The Financial Crisis in Constitutional Perspective

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P.F. Kjaer, G. Teubner and A. Febbrajo (eds.), *The Financial Crisis in Constitutional Perspective. The Dark Side of Functional Differentiation* (Hart Publishing 2011), 444 p., ISBN 9781841130101

In this edited volume, legal theorists, sociologists, and historians discuss the question of how the 2008 financial crisis can be analysed in terms of system theory. This follows from the sub-title, *The Dark Side of Functional Differentiation*, which leaves open an intriguing ambivalence. Is the 'dark side', namely the crisis, intended in the sense of obscuring the functional differentiation theory, due to the 'expansion of economic rationality beyond the borders of the economic system', as Kjaer puts it in the Introduction (xv)? Or is it intended rather in the sense of an evil vis-à-vis the differentiation's benefits for civilisation, namely how international terrorism was depicted vis-à-vis globalisation ('the dark side of globalisation')?

Unlike accounts of the EU's responses to the crisis from different legal approaches,[1] the book promises to analyse such crisis by combining a 'constitutional perspective' with the functional differentiation theory. This may sound unfamiliar to many constitutionalists, but they should not deny the volume attention for that reason. I refer especially to those driven by the conviction that the state/constitution relationship rests on historical, not on logical or on axiological, grounds, and are thus willing to confront the issue of how constitutionalism deals with the phenomena of globalisation. Here they join legal and non-legal theorists participating in the intricate debate about 'postnational constitutionalism', where methods and approaches, if not languages, are inevitably juxtaposed. Nonetheless, 'it is clearly not enough for constitutionalism to convince constitutionalists'[2].

The volume is divided into three sections, respectively entitled 'The Financial Crisis in a Systemic Perspective', 'Dynamics' and 'Reactions'.

[1] *See* recently K. Tuori and K. Tuori (eds.), *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014).

[2] N. Walker, 'The Idea of Constitutional Pluralism', 65 *The Modern Law Review* (2002) p. 317 at 336.

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Gunther Teubner opens the first section with a theoretical account of the 'social addiction mechanisms' or 'growth excesses' of social systems, which attempts to demonstrate how these systems transform themselves autonomously before a catastrophe (chapter 1), while Rudolf Stichweh explores the possibilities of a more general theory of crisis, observing in particular that the danger of inflation, well-known in the economic domain, can be observed within all social systems (Chapter 2).

The second section is structured in two sub-sections, namely 'The Breakdown of Expectations' and 'Fundamental Crises of Society'. The first comprises three contributions, including that of Karl-Heinz Ladeur (chapter 3), whose main aim consists in demonstrating 'the increasing fragmentation of the knowledge basis and the generation of its practice and management rules also within corporations' (79), through an analysis of the recent trend towards 'regulated self-regulation' or 'negotiated regulation' irrespective of the influence of neo-liberal ideology. Also in this sub-section is the contribution of Moritz Renner (chapter 4), which is devoted to the breaking down of societal expectations due to the proliferation of cognitive expectations and to the erosion of any meaningful distinction between normative and cognitive expectations. A final contribution in this sub-section is that of Urs Staheli (chapter 5), who examines the issue of financial contagion from an ecological and epidemiological perspective.

In section II.2 Hauke Brunkhorst (chapter 6) proposes a concept of crisis which combines functional differentiation and social conflicts, including 'capital-oriented conflicts', 'state-oriented conflicts', 'belief-oriented conflicts' and 'integration-oriented conflicts', with a view to draw a picture of the structural ambivalence of the globalised world society, where 'Democratisation and de-democratisation are both proceeding at the same time', and 'The regional system of *state-embedded markets* has turned into a world system of *market-embedded states*' (168-169). Interestingly, such ambivalence involves post-totalitarian constitutionalism, since 'the great legal and constitutional advances of the twentieth century (which was not only *the* catastrophe) are not simply a progressive success story. They only changed (as in all revolutions) some important (but vulnerable) normative constraints and institutional conditions, which set the course for further evolution and further social struggles' (167).

