not contain a comparative text. Though, readers will complement the authors for numerous references to foreign reasoning in order to provide deeper insight as to the policy behind UK provisions. Although the authors correctly acknowledge that tax law plays an important role in financing choices, they—unfortunately but common for books on corporate finance law—provide little background information on tax law issues only.

Following an introduction Chapters 2 and 3 contain an overview of financing options, the relationship between equity and debt, and the risks faced by creditors. Chapter 4 provides an overview of the legal capital rules in the UK and their functions. After introductory descriptions on how legal capital is raised and shall be maintained the authors stress several widely recognized failures of the legal capital regime to provide meaningful creditor protection. As a consequence, an overview of alternatives to the current legal capital rules, especially the creditor protection by solvency statement approach, is provided. Within their conclusions Gullifer and Payne advocate the removal of most of the current legal capital regime.

Turning to debt financing, Chapters 5 and 6 deal with the possibilities available to creditors to protect themselves by proprietary and contractual means. Discussing several covenants in order to limit the borrower's activities the authors detect one common major disadvantage: on the insolvency of the borrower lenders will only be able to collect a fraction of the amount due. Consequently, the authors consider two basic techniques in order to protect creditors. Chapter 5 focuses on contractual rights against third parties, such as guarantees, indemnities and performance bonds, credit insurance mechanisms, credit default swaps, and subordination clauses. In addition, Chap-

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