Also in Section II.2, Dirk Baecker (chapter 7) views the notion of crisis as an aspect of the immune system of the society, conceived as 'the ongoing operations of action and communication, even while certain problems, understood as crisis, are effecting the reproduction of these operations' (174), thus emphasizing the paradox that a crisis is bound to occur in a society which in all other respects is sound. According to Jean Clam (chapter 8), the 2008 financial turmoil belongs to a new type of crisis, as demonstrated by the fact that

> the political rescue plans of the financial economy are in themselves, in their unimaginable magnitude, exemplary figures of non-control. They are not capable of

> binding vectors of necessity or of determinative influence on the real. That they are factually able to elicit a re-stabilising effect on markets and economies is not explainable. (212)

This exemplifies the radical contingency of the contemporary world, characterised not only by 'a relativisation of the real', but also by

> a cognitivisation of the normative which loses its bindingness by being able to be conceived of in other ways which lead to a questioning of the affirmation of the norm in front of factual breaches of its rule, while social communication, as long as it upholds its normative posture, refuses to learn from such antinomic facts and to adapt to them. (214)

The third section is divided into three sub-sections, namely 'Regulatory Reactions', 'Individual and Collective Reactions', and 'Constitutional Transformation'. In the first sub-section Mark Amstutz (chapter 9) suggests a further perspective to the notion of crisis, as a symptom of boundary disorders which occur when the closure mechanisms of one or more social systems deteriorate to such a degree that they become dysfunctional, while Alberto Febbrajo (chapter 10) explores the implications of this phenomenon, noting that traditional state-centred regulations of social life have not yet been replaced by adequate alternatives (299).

Sub-section III.2 comprises Kolja Möller's contribution (chapter 11), advocating a re-contextualisation of the global social rights agenda, capable of prospecting a genuine alternative to the market-liberal order, and that of Aldo Mascareno (chapter 12), whose attention is once again focused on the distinction between normative and cognitive expectations, with a view to contend that, while the latter learn from disappointments and adapt, the unreflective pressure of norms upon the complexity and contingency of the world is a major trigger of crisis, as confirmed by the sub-prime mortgage crisis in the US.

Finally, in Section III.3, Chris Thornhill (chapter 13) analyses the evolution of statehood, with a view to demonstrate that the modern state was affected both by an 'historical paradox' and by a 'conceptual paradox'. As for the former, he argues that it was only during the First World War that state power was effectively mobilised throughout modern societies, and that, at the same time, political institutions were forced to internalise responsibilities for tasks that had traditionally fallen outside their own sphere, with the effect of co-opting private actors into their structure, and of devolving them key political functions: while assuming a territorial and national monopoly of power, states relinquished thus the functional monopoly of power (369). From this Thornill infers a second paradox at the centre of modern statehood, namely 'the dialectical disjuncture' of the institutional or theoretical construction of power with the quality of power 'as an objective societal resource', that results in 'perceiv[ing] the state, and the

constructions of legitimacy that are attached to it, as reflexive elements of power' (373). And the articulation of power, in turn, is likely to remain correlated with the function of rights, which 'will continue to support power by offering a reflexivity that curtails and excludes the more extreme inclusionary dimensions and paradoxes of power' (392).

Poul F. Kjaer (chapter 14) draws attention instead to the role of constitutions as evolutionary responses to crisis, which can either be internally or externally provoked. From this perspective, the recent financial crisis 'can be understood as a symptom which indicates a failure of constitutional bonding' (395), due to 'a striking inability' to make the increased globalisation of functional systems correspondent with 'adaptations and re-configurations of the institutional, and, indeed, constitutional framing of economic processes, as well as other social processes' (416).

Teubner's societal constitutionalism

Within these sophisticated and insightful contributions, two topics appear crucial: one is the impact of the transformations leading to the financial crisis on the distinction between normative and cognitive expectations, that deserves particular attention for an understanding of the regulatory reactions to the crisis. The other is the ultimate meaning of the economic system's 'growth excesses' for the theory of functional differentiation. Reference will here be made to the latter, given its importance for the already mentioned discourses on 'post-national constitutionalism'.

Among these discourses, Teubner's 'societal constitutionalism' distinguishes itself on the ground of the analysis of fragmentation of social systems, namely the most commonly acknowledged effect of globalisation. While embarking on such analysis, legal scholars appear usually incapable of escaping the traditional dilemma between the pre-eminence of the descriptive over the normative approach or *vice versa*: either they content themselves with describing the fragmented world resulting from globalisation (e.g. 'global administrative law'), or they maintain a normative approach at the expenses of demonstrating its feasibility (e.g. those following the 'constitutionalisation of international law'). While adapting Luhmann's theory of social systems to globalisation, Teubner's 'societal constitutionalism' is clearly more at ease with fragmentation. 'In functional differentiation', he argues, 'the experiment runs the risk of renouncing the unity of society and liberating a variety of fragmented social energies – each of which, since it is not limited by any in-built counter-principles, causes a massive internal growth-dynamic. The great achievements of civilisation in art, science, medicine, economics, politics and law only became possible by virtue of this process' (12).

Far from creating a dilemma, fragmentation here becomes an opportunity for re-defining the constitutional problems of world society, leaving aside the idea of a globally unified constitution. Transnational regimes, particularly in the private area, are viewed as the new constitutional subjects in the global space which compete with the nation states: contrary to the 'obstinate state- and politics-centricity of traditional constitutionalism', constitutional sociology projects the constitutional question not only onto the relationship between politics and law, but also onto all of society, and believes that constitutionalism has the potential to counteract the expansionist tendencies of social systems outside the state, particularly the globalised economy, science and technology, and the information media, when they endanger individual or institutional autonomy.[3] The crucial point is that these social systems are believed to structure themselves into constitutions, in the sense of a body's *constitutio*, namely the physical condition of that body.[4] This is the oldest meaning of constitution (constitution in the organic sense), as distinguished from its formal (or artificial) meaning, which characterised modernity.[5]

But the self-structuring of social systems into constitutions does not exhaust Teubner's account: 'In the course of functional differentiation, all sub-systems develop growth-energies, which, both in their productivity as well as in their destructivity, are highly ambivalent' (12). And such 'growth spiral' might accelerate 'to the point where it tips over into destructiveness by colliding with other social dynamics' (10). These are potentially 'catastrophe moments, the constitutional moments which make possible collective learning experiences of self-limitation. 1945 is the paradigm. That was the constitutional moment for a worldwide proclamation of human rights in the wake of a political totalitarianism; the moment in which political power was willing, worldwide, to self-limit. Similarly, 1789 and 1989 were moments in which, in the wake of destructive expansion tendencies, politics limited itself by guaranteeing the separation of powers and fundamental rights within political constitutions' (12).

'Catastrophe moments' thus require constitutional rules that, rather than constitutive of the internal structure of each social system, should be limitative of its 'excessive growth processes'.[6] And these rules, not less than the constitutive, should derive from self-limitation. External limitation, which would only result from state intervention, might in fact either engender a permanent subordination of the sub-systems to the state, which is no longer a valid option after the

[3] G. Teubner, *Constitutional Fragments. Societal Constitutionalism and Globalization* (OUP 2012) at p. 7.

[4] Teubner, ibid., p. 89.

[5] For a recent account of these meanings see Y. Hasebe and C. Pinelli, 'Constitutions', in M. Tushnet et al. (eds.), *Routledge Handbook of Constitutional Law* (Routledge 2013) at p. 9 ff.

[6] Teubner, *supra* n. 3, p. 75-76.

experiences of the last century's political totalitarianism, or prevent excessive growth processes through 'the external exercise of control, backed by massive sanctions', which are however 'bound to misfire'. Therefore, 'It is only possible to invent these limitations from within the system-specific logic, and not from the outside': external social forces – including state instruments of power, legal rules and civil society countervailing powers from other contexts, media, spontaneous protest, social movements, NGOs or trade union power – should rather 'apply such massive pressure on the function systems that internal self-limitations are configured and become truly effective' (13).

While applying his theory to the financial crisis, Teubner admits that here, societal constitutionalism attempts 'to steer a difficult path between external interventions and self-steering' (13). However, to the extent that some external pressures, including legal rules, would at least be invented from the outside, it also remains to be seen how the self-limitations of the sub-system could maintain a significant role. In spite of its brilliant account of the financial system's 'growth-excesses' and 'collective addiction', Teubner seems reluctant to admit that that system has already taken the decisive step towards de-differentiation.

Functional differentiation and financial crisis

According to Kjaer, on the contrary, the 1980s' de-regulation of the financial markets already resulted in a coalescence between operators and regulators that 'undermined the value of the structural coupling between the economic and the political system, in the sense that the form of stability and restraint imposed by public regulation *vis-à-vis* economic processes was increasingly weakened. This had subsequent effects internally in the financial system because the differentiation between different functions, products and levels of risk collapsed, in the sense that the distinction between banks, investment banks and hedge funds became increasingly blurred' (418).

Given these premises, the financial crisis is believed to endanger the theory of functional differentiation. Neo-liberalism, as well as other variants of political fundamentalism, aims at overcoming Luhmann's 'original sin' of functional differentiation 'through the submission of society in its entirety to a single form of rationality': contrary to the totalitarian ideologies of the past, these 'paradoxically use a single universe which is external to the political system, such as economic, environmental, national or religious belief systems, as a vehicle for the attempt to submit society to a totalising political ideology', with the consequence that

> an ideology such as neo-liberalism, which is seemingly aimed at reducing the reach of the political system as much as possible, can only achieve this through political means and within the framework of a political universe. As such, neo-liberalism

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> remains guided by political, rather than economic, rationality, in the sense that the intention to submit society in its entirety to an economistic logic remains foremost a political objective, and only secondarily an economic one. (419-420)

The assumption that, notwithstanding its claim of setting exclusively economic benchmarks, neo-liberal ideology is guided from political rationality goes hand in hand here with that of the coalescence between financial operators and regulators. Rather than being its 'dark side', global markets should thus appear at odds with functional differentiation.

So far, societal constitutionalism meets serious obstacles *vis-à-vis* the global financial market. These difficulties, however, affect its capacity of predicting developments concerning the relationship between the financial market and political powers. A different question is that of how societal constitutionalism might be connected to the versions of constitutionalism different from those centred on the state's sovereignty, with a view to display globalisation's challenge irrespective of its future developments.

It is worth noticing in this respect that, according to Teubner, the 'partial societal constitutions' were not born with globalisation: these lived in a 'strange penumbra' under the 19th century's political constitutions of liberalism, and after being submitted to the state's power in the totalitarian epoch, were respected, although not officially recognised, by the late 20th century's constitutions, thus balancing state constitutionalism with constitutional pluralism.[7] Such an account appears far more accurate than the frequent opposition between a monistic and 'holistic' constitutionalism and the pluralistic trends that globalisation is believed to engender.[8] The latter presupposes in fact that post-totalitarian constitutionalism was compromised with the old continental Europe's legacy of state monistic sovereignty, with the effect of considering the rise of globalisation as a threat to such an assessment. That presumption neglects, as we will see, the pluralistic features affecting the late 20th century's constitutions not only within the internal order, but also with respect to its relationship with the international community.

The post-totalitarian search for a just distance between citizens and public power

The post-totalitarian constitutional choices of recognizing freedom of association without institutionalizing economic and social pluralism reflected a decisive shift from the version of constitutionalism that prevailed throughout continental

[7] Teubner, *supra* n. 3, p. 11.

[8] *See* inter alia N. Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (OUP 2010) and, with respect to multiculturalism, J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (CUP 1995).

Europe in the aftermath of the French Revolution. With the abolition of the *corps intermédiaires* that during the *ancien régime* resisted the absolutist pretention of the kings, nothing was left between the state and the individual: sovereignty was then viewed in terms of omnipotence, with the effect that the individual's rights would depend either on the presumption that parliament, as expression of the *volonté générale*, would ensure their best protection, or on self-limitations of the state, as in the German *Rechtsstaat*.

Herefrom derived the abstractedness of legislation, and public power's detachment from citizens that were meanwhile entering into the public sphere due to the gradual extension of suffrage. Social and political conflicts followed that were exploited by leaders of totalitarian parties with a view to demonstrating the failure of the traditional legal order. The totalitarian regimes' concreteness resulted in abolishing whatever distance with citizens, to the point of conditioning their conscience. Far from limiting themselves to the repression of dissent, these regimes needed active consent from the people, managing to obtain it through massive interventions of the propaganda into the individual's realm.

The Constituent Assemblies convened after the collapse of totalitarian regimes were therefore confronted with the issue of how to reverse the premises of totalitarianism without returning to the previous constitutional assessments. The concreteness of the former *vis-à-vis* ordinary citizens was of course the main threat to be avoided. But this was not a good reason for going back to parliamentarism's abstractedness. A just distance was rather sought between public power and citizens. While recognizing the principle of human dignity, the Constituent Assemblies affirmed their 'never again' with respect to totalitarianism, but also attempted to overcome the atomistic conception of freedom that characterised post-1789 constitutionalism. Emphasis was thus put on the relational dimension of individual identity, as demonstrated both from the guarantee of freedom of association, and from the promotion of pluralism in the social, economic, cultural and religious spheres.

Given these premises, post-totalitarian constitutions are not expected to predict the social evolution of the respective countries, nor reflect the ambition of building an artificial order from above. Their principles are rather structured with the aim of orienting, and accompanying, social changes, on the assumption that the challenge of enduring through different generations distinguishes the constitution from ordinary legislation. Accordingly, limitations of sovereignty are constitutionally provided for the purpose of accepting the obligations deriving from membership in international organisations aimed at promoting peace and justice among nations: and the effects of these limitations on the national legal and political system are unforeseeable in advance, as confirmed by developments occurring since the 1957 Treaty of Rome. While seeking, rather than planning, a just distance between citizens and public power, these constitutions constructed a bridge with EU law,

'which poses the most pressing paradigm-challenging test to what we might call constitutional monism'.[9]

Functional differentiation's challenge to societal and post-totalitarian constitutionalism

The notion of contemporary constitutionalism as opposed to pluralism amounts therefore to a caricature of the former, in epistemological not less than in legal terms. Moreover, that 'false opposition' impedes an understanding of

> the subject(s) of both the plurality of legal norms at stake and the plurality of corresponding constitutional constraints. It is not a matter of choosing the one over the many or *vice versa*, but of explaining who the many are and how they ought to relate in the absence of ultimate authority of the constituted orders.[10]

In that direction goes the research of an 'ordered pluralism', capable of dealing both with the growing complexity and fragmentation of the legal and political orders, and with the forced uniformity pursued from the global financial market.[11]

However, it is precisely this double feature of globalisation, namely differentiation and de-differentiation, that challenges constitutionalism. Heterarchical, rather than hierarchical, criteria might compose the conflicts arising between fragmented legal and political orders. But these, as demonstrated by the EU's reaction to the financial crisis, appear in any event too weakly organised to resist the financial system's 'growth excesses'. Societal constitutionalism is challenged here no less than post-totalitarian constitutionalism, to the extent that the functional differentiation processes stem from the very premises of constitutional pluralism. That origin should be borne in mind, *vis-à-vis* the rise of whichever fundamentalist ideology tending to blur functional differentiation, together with civilisation's achievements that it has permitted.

[9] Walker, *supra* n. 2, p. 317 at p. 337.

[10] S. Besson, 'The Truth about Legal Pluralism', 8 *EuConst* (2012) p. 354 at p. 358-359, reviewing N. Krisch, *Beyond Constitutionalism*.

[11] M. Delmas-Marty, *Le pluralisme ordonné. Les forces imaginantes du droit* (Seuil, 2010